Slip Op. 10–78

MTZ POLYFILMS, LTD. Plaintiff, v. UNITED STATES, Defendant, and DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, SKC, INC., AND TORAY PLASTICS (AMERICA), INC. Defendant-Intervenors.

Before: WALLACH, Judge
Court No: 09–00010
**PUBLIC VERSION**

[Plaintiff's Motion for Judgment on the Agency Record is DENIED and the Agency's Determination is AFFIRMED.]

Dated: July 14, 2010

*Riggle & Craven* (*David J. Craven*) for Plaintiff MTZ Polyfilms, Ltd.

*Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*); and *Deborah R. King*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

*Wilmer, Cutler, Pickering, Hale and Dorr, LLP* (*Ronald I. Meltzer*, *John D. Greenwald*, and *Patrick McLain*) for Defendant-Intervenors Dupont Teijin Films USA, LP, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc.

***OPINION***

**Wallach, Judge:**

## I.
## Introduction

Plaintiff MTZ Polyfilms, Ltd. ("MTZ") appears before the court on a motion for judgment on the agency record pursuant to USCIT Rule 56.2, challenging determinations of the U.S. Department of Commerce ("Commerce" or the "Department") in *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 75,672 (December 12, 2008), Public Record ("P.R.") 94 ("*Final Results*"). This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because the challenged determinations are supported by substantial evidence and in accordance with law, they are sustained and judgment is entered for Defendant United States ("Defendant").

## II.
## Background

### A
### *Countervailing Duty Overview*

"Countervailing duties are imposed on foreign products that are imported, sold, or likely to be sold in the United States, where the foreign government is directly or indirectly subsidizing the manufacture, production, or export of that merchandise." *Royal Thai Gov't v. United States*, 502 F. Supp. 2d 1334, 1339–40 (CIT 2007) (citations omitted).

> They are levied on subsidized imports to offset the unfair competitive advantages created by foreign subsidies. Pursuant to 19 U.S.C. § 1671, [Commerce] must impose countervailing duties on subsidized imports if it determines that the subject imports are in fact being subsidized, and the International Trade Commission determines that an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury . . . by reason of the subsidized imports. After the initial determination, Commerce must perform annual reviews of outstanding countervailing duty orders. After Commerce performs an annual review under [19 U.S.C.] § 1675(a), the statute allows an interested party to seek judicial review of the factual findings and legal conclusions of Commerce in the Court of International Trade.

*Wolf Shoe Co. v. United States*, 141 F.3d. 1116, 1117–18 (Fed. Cir. 1998) (citations, footnotes, and internal quotations omitted).

### B
### *The Subject Administrative Review And Preliminary Results*

In 2002, Commerce published a countervailing duty order applying to Polyethylene Terephthalate Film, Sheet, and Strip (collectively, "PET Film") from India. *Notice of Countervailing Duty Order: [PET Film] from India*, 67 Fed. Reg. 44,179 (July 1, 2002) ("*CVD Order*"). In response to a July 2007 notice, MTZ that month sought review of the *CVD Order* for its U.S. sales during the period of review ("POR") covering calendar year 2006. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72 Fed. Reg. 36,420, 36,420 (July 3, 2007), P.R. 1; Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; Request for Administrative Review of the Countervailing Duty Order on

Certain PET Film Produced and Exported by MTZ . . . During the [POR], January 1, 2006 to December 31, 2006 (July 30, 2007), P.R. 2.

Commerce in August 2007 initiated the administrative review requested by MTZ and in October 2007 issued a questionnaire to MTZ and the Government of India ("GOI"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 48,613, 48,615 (August 24, 2007); Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to Rupinder Sawhney, Case Officer, Embassy of India, Re: 2006 Countervailing Duty Review: [PET Film] from India (October 5, 2007), P.R. 7 ("Initial Questionnaire").

Commerce issued four supplemental questionnaires to MTZ between April and July 2008. *See* Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to MTZ . . . , Re: First Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (April 11, 2008), P.R. 29, Confidential Record ("C.R.") 2 ("Supp. MTZ Questionnaire"); Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to MTZ . . . , Re: Second Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (May 28, 2008), P.R. 38, C.R. 4 ("2d Supp. MTZ Questionnaire"); Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to MTZ . . . , Re: Fourth Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (July 11, 2008), P.R. 51 ("4th Supp. MTZ Questionnaire").

MTZ responded to Commerce between December 2007 and July 2008. Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Response to the Countervailing Duty Questionnaire by MTZ . . . (December 4, 2007), P.R. 15, C.R. 1 ("MTZ Response"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Response to the Countervailing Duty Supplemental Questionnaire by MTZ . . . (May 6, 2008), P.R. 36, C.R. 3 ("MTZ Supp. Response"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Response to the Countervailing Duty 2nd and 3rd Supplemental Questionnaires by MTZ . . . (June 20, 2008), P.R. 48, C.R. 6 ("MTZ 2d/3d Supp. Repsonse"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from

India; C-533–825; Response to the Countervailing Duty 4th Supplemental Questionnaires by MTZ . . . (July 21, 2008), P.R. 57, C.R. 7 ("MTZ 4th Supp. Response").

In August 2008, Commerce rendered its preliminary determination in the subject administrative review. *[PET Film] from India: Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 45,956 (August 7, 2008), P.R. 59 ("*Preliminary Results*"). Commerce preliminarily found the GOI Export Promotion Capital Goods Scheme ("EPCGS") had conferred a countervailable export subsidy. *Id.* at 45,961–62. EPCGS:

> provides for a reduction or exemption of customs duties and excise taxes on imports of capital goods used in the production of exported products. Under this program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to four to five times the value of the capital goods within a period of eight years.

*Id.* at 45,961.

Commerce preliminarily calculated the benefit received by GOI's formal waiver of import duties for MTZ's capital equipment imports under EPCGS. *Id.* at 45,962–63. In this calculation, Commerce included the GOI Special Additional Duty ("SAD"). *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to David M. Spooner, Assistant Secretary for Import Administration, U.S Department of Commerce, Issues and Decision Memorandum in the Final Results of the Countervailing Duty Administrative Review of [PET Film] from India (December 5, 2008), P.R. 91 ("*Decision Memo*"), at 22–24.

Commerce also preliminary found that the GOI pre-shipment and post-shipment export financing program conferred countervailable export subsidies. *Preliminary Results*, 73 Fed. Reg. at 45,958. "The Reserve Bank of India (['RBI']), through commercial banks, provides short-term pre-shipment financing, or 'packing credits,' to exporters." *Id.* These "pre-shipment loans for working capital purposes" and "pre-shipment credit lines . . . to Indian companies must, by law, charge interest rates determined by the RBI." *Id.* Additionally, "[p]ost-shipment export financing consists of loans in the form of discounted trade bills or advances by commercial banks." *Id.* Commerce preliminarily found that MTZ benefitted from this program based on questionnaire responses from MTZ and GOI. *Id.* at 45,959. Commerce explained that, despite the numerous questionnaires, MTZ had not provided the necessary information as follows:

> [T]he Department repeatedly requested that MTZ provide all short-term loans outstanding during the POR, and record evidence indicates that MTZ has failed to provide the Department with reliable and useable information regarding its short-term export financing loans. As a result, the Department does not have the information necessary to calculate a rate for MTZ based on its own information under the pre-shipment and post-shipment program for theses [sic] preliminary results.

*Id.*

Finding the MTZ loan information for the export financing program to be "incomplete," Commerce preliminarily concluded that "the application of facts otherwise available is warranted" pursuant to 19 U.S.C. § 1677e(a). *Id.* at 45,960. "Because MTZ failed to cooperate to the best of its ability to comply with the Department's requests for information, an adverse inference" was preliminarily applied to MTZ pursuant to 19 U.S.C. § 1677e(b), resulting in the selection of an adverse facts available ("AFA") rate. *Id.*

### C
### *The Fifth Supplemental Questionnaires, Final Results, And This Litigation*

Commerce in August 2008 issued fifth supplemental questionnaires to GOI and MTZ. Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to MTZ. . ., Fifth Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (August 15, 2008), P.R. 61, C.R. 9 ("5th Supp. MTZ Questionnaire"); Letter from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, to Anil K. Sharan, Counsellor (Commerce), Government of India, Fifth Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (August 15, 2008), P.R. 60 ("5th Supp. GOI Questionnaire").

In September 2008, MTZ submitted both its response to the 5th Supp. MTZ Questionnaire and a supplement thereto. Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Response to the Countervailing Duty 5th Supplemental Questionnaires by MTZ . . . (September 8, 2008), P.R. 69, C.R. 10 ("MTZ 5th Supp. Response"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Supplement to Response to the [MTZ 5th Supp. Response] And Request for Acceptance of Out-of-Time Filing (September 9, 2008), P.R.

71, C.R. 11 ("Supp. to MTZ 5th Supp. Response"). MTZ provided loan data and stated that it had not benefitted from either SAD under EPCGS or the export financing program. *See* MTZ 5th Supp. Response Att. I at 1–2, 7, Exs. SSSS-1, SSSS3; Supp. to MTZ 5th Supp. Response Ex. SSSS-2.

Commerce in October 2008 conducted a hearing on the subject administrative review, in accommodation of the MTZ request, and accepted MTZ's administrative case brief.[1] Transcript of Hearing, U.S. Department of Commerce, In the Matter of: The Administrative Review of the Countervailing Duty Order on [PET Film] from India, C–533–825 (October 6, 2008), P.R. 83 ("October 6, 2008 Transcript"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: [PET Film] from India; C-533–825; Request for Hearing (September 8, 2008), P.R. 70; Administrative Brief of MTZ . . . , Case No. C-533–825, U.S. Department of Commerce (October 15, 2008), P.R. 89, C.R. 12 ("MTZ Case Brief"). MTZ challenged, *inter alia*, the inclusion of SAD in calculating the benefit to MTZ under EPCGS and the application of AFA for the export financing program. MTZ Case Brief at 4–6, 24–30.

In December 2008, Commerce rendered its final determination in the subject administrative review. *Final Results*, 73 Fed. Reg. 75,672. Although Commerce made certain revisions to the rate calculations for MTZ, inclusion of SAD in the EPCGS benefit calculation and application of AFA remained from the *Preliminary Results*. *See* Memorandum from Elfi Blum, International Trade Compliance Analyst, AD/CVD Operations, Office 6, U.S. Department of Commerce, to The File, Re: Administrative Review of the Countervailing Duty Order on [PET Film] from India, Revisions to the Rate Calculations for MTZ . . . (December 5, 2008), P.R. 93; *Decision Memo* at 4–14, 41. Applying AFA, Commerce selected 2.90 percent *ad valorem* as MTZ's rate for the export financing program. *Decision Memo* at 10–11, 41.

MTZ commenced this action in early 2009. *See* Summons (January 9, 2009); Complaint (February 3, 2009). Defendant-Intervenors Dupont Teijin Films USA, LP, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, "Defendant-Intervenors") intervened as a matter of right pursuant to USCIT Rule 24(a).[2] March 10, 2009 Order. MTZ moved for judgment on the agency

[1] Although MTZ originally submitted its administrative case brief in September 2008, Commerce rejected that submission because it contained untimely information and directed MTZ to resubmit. Letter from Barbara E. Tillman, Director, AD/CVD Operations, Office 6, U.S. Department of Commerce, to MTZ . . . , Re: Countervailing Duty Administrative Review on [PET Film] from India (October 8, 2008), P.R. 85.

[2] Defendant-Intervenors were the petitioners in underlying administrative review. *Decision Memo* at 1.

record, contesting inclusion of SAD in the EPCGS benefit calculation and application of AFA to the export financing program. Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("MTZ's Motion") at 6–13.

## III
## Standard of Review

Determinations by Commerce resulting from an administrative review of a countervailing duty order will be upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *SKF USA, Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1374 (Fed. Cir. 1999) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aimcor v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[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." *Matsushita*,750 F.2d at 933 (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)).

In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

To evaluate whether Commerce's interpretation and application of the countervailing duty statute at issue is otherwise "in accordance with law," the court uses a two step analysis that first examines whether Congress has "directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If this is the case, the court then must "give effect to the unambiguously expressed

intent of Congress." *Id.* at 842–43; *see Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004). If instead Congress has left a "gap" for Commerce to fill, the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44.

## IV
## Discussion

MTZ does not prevail on either of its challenges to the *Final Results*, because Commerce, lawfully and with the support of substantial evidence, included SAD in calculating the EPCGS benefit conferred on MTZ, *infra* Part IV.A and applied AFA to MTZ for the export financing program, *infra* Part IV.B. These Commerce determinations are not invalidated by a verification of MTZ during the prior POR, *infra* Part IV.C.

### A
### *Commerce Properly Included SAD In The Benefit MTZ Received Under EPCGS*

MTZ does not challenge Commerce's premise that benefits conferred by EPCGS are countervailable. *See Preliminary Results*, 73 Fed. Reg. at 45,961–62 ("the Department determined that import duty reductions provided under the EPCGS are a countervailable export subsidy"); MTZ Case Brief at 3–19 (arguing that "The Benefits Received By MTZ Under the ECPGS [sic] Programs Are Grossly Overstated"). MTZ also does not challenge Commerce's stated general approach to calculating the benefit received under EPCGS. *See* MTZ's Motion at 6–11 (citing *Decision Memo* at 14). Rather, the sole issue concerning EPCGS is whether Commerce properly included SAD in calculating the benefit MTZ received. *See id.*

GOI in March 2008 informed Commerce that "[a]ny article which was imported into India was liable to a special additional duty." Letter from Umesh Kumar, Second Secretary (Commerce), Embassy of India, to Secretary of Commerce, Re: First Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (March 28, 2008), P.R. 26 ("GOI Supp. Response"), at 8. GOI further quoted its 1975 Customs Tariff Act as follows:

> Any article which is imported into India shall . . . be liable to a duty (hereinafter referred to in this section as [SAD]), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the

> time being leviable on a like article on its sales purchase in India: Provided that until such rate is specified by the Central Government, [SAD] shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

*Id.*

Based on this GOI information, Commerce preliminarily included the non-collection of SAD in the benefit received by MTZ under EPCGS. *See Decision Memo* at 22–24. MTZ challenged this decision, contending that SAD "did not apply to the importations made under the license and were not part of the duty foregone by [GOI], and thus the amount of the duty savings for MTZ." MTZ Case Brief at 4–5. MTZ claimed support for this proposition from correspondence from GOI. *Id.* at 5 (citing Letter from Paul Fernandes, DY Commissioner of Customs, to M/s.MTZ . . . , Foregone of Customs Duty . . . (November 9, 2004), MTZ Case Brief Ex. BR-2, MTZ 5th Supp. Response Ex. SSSS-4(a) ("GOI Customs Duty Foregone Letter")). According to MTZ, the amount in this document "represents the formal calculation by [GOI] of the amount of duty foregone. This amount . . . represents the outside limit of the monies that could be recovered by [GOI] in the event that MTZ were to default on fulfilling its export obligation." *Id.* at 5–6.

Subsequent to the *Preliminary Results*, Commerce sought clarification about SAD from both GOI and MTZ. 5th Supp. GOI Questionnaire Att. I ¶ 1; 5th Supp. MTZ Questionnaire Att. I ¶¶ 8, 10, 11.[3] MTZ was specifically questioned about two of its EPCGS licenses. 5th Supp. MTZ Questionnaire Att. I ¶¶ 7, 8, 9. Commerce asked GOI to "[d]escribe the conditions under which MTZ has to pay" SAD. 5th Supp. GOI Questionnaire Att. I ¶ 1. In response, GOI once more informed Commerce that "[a]ny article which is imported into India is liable to a special additional duty" and again quoted its 1975 Customs Tariff Act that, absent specification by GOI, SAD "shall be levied and collected at the rate of eight per cent of the value of the article imported into India." Letter from Banhashri B Harrison, Minister (Commerce), Embassy of India, to U.S. Department of Commerce, Re: Fifth Supplemental Questionnaire concerning the Countervailing Duty Administrative Review of [PET Film] from India (August 29, 2008), P.R. 65 ("GOI 5th Supp. Response"), at 5.

[3] Commerce in these requests also sought clarification about the GOI Additional Duty ("AD") and Education Cess. *See* 5th Supp. GOI Questionnaire Att. I ¶ 1; 5th Supp. MTZ Questionnaire Att. I ¶¶ 7–11; *Decision Memo* at 22. Commerce excluded amounts for AD and Education Cess in calculating the EPCGS benefit, and MTZ agrees with these determinations. *See* MTZ's Motion at 6 n.1; MTZ Case Brief at 5 n.1; *Decision Memo* at 22.

Commerce asked MTZ to clarify aspects of SAD. 5th Supp. MTZ Questionnaire Att. I ¶¶ 8, 10, 11. MTZ was instructed to "[d]escribe the conditions under which MTZ has to pay . . . [SAD]. Provide supporting documentation for your response." *Id.* ¶ 10. MTZ's response included the following statements:

- "MTZ did not report any [SADs] for [one EPCGS license] as it was not subject to these duties. MTZ did report [SADs] for [another EPCGS license].";
- "At the time that the importation under [one EPCGS license] was made into India by MTZ, these [SADs] were not required for this importation. MTZ was not liable for these duties and made no application . . . to be exempted from these duties as they did not apply."; and
- "The 8% [SAD] referenced by [GOI] in its response was the default rate from the Customs Tariff Act of 1975. Duty rates and the names of such duty rates change. The [SAD] for the purchases made under the advance license program was 4% based on rate in effect at the time."

MTZ 5th Supp. Response Att. I at 5–6, 7.

Not persuaded by MTZ's response, Commerce continued to include SAD in its benefit calculation for the *Final Results*. *See Decision Memo* at 24. Commerce declined to interpret the GOI Customs Duty Foregone Letter as setting forth the maximum benefit conferred to MTZ under EPCGS. *Id.* Instead, Commerce explained that the document "refers to the customs duty foregone only, and not to any other duties levied by the GOI on imports. Thus, the document issued by the GOI cannot be considered to be representative of all duties foregone by the GOI under this program." *Id.* Commerce further found MTZ's response to be inadequate as follows:

> MTZ did not explain in its response under what circumstances . . . the SAD . . . appl[ies] to imports to India; MTZ also did not explain or discuss the applicability of the SAD to any other EPCGS license it obtained. MTZ failed to provide any documentary evidence of its claim that it was not liable for these duties and made no application to be exempted from these duties as they did not apply. In fact, GOI statements contradict this claim by MTZ. . . . Therefore, in the absence of any documentary evidence to the contrary, we continue to determine that the SAD applied to all of MTZ's imports under the EPCGS program.

*Id.*

Commerce properly included SAD in calculating the benefit received by MTZ under EPCGS. The repeated and unequivocal GOI statements that the SAD applied to "[a]ny any article which is imported into India" provided a reasonable basis for Commerce to presume inclusion. GOI Supp. Response at 8; GOI 5th Supp. Response at 5. The lone GOI document cited by MTZ indicates only the customs duty foregone. *See* GOI Customs Duty Foregone Letter; *Decision Memo* at 24. It "provides only an amount and does not explain how [GOI] calculated the 'duty saved.'" Defendant's Response to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Defendant's Opposition") at 11. MTZ's reliance on the GOI Customs Duty Foregone Letter, *see* MTZ Motion at 7; October 6, 2008 Transcript at 13, is undercut because the percentage of the duty saved that the letter sets forth is greater than that asserted by MTZ as the percentage comprising all GOI duties foregone. *Compare* GOI Customs Duty Foregone Letter (stating a "Duty Saved" that is approximately 38 percent of the "CIF Value" stated) *with* MTZ Response Ex. 12 (asserting that 35 percent is the "Duty Rate Absent the [EPCGS] Program"); *see* October 6, 2008 Transcript at 13. For these reasons, Commerce was not required to construe the GOI Customs Duty Foregone Letter as conclusively establishing the inapplicability of SAD.[4]

MTZ's statements and omissions support Commerce's EPCGS benefit calculation. When asked after the *Preliminary Results* to clarify SAD,[5] MTZ not only confirmed the general applicability of SAD, but provided inconsistent statements about both the SAD percentage and whether SAD applied to MTZ. *See* MTZ 5th Supp. Response Att. I at 5–6, 7. MTZ in fact conceded the applicability of SAD, although not the percent. *See id.* Att. I at 7. Moreover, MTZ did not include any record support despite being asked to "provide supporting documentation for your response." 5th Supp. MTZ Questionnaire Att. I ¶ 10;

[4] MTZ attempts to draw support from the amount identified on an MTZ table labeled "Statement of Goods Imported Under [an EPCGS license]" comporting with the amount identified on the GOI Customs Duty Foregone Letter. MTZ Supp. Response Ex. S-9 at 19; *see* MTZ Motion at 7–8; October 6, 2008 Transcript at 13. MTZ maintains that these documents "clearly and unequivocally state the amount of the duty." MTZ's Motion at 7. However, MTZ's restatement of an amount of customs duty foregone by GOI does not set that amount as representing all duties foregone by GOI under EPCGS, *see* Decision Memo at 24, particularly where the amount on both documents exceeds the percentage MTZ claims is the maximum of all GOI duties foregone, *see* MTZ Response Ex. 12; GOI Customs Duty Foregone Letter; MTZ Supp. Response Ex. S-9 at 19.

[5] MTZ argues that Commerce did not afford MTZ an "opportunity to 'explain' why this duty did not apply to MTZ . . . [because] the questions asked were not as straightforward as suggested by the Department and were asking for very old information." MTZ's Motion at 9 n.3. However, given the *Preliminary Results* EPCGS benefit calculation, it should have been clear that MTZ was being afforded the opportunity to challenge Commerce's position about SAD. *See* MTZ Case Brief at 4; 5th Supp. MTZ Questionnaire Att. I ¶¶ 8, 10, 11.

*see* MTZ's 5th Supp. Response Att. I at 5–8. Without such evidence, MTZ did not rebut the presumption of SAD applicability based on the GOI responses,[6] and it did not support its claim that "[t]here was no evidence that this was an unpaid duty under the license," MTZ's Motion at 10. Defendant-Intervenors are correct that MTZ "fails to cite any GOI laws or regulations showing this to be the case, or, at a minimum, to explain how a duty applicable to 'any article . . . at a specified rate' did not apply to the capital goods MTZ imported under the license." Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record Pursuant to Rule 56.2 by Defendant-Intervenors . . . at 7 (quoting GOI Supp. Response at 8) (emphasis removed).

These GOI and MTZ statements about SAD provide "such relevant evidence as a reasonable mind might accept as adequate to support" Commerce's calculation of the benefit MTZ received under EPCGS. *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933). That Commerce could have alternatively construed the GOI Customs Duty Foregone Letter as supporting the exclusion of SAD does not negate support of the calculation by substantial evidence. *See Cleo*, 501 F.3d at 1296 (citing *Universal Camera*, 340 U.S. at 487–88).

### B
### *Commerce Properly Applied AFA To MTZ*

#### 1
#### AFA Overview

Commerce is permitted in certain circumstances to render determinations through the application of AFA. 19 U.S.C. § 1677e. The statute provides in relevant part as follows:

> (a) In general. If—
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority . . . under this title,
>
> (B) fails to provide such information by the deadlines for submission of the information . . . ,
>
> (C) significantly impedes a proceeding . . . , or

[6] MTZ attempts to shift the burden of proof by claiming that "[e]ven assuming that this duty was due and was not paid by MTZ, which fact was not established on the record, there is no showing that this duty was not collected pursuant to the EPCGS program." MTZ's Motion at 9. However, given the repeated and unequivocal GOI responses about SAD applicability, Commerce correctly placed the burden on MTZ to establish inapplicability. *See* GOI Supp. Response at 8–9; GOI 5th Supp. Response at 5–6.

> (D) provides such information but the information cannot be verified . . . , the administering authority . . . shall . . . use the facts otherwise available in reaching the applicable determination . . . .
>
> (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 . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

*Id.*

*Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003), clarifies this statute. There, the Federal Circuit explained that the adverse-inference provision focuses on the

> respondent's failure to cooperate to the best of its ability, not its failure to provide requested information. . . . To conclude that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records. An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. "Inadequate inquiries" may suffice. The statutory trigger for Com-

> merce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent.

*Id.* at 1381–83 (citation omitted) (emphasis removed).

Commerce is by statute afforded discretion in applying adverse inferences. *See* 19 U.S.C. § 1677e(b). "Commerce's special expertise in administering the anti-dumping law entitles its decisions to deference from the courts." *Nippon Steel*, 337 F.3d at 1379 (citations omitted). "Commerce's discretion is particularly great in the case of uncooperative respondents. . . . 'Commerce's discretion in these matters, however, is not unbounded.'" *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli De Cecco De Filippo Fara S. Martino S.p.A. v. United States* [sic], 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

**2**
**Commerce's Requests For Loan Information And MTZ's Responses**

Commerce initially explained that it had previously "found the Pre-Shipment & Post-Shipment Export Financing program to be countervailable" and that it was "not going to reevaulate the countervailability [of] this program." Initial Questionnaire at II-3, III-6. "The Department normally determines the benefit conferred by the pre-shipment and post-shipment loans as the difference between the amount of interest the company paid on the loan and the amount of interest it would have paid on a comparable commercial loan during the POR." *Preliminary Results*, 73 Fed. Reg. at 45,960. Accordingly, Commerce asked MTZ for detailed information about "each pre and post-shipment loan." Initial Questionnaire at III-7, III-19, III24–26. This request included the following program description: "[RBI], through commercial banks, provides pre-shipment financing or 'packing credits,' to exporters. Post-shipment export financing consists of loans in the form of discounted trade bills or advance by commercial banks." *Id.* at III-6.

MTZ informed Commerce that it had obtained packing credits in 2005, through which "MTZ pays a lower rate of interest as applicable on foreign currency than for other short term borrowings." MTZ Response at III-12. This response continued that although:

> MTZ believes that this is not the program referenced [by Commerce], as MTZ does not borrow the money from [RBI] and as MTZ's rates are at a rate exceeding that of LIBOR, for purposes of completeness, MTZ is supplying a response. In 2006, MTZ did

> not receive any packing credits. Accordingly, no data is supplied and no further response is necessary with respect to this program.

*Id.*[7]

Commerce asked MTZ follow-up questions concerning the export financing program. Supp. MTZ Questionnaire Att. I at 2. Specifically, MTZ was asked to "describe the process and procedure MTZ followed to apply for the packing credits" referenced in its initial response, submit the "documentation MTZ needed to provide to the bank to obtain those credits," and "[c]larify whether MTZ utilized any packing credits, *i.e.*, working capital loans or lines of credit, or any post-shipment loans, such as discounted trade bills or advances by commercial banks, during the [POR]." *Id.* MTZ in response submitted a document indicating that it received a packing credit in 2006, MTZ Supp. Response Att. I at 5, Ex. S-5, and reiterated its position as follows:

> MTZ believes that this is not the Pre- and Post- Shipment export financing program identified by the Department as MTZ does not borrow this money from [RBI]. . . . The term "packing credits" have previously been defined by the Department as being those credits which were expressly provided by [RBI]. . . . MTZ did obtain an advance on certain of its invoices, but did so through its banks at interest rates which were in excess of LIBOR.

MTZ Supp. Response Att. I at 5–6.

Commerce once again asked MTZ for information concerning "all pre-and post-shipment loans received during the POR from private commercial banks, or semi-private commercial banks, as well as any government owned entity." 2d Supp. MTZ Questionnaire Att. I at 3. Commerce this time provided a form for MTZ to report the information. *Id.* Att. I at 3, Att. II. MTZ in turn informed Commerce that "MTZ is unable to provide further information as the information is not maintained, if at all, in a form which would permit the extraction of the data in the form requested by the Department." MTZ 2d/3d Supp. Response at SS-1–2. MTZ did direct Commerce to an attached

[7] The repeated qualification by MTZ that its advance was at rates above the London Inter-Bank Offer Rate ("LIBOR"), MTZ Response at III-12; MTZ Supp. Response Att. I at 6, is inapposite because the export financing program's ceiling interest rate is not connected to LIBOR. *See* Letter from Anil K. Sharan, Counsellor (Commerce), Embassy of India, to U.S. Department of Commerce, Re: Third Supplemental Questionnaire Concerning the Countervailing Duty Administrative Review of [PET Film] from India (June 10, 2008), P.R. 44 ("3d Supp. GOI Response"), at 4.

exhibit in response to the request for documentation. *Id.* at SS-5, Ex. SS-1. However, that exhibit was not provided. *See Preliminary Results*, 73 Fed. Reg at 45,959.

Commerce subsequently requested MTZ provide both the missing exhibit and complete loan information. 4th Supp. MTZ Questionnaire Att. I ¶¶ 1, 2. Furthermore, Commerce included a warning that failure to comply could result in the application of AFA to MTZ:

> As previously requested in the original questionnaire, the first supplemental questionnaire, and the second supplemental questionnaire, for each short-term loan outstanding during the POR, provide the name of the lending institution, the purpose of the loan, the amount, the interest rate, the interest paid, the date of receipt, and the date of payment. In addition, in a separate spreadsheet, list again all short-term loans utilized for pre- or post-shipment export financing, respectively. . . . *Failure to provide this information to the Department may require the Department to base its findings on the facts available with an adverse inference*.

*Id.* Att. I ¶ 2 (emphasis added).

In response, MTZ provided Commerce with two spreadsheets of 2006 loan information titled "Short-Term Interest Bench Mark" and "Pre and Post Shipment Export Financing," respectively. *Id.* Exs. SSS-1(a)(i), SSS-1(a)(ii). The spreadsheets were devoid of "any descriptions or explanation of the loan data." *Preliminary Results*, 73 Fed. Reg. at 45,959; *see* MTZ 4th Supp. Response Att. I at 1–2. MTZ doubted the relevance of this information as follows:

> MTZ notes that there have been no changes in the nature of any short term loans obtained by MTZ since the prior POR. MTZ further notes that the Department examined and verified these short term loans in the most immediate prior review and determined that they did not constitute a countervailable subsidy. . . . Accordingly, MTZ questions the relevance of questions seeking information relating to loans previously found not to constitute a countervailable subsidy.

MTZ 4th Supp. Response Att. I at 1.

Based upon MTZ's unwillingness to provide complete loan information despite numerous requests, Commerce preliminarily applied AFA to MTZ for the export financing program. *Preliminary Results*, 73 Fed. Reg. at 45,960–61. Commerce thereafter once more asked MTZ to "provide all short-term loans MTZ has outstanding during the POR in the format requested . . . . Report those loans in separate

spreadsheets for benchmarks, pre-shipment financing and post-shipment financing." 5th Supp. MTZ Questionnaire Att. I ¶ 1. Because Commerce could not locate the 2006 packing credit indicated by the MTZ Supp. Response on the spreadsheets of 2006 loan data in the MTZ 4th Supp. Response, *Preliminary Results*, 73 Fed. Reg. at 45,960, it asked MTZ to "reconcile" those responses and to connect "all loan information and documentation . . . to MTZ's financial statements," 5th Supp. MTZ Questionnaire Att. I ¶ 2.

MTZ in response provided Commerce with documents including "a listing of all bank borrowings during the POR." MTZ 5th Supp. Response Att. I at 1, Ex. SSSS-1. MTZ further submitted a table entitled "[r]econciliation" that listed its 2006 loans by category and bank, *id.* Ex. SSSS-3, as well as "the ledger sheets for all of MTZ's customers for which MTZ either obtained packing credits from Banks or rediscounted certain invoices." Supp. to MTZ 5th Supp. Response at 1, Ex. SSSS-2.[8] Commerce characterized MTZ's final submission and its deficiencies as follows:

> MTZ provided a reconciliation of type of loan totals by bank to a listing of schedule totals that form part of MTZ's balance sheet. . . . MTZ provided the Department with customer specific ledger vouchers for various bank transactions with various banks. . . . *MTZ did not provide the complete loan information for the loan reported in [MTZ Supp. Response Ex. S-5], nor did MTZ reconcile that loan to a short-term loan listing in the format as requested by the Department* in its [5th Supp. MTZ Questionnaire].

*Decision Memo* at 7 (emphasis added).

**3**

**The AFA Application Is Supported By Substantial Evidence**

The multiple Commerce requests and evasive MTZ responses demonstrate that MTZ withheld requested information and "failed to cooperate by not acting to the best of its ability to comply" with the requests. 19 U.S.C. § 1677e(a)-(b); *see Decision Memo* at 8–10; *supra* Part IV.B.2. Commerce repeatedly sought the same loan information from MTZ because, despite the clear initial description from Commerce, MTZ apparently misunderstood the export financing program

[8] This exhibit was not included in the MTZ 5th Supp. Response but was accepted despite being untimely. *See* Supp. to MTZ 5th Supp. Response at 1–3.

as requiring loans from RBI.[9] *See* Initial Questionnaire at III-6–7; MTZ Response at III12; Supp. MTZ Questionnaire Att. I at 2; *Decision Memo* at 8–9. MTZ reiterated its position that only RBI loans were relevant, conceded that it "did obtain an advance on certain of its invoices," and submitted a document showing receipt of a packing credit during the POR. MTZ Supp. Response Att. I at 5–6, Ex. S-5. This reasonably led Commerce to believe MTZ both participated in the program during the POR and was not cooperative in providing the information needed to ascertain the benefits conferred. *See Decision Memo* at 9; Defendant's Opposition at 13–14.

Commerce then again asked MTZ for all loan information relevant to the program during the POR, and provided a specific format. 2d Supp. MTZ Questionnaire Att. I at 3, Att. II. MTZ informed Commerce that it could not comply with the requested format and referred Commerce to a missing exhibit. MTZ 2d/3d Response at SS-1–2, SS-5; *Decision Memo* at 6. Commerce thereafter asked MTZ for the missing exhibit and explicitly warned MTZ that its failure to provide the requested complete loan information could result in the application of AFA. 4th Supp. MTZ Questionnaire Att. I ¶¶ 1, 2. Although MTZ submitted spreadsheets of loan data, it did not provide the particular exhibit requested by Commerce. *See* MTZ 4th Supp. Response Att. I at 1. Moreover, Commerce "was unable to reconcile" the MTZ 4th Supp. Response data with MTZ Supp. Response Ex. S-5. *Decision Memo* at 7. Commerce therefore properly made the preliminarily finding that AFA application was warranted based on MTZ's inadequate responses. *See Preliminary Results*, 73 Fed. Reg. at 45,960–61.

MTZ did not take advantage of the final opportunity from Commerce to avoid AFA. *See*5th MTZ Supp. Questionnaire Att. I ¶ 1. Although MTZ did submit a large amount of loan data, once again these data were neither in the requested format nor accompanied by meaningful explanation.[10] *See* MTZ 5th Supp. Response Att. I at 1, Exs. SSSS-1, SSSS-3, SSSS-5; Supp. to MTZ 5th Supp. Response Ex.

[9] Despite being corrected by Commerce, MTZ persisted in its characterization of the program. *See* MTZ Case Brief at 24–25 ("any of the 'packing credits' obtained by MTZ were obtained from Independent Banks and not from [RBI]."). As explained by GOI, "RBI fixes the ceiling rate of interest for export credit. . . . RBI has not prescribed any application process or application form for Export Credit program. Commercial banks directly administer the program in accordance with their own procedures." GOI Supp. Response at 15. "The Department has not, in this administrative review or any prior segment under this [*CVD Order* ] defined pre-shipment and post-shipment loans under this program as short-term loans obtained by a respondent from the RBI." *Preliminary Results*, 73 Fed. Reg. at 45,959.

[10] MTZ maintains that its final submission of loan data proves that "MTZ paid commercial interest rates for any of the 'packing credits' that it obtained and did not pay preferential

SSSS-2; *Decision Memo* at 7. MTZ further failed to correlate the 2006 packing credit indicated in a previous submission with the loan data as expressly—and reasonably—requested by Commerce. *See* 5th Supp. MTZ Questionnaire Att. I ¶¶ 2–3; *Decision Memo* at 7; MTZ Supp. Response Att. I at 5, Ex. S-5; MTZ 4th Supp. Response Exs. SSS-1(a)(i), SSS-1(a)(ii). Instead, MTZ replied that Commerce's reconciliation "questions are of no moment." MTZ 5th Supp. Response Att. I at 2. Commerce analyzed the data contained in MTZ's final submission and reasonably concluded that "the Department was still unable to reconcile the loan information from" the earlier submissions.[11] *Decision Memo* at 7.

These exchanges provide "such relevant evidence as a reasonable mind might accept as adequate to support" Commerce's conclusion that MTZ withheld requested information and "failed to cooperate by not acting to the best of its ability to comply," 19 U.S.C. § 1677e. *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933). Commerce accurately recapped its back-and-forth with MTZ and articulated the bases for applying AFA as follows:

> [T]he Department asked MTZ to provide the requested pre-shipment and post-shipment export financing loan information on four separate occasions prior to the *Preliminary Results*, and another time after the *Preliminary Results* yet, the information on the record remains incomplete. Not only did MTZ fail to reconcile its individual short-term loans reported as benchmarks and those obtained for the pre-shipment and post-shipment export financing, but it also failed to reconcile the short-term loan reported in [MTZ Supp. Response Ex. S-5]. Thus, without this reconciliation, the extent to which the reported data is incomplete remains unclear. Because MTZ failed to provide all the information requested by the Department, and MTZ's failure to provide this loan information within the established deadlines impeded our review, we find that the application of facts otherwise available is warranted . . . .
>
> Because MTZ failed to cooperate to the best of its ability to comply with the Department's requests for the loan information,

rates under a [RBI] program." MTZ's Motion at 13; *see also* MTZ Case Brief at 24–25. This conclusory statement is unpersuasive; without any correlation of the large amount of loan data with the packing credit program, Commerce correctly found MTZ's data to be incomplete and unclear. *See Decision Memo* at 9.

[11] At oral argument, MTZ's counsel was provided with another opportunity to reconcile the 2006 packing credit indicated on MTZ Supp. Response Ex. S-5 with the loan data included as exhibits to 5th Supp. MTZ Response. June 29, 2010 Oral Argument at 5:30–6:15. After reviewing the pertinent exhibits provided by Defendant's counsel, *id.* at 9:50–15:15, MTZ's counsel was unable to do so, *id.* at 15:16–30.

> the Department has determined that an adverse inference . . . is warranted. Accordingly, the Department is making an adverse inference that MTZ benefitted from this program during the POR . . . .

*Decision Memo* at 9–10 (citations omitted).

Commerce satisfied the objective and subjective showings necessary to apply AFA pursuant to *Nippon Steel*, 337 F.3d at 1382–83. Given Commerce's position carried over from the previous review that the program was countervailable, *see* Initial Questionnaire at III-6, "a reasonable and responsible [exporter] would have known that the requested information was required to be kept and maintained," *Nippon Steel*, 337 F.3d at 1382. Commerce repeatedly and specifically requested the information from MTZ—both before and after the warning about, and preliminary application of, AFA. *See* 2d Supp. MTZ Questionnaire Att. I at 3, Att. II; 4th Supp. MTZ Questionnaire Att. I ¶¶ 1, 2; *Preliminary Results*, 73 Fed. Reg. at 45,958–61; 5th Supp. MTZ Questionnaire, Att. I ¶ 1; *see generally supra* Part IV.B.2. Thus, MTZ's "failure to fully respond is the result of the respondent's lack of cooperation in . . . failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Nippon Steel,* 337 F.3d at 1383. The application of AFA to MTZ for export financing program is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).[12]

### C
### *Commerce's Previous Verification Does Not Invalidate The Subject Determinations*

#### 1
#### MTZ's Arguments Based On The Previous Verification

MTZ relies in part on a verification in the previous POR to support its challenges in the instant POR relating to both ECPGS and the export financing program. *See* MTZ's Motion at 813; MTZ Case Brief at 6, 24. Commerce in September 2007 conducted a verification of MTZ as part of the previous review of the *CVD Order*, covering the calendar year 2005 POR. *See* Memorandum from Elfi Blum & Toni Page, International Trade Compliance Analysts, to Thomas Gilgunn,

[12] MTZ challenges only Commerce's application of AFA as opposed to the rate itself. *See* MTZ's Motion at 11–13. Commerce selected the 2.90 percent *ad valorem* AFA rate for MTZ "because it was calculated for the same program (Pre-Shipment and Post-Shipment Export Financing) and in the same proceeding, PET film from India." *Decision Memo* at 11. These features, *inter alia*, distinguish the 2.90 percent AFA rate here from the 57.64 percent AFA rate struck down by the Federal Circuit in *Gallant Ocean*, 602 F.3d 1319.

Program Manager, AD/CVD Operations, Office 6, U.S. Department of Commerce, Countervailing Duty Administrative Review of . . . PET[] Film from India, Verification of the Questionnaire Responses Submitted by MTZ . . . (December 7, 2007), MTZ 5th Supp. Response Ex. SSSS-4(d), MTZ Case Brief Ex. BR-5 ("Verification Report"); *[PET Film] from India: Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review*, 72 Fed. Reg. 43,607 (August 6, 2007).

During that verification, Commerce "discussed MTZ's usage of the EPCGS program with company representatives." Verification Report at 10. Commerce reviewed the two MTZ EPCGS licenses at issue in the 2006 POR *CVD Order* review. *Id.*; MTZ 5th Supp. Response Att. I at 5–6. Commerce at that time "requested and MTZ provided information on the duty rates the company would have paid absent the program." Verification Report at 10. MTZ claims that Commerce's acceptance of the information provided at that time "establishes . . . the correct amount . . . for duty foregone by [GOI] and saved by MTZ. This, in turn, represents the upper limit of the EPCGS benefit." MTZ's Motion at 9.

Commerce did not address the prior review verification in rendering the *Final Results*. *See Decision Memo* at 1, 11–14. MTZ contends that "Commerce did not make any explanation for its change from its prior decision." MTZ's Motion at 11. According to MTZ, Commerce erred because the *Decision Memo* "is silent on the impact of the verification and silent as to any reasons why Commerce changed its calculation from the prior review to this review." *Id.*

During that verification, Commerce also established that MTZ did not receive benefits under the export financing program during the 2005 POR. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Issues and Decision Memorandum in the Final Results of the Countervailing Duty Administrative Review of [PET Film] from India (February 4, 2008) at 6, MTZ 5th Supp. Response Ex. SSSS-3. MTZ contends that this finding as to the 2005 POR demonstrates that MTZ did not receive benefits under the program in the 2006 POR. *See* MTZ 5th Supp. Response Att. I at 1–2 (citing Verification Report); MTZ's Motion at 11–13.

**2**
**Commerce Sufficiently Explained Its Bases For The Challenged Determinations**

"MTZ does not disagree with the basic statement of law," Plaintiff's Reply to Responses Submitted by the Defendant and Defendant-

Intervenors to Plaintiff's Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the United States Court of International Trade ("MTZ's Reply") at 3, "that the Department has the authority to reach a differing determination in separate reviews," *id.* at 4. MTZ recognizes that Commerce can collect new information and reach a different determination in the 2006 POR than in the prior POR that included verification. *See* MTZ's Motion at 8 n.2 (MTZ stating that an Education Cess exemption was properly excluded from the EPCGS benefit calculation for the 2006 POR despite its inclusion in the 2005 POR); *Decision Memo* at 22. Defendant is correct that prior POR determinations are "not at issue in this dispute." Defendant's Motion at 12, 20 ("Whether or not Commerce found that MTZ benefitted from [the export financing] program based upon different shipments of subject merchandise and different loans in a prior review is not relevant to whether Commerce properly determined that MTZ received packing credits on shipments of subject merchandise in this [POR].")

Precedent from this court establishes that "Commerce may adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record." *Save Domestic Oil, Inc. v. United States*, 26 CIT 1380, 1395, 240 F. Supp. 2d 1342 (2002) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42–43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 173, 184–85, 6 F. Supp. 2d 865 (1998)), *aff'd* 357 F.3d 1278 (Fed. Cir. 2004). The Federal Circuit instructs that "if Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." *Save Domestic Oil*, 357 F.3d at 1283–84 (citing *Motor Vehicle Mfrs.*, 463 U.S. at 42–43).

Commerce's not having addressed the 2005 *CVD Order* verification in the *Decision Memo* does not invalidate the challenged determinations. The one-time, record-specific verification of MTZ's EPCGS benefit and export credit financing program participation (or lack thereof) from the prior POR does not approximate "a routine practice" obligating Commerce to justify its "depart[ure] therefrom," *Save Domestic Oil*, 357 F.3d at 1283–84. The verification not being addressed here is therefore distinguishable from the cases where Commerce was required to explain its reversal. *See, e.g.*, *CINSA, S.A. de C.V. v. United States*, 21 CIT 341, 347, 349, 966 F. Supp. 1230 (1997) (plaintiff provided information that was "exactly the same for the previous

three administrative reviews" and Commerce improperly "change[d] its methodology without explanation.").[13]

MTZ's reliance on the previous *CVD Order* review "is misplaced. Even assuming Commerce's determinations at issue are factually identical, as a matter of law a prior administrative determination is not binding on other reviews before this court." *Alloy Piping Prods., Inc. v. United States*, Slip Op. 09–29, 2009 WL 983078, at *6 (CIT April 14, 2009) (holding that Commerce properly granted a constructed export price offset to a respondent despite not having done so in the previous administrative review). The challenged determinations here need only be supported by substantial evidence and in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). This standard is satisfied. *Supra* Parts IV.A, IV.B.3.

## V
## CONCLUSION

For the above stated reasons, Plaintiff MTZ Polyfilms, Ltd.'s Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade is DENIED and Commerce's determinations in *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 75,672 (December 12, 2008), are AFFIRMED.

Dated: July 14, 2010
New York, New York

*__/s/ Evan J. Wallach____*
EVAN J. WALLACH, JUDGE

Slip Op. 10–80

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES, U. S. DEPARTMENT OF HOMELAND SECURITY, AND U. S. CUSTOMS AND BORDER PROTECTION Defendants.

Before: Gregory W. Carman, Judge
Court No. 09 00151

[*Defendants' motion to dismiss is granted in part and denied in part; Plaintiff's motion for partial summary judgment is denied. The Court finds it has jurisdiction over some of Plaintiff's claims, but declines to issue a declaratory judgment on the basis of those claims.* ]

[13] MTZ's attempt to rely on *CINSA* and other precedent from this court is unpersuasive because MTZ does not argue, let alone demonstrate, that "Commerce has a routine practice for addressing like situations." *Save Domestic Oil*, 357 F.3d at 1283; *see* MTZ's Reply at 4–8.

Dated: July 22, 2010

*Ford Motor Company, Office of General Counsel* (*Paulsen K. Vandevert*); *Baker & Hostetler LLP* (*Matthew W. Caligur*), of counsel, for Plaintiff.

*Tony West*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, *Justin R. Miller*); and *Yelena Slepak*, of counsel, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Department of Homeland Security, for Defendants.

## *OPINION*

**CARMAN, JUDGE:**

### Introduction

Plaintiff Ford Motor Company ("Ford" or "Plaintiff") brought this action asking the Court to declare that ten entries ("Entries" or "Subject Entries") of Jaguar brand vehicles imported from the United Kingdom are deemed liquidated by operation of law, and that Ford is entitled to duty refunds on these entries from U.S. Customs and Border Protection ("CBP"). (Second Amended Compl. for Declaratory And Injunctive Relief ("2d Am. Compl.") 1 2.) Defendants (collectively, the "United States") moved to dismiss this case, asserting that for certain entries the statute of limitations had run, that there was no case or controversy, or that the dispute was not ripe for judicial review, and that in any event, the Court lacks jurisdiction to decide the case. (Defs.' Mot. to Dismiss ("Mot. to Dismiss") 6 15.) Plaintiff responded to Defendants' motion to dismiss and cross moved for partial summary judgment. For the reasons set forth below, Defendants' Motion to Dismiss is granted in part and denied in part, and Plaintiff's Motion for partial summary judgment is denied. While the Court finds it has jurisdiction over some of Plaintiff's claims, it declines to issue a declaratory judgment on the basis of those claims, dismisses the remainder of Plaintiff's case, and denies all other outstanding motions.

### Background

The Subject Entries are known as "reconciliation entries." Reconciliation is "an electronic process, initiated at the request of an importer, under which the elements of an entry (other than those elements related to the admissibility of the merchandise) that are undetermined at the time the importer files [the entry], are provided to [CBP] at a later time." 19 U.S.C. § 1401(s).[1] When filed by an importer, a reconciliation "is treated as an entry for purposes of

[1] All citations to the United States Code refer to the 2006 edition.

liquidation, reliquidation, recordkeeping, and protest." *Id.* This case involves 10 reconciliation entries. For ease of reference, the Court has labeled them A through J:

| Label | Reconciliation Entry Number | Reconciliation File Date | Liquidation Date | Reliquidation Date |
|---|---|---|---|---|
| A | 300 4830272 0 | 7/20/2006 | 7/11/2008 | |
| B | 300 9945919 7 | 6/29/2005 | 6/19/2009 | 8/7/2009 |
| C | 300 9945928 8 | 7/28/2005 | 7/17/2009 | 7/31/2009 |
| D | 300 9945935 3 | 8/26/2005 | 8/14/2009 | 9/18/2009 |
| E | 300 4830222 5 | 5/15/2006 | 5/7/2010 | |
| F | 300 4830252 2 | 6/15/2006 | 6/4/2010 | 7/23/2010 (scheduled) |
| G | 300 4830281 1 | 8/14/2006 | | |
| H | 300 4830280 3 | 8/14/2006 | | |
| I | 300 4830290 2 | 9/21/2006 | | |
| J | 300 4830301 7 | 10/4/2006 | | |

(*See* 2d Am. Compl., Ex. A; Defs.' Mot. to Dismiss, Ex. B; Pl.'s Expedited App./Mot. for TRO and Prelim. Inj. and Brief in Support ("Pl.'s TRO/PI Mot.") 2.); Defs.' Opp. to Pl.'s App. for a TRO and Prelim. Inj. ("Defs.' TRO/PI Opp.") 5.)

According to 19 U.S.C. § 1504, unless extended or suspended, a reconciliation entry that has not been liquidated within one year from the date of filing "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record." 19 U.S.C. § 1504(a). CBP is authorized to "extend the period in which to liquidate an entry if (1) the information needed for the proper appraisement or classification of the imported or withdrawn merchandise, . . . or for insuring compliance with applicable law, is not available to the Customs Service," and is required to provide notice to the importer that it is doing so. 19 U.S.C. § 1504(b). Entries may not be extended indefinitely. If reconciliation entries are extended, they "shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record . . . at the expiration of 4 years" from the date the reconciliation was filed. *Id.*

Plaintiff asserts that all ten Subject Entries should have been deemed liquidated one year from the date of filing the reconciliation. (2d Am. Compl. ¶¶ 69, 74, 79, 86.) In its first claim,[2] Plaintiff asserts that none of its Entries were extended or suspended. (*Id.* ¶ 68.) In its second claim, Ford asserts that CBP did not issue notice of any extensions or suspensions that may have been made. (*Id.* ¶ 72.) In its third claim, Ford asserts that even if CBP issued notices of extension or suspension, it did not provide Ford with any reasons for extending or suspending the Entries, thereby voiding any purported extensions or suspensions. (*Id.* ¶¶ 77 78.) In its fourth claim, Ford asserts that CBP had no statutorily valid reason for extending or suspending the Entries, in any case. (*Id.* ¶¶ 82 85).

In its fifth and sixth claims, Plaintiff specifically asserts that CBP's treatment of Entries B, C, and D was unlawful. (*Id.* ¶¶ 88 94 (objecting to the reliquidation of Entries B and C after these Entries were allegedly deemed liquidated), ¶¶ 95 103 (asserting that liquidation of Entry D was unlawful because CBP failed to fix the final appraisement and final amount of duty to be paid, in violation of 19 U.S.C. § 1500(a) and (c)).) CBP actively liquidated these three Entries prior to the 4 year anniversary of the filing of the reconciliation and subsequently reliquidated each of these three Entries. (*Id.*, Ex. A, Mot. to Dismiss, Ex. B.)

In its seventh and final claim, Plaintiff asserts that CBP continues to request additional information from Ford relating to the remaining Subject Entries, which Ford claims is "imposing an unreasonable and costly burden." (2d Am. Compl. ¶¶ 105 106.) Plaintiff asks the Court to "issue an order enjoining Customs from taking any further action on any of the Subject Entries" until the Court provides Plaintiff with the declaratory relief sought in the balance of the complaint. (*Id.* at ¶ 109.)

## Jurisdiction

### I. *Parties' Contentions*

Plaintiff asserts

> that [t]his Court has jurisdiction over this matter pursuant to 28 U.S.C. 1581(i), because, as of the time this action was commenced, Customs had not liquidated any of the Subject Entries. Therefore, Plaintiff has no administrative action to take or remedy to exhaust. There is no other part of section of [sic] 28 U.S.C. § 1581 that applies.

[2] Plaintiff refers to each claim as a "cause of action."

(*Id.* at ¶ 6.) Plaintiff cites *Fujitsu Gen. Am., Inc. v. United States*, 24 C.I.T. 733, 110 F. Supp. 2d 1061 (2000), for the proposition that when CBP has not actively liquidated an importer's entries, the importer may bring a claim under 28 U.S.C. § 1581(i) seeking a declaratory judgment that its entries have deemed liquidated. (Pl.'s Mot. for Partial Summ. J. and App. for Writ of Mandamus ("Pl.'s Mot. for Partial Summ. J.") 5 6.) Plaintiff also asserts that the Court has the authority to issue a declaratory judgment pursuant to 28 U.S.C. § 1585, and the Declaratory Judgment Act, 28 U.S.C. § 2201. (2d Am. Compl. ¶ 8.)

Defendants assert that Entry A liquidated "no change," that a refund was appropriately issued to Ford, and that because there is no longer a case or controversy for the Court to decide in regards to this Entry, all claims relating to Entry A should be dismissed for lack of subject matter jurisdiction. (Defendants.' Mot. to Dismiss at 7 8; Defendants.' Mot. to Strike and Mot to Stay ("Defendants.' Mot. to Strike") 9.)

Defendants attack jurisdiction for claims relating to Entries B, C, and D on two grounds. First, Defendants assert that Ford's claims with respect to these three Entriesare barred by the 2 year statute of limitations found in 28 U.S.C. § 2636(i). (Mot. to Dismiss at 6 7 (*quoting SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1348 (Fed. Cir. 2009) ("We assume, but do not decide, that the statute of limitations in § 2636(i) is jurisdictional under *John R. Sand & Gravel Co.* [*v. United States*, 552 U.S. 130 (2008).])).) Alternatively, Defendants point out that Ford has filed a protest challenging CBP's liquidation and reliquidation of Entries B, C & D, and that "[i]f Customs denies the protest, Ford has a right to challenge the denial of that protest by commencing a judicial action pursuant to 28 U.S.C. § 1581(a)." (*Id.* at 11.) Defendants claim that this Court may not take jurisdiction pursuant to § 1581(i) "without a showing that subsection 1581(a) was manifestly inadequate." (*Id.* (*quoting Hartford Fire Ins. Co., v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008)).)

Defendants argue that any claims with respect to Entries E J "are subject to dismissal under the doctrine of ripeness. (*Id.* at 8.) Citing sworn declarations from CBP officials and other documents attached to its motion to dismiss, Defendants claim that Entries E J were properly extended, and therefore have not deemed liquidated. (*Id.* at 9.) Defendants assert that "Ford's claims with respect to these Entries are purely speculative," and therefore not ripe for judicial determination. (*Id.* at 9.) Additionally, citing *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1241 (Fed. Cir. 2007), Defendants claim

that if Ford believes Entries E J liquidated as a matter of law, "it should have protested the deemed liquidation of those Entries and commenced an action pursuant to 28 U.S.C. § 1581(a)." (*Id.* at 12 13.) Because Defendants believe jurisdiction over Entries E J is only appropriate via § 1581(a), they argue the Court cannot take jurisdiction over claims relating to these Entries via § 1581(i). (*Id.* at 15.)

## II. *Analysis*

The Declaratory Judgment Act, 28 U.S.C. § 2201, states that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[3] In order to issue a declaratory judgment, then, there must exist an actual controversy arising within this Court's limited jurisdiction. The term "actual controversy," as it is used in the Declaratory Judgment Act "is the same as an Article III case or controversy." *Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007) (*citing Aetna Life Ins. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937).) The jurisdictional provision invoked by Plaintiff gives the Court of International Trade

> exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1) (3) of this subsection and subsections
> (a) (h) of this section.

28 U.S.C. § 1581(i).

In its Second Amended Complaint, Plaintiff brought seven claims pertaining to ten Subject Entries. Certain claims apply to one or two specific Entries, while others address all ten Entries.[4] Since Plaintiff

[3] The recent amendment of 28 U.S.C. § 2201(b) by the Patient Protection and Affordable Care Act, Pub. L. No. 111 148, 124 Stat. 1195 (2010) has no effect on this case.

[4] Attached to this opinion as Appendix A is a chart indicating the fate of each of Plaintiff's claims, as they relate to each of the Subject Entries.

brought this suit, CBP has liquidated a number of the Subject Entries, and Ford's understanding of the facts has also changed. The effect of these changes is that, as to all of the Entries underlying claims one, five, and six, the Court either lacks subject matter jurisdiction or confronts no case or controversy between the parties. Claims one, five, and six, are consequently dismissed in their entirety.[5] Claims two, three and four are also dismissed for lack of subject matter jurisdiction insofar as they apply to those Entries that have been liquidated, but the Court finds that it has subject matter jurisdiction over claims two, three, and four insofar as they apply to the Entries not yet liquidated (G, H, I, and J), and that these claims assert an actual controversy with respect to these unliquidated Entries. However, for the reasons set forth in the Discussion, below, the Court exercises its discretion not to issue a declaratory judgment on the basis of claims two, three, and four, and therefore dismisses them as well.

### A. All Claims Relating To Entry A are Dismissed For Lack of Case or Controversy

The parties appear to be in agreement that there is no controversy as to Entry A. Defendants assert that the Entry liquidated as entered, and that CBP refunded the duties to Ford. While Ford was apparently not initially aware that it had received this refund, in a more recent filing, it acknowledged that "it has received the duty refund sought" with respect to Entry A.[6] Finding no case or controversy with respect to Entry A, claims one through four are dismissed, insofar as they relate to Entry A, for lack of case or controversy.

### B. All Claims Relating to Entries B, C, and D are Dismissed for Lack of Subject Matter Jurisdiction

As Defendants correctly point out, the reliquidation of Entries B, C, and D has been administratively protested by Ford. The Court notes

[5] Claim seven, seeking an injunction, rather than declaratory relief, is dismissed on mootness grounds below.

[6] Along with its motion for partial summary judgment, Plaintiff sought a writ of mandamus requiring CBP to refund the duties owed to Ford, that it did not believe it had yet received following the liquidation of Entry A. (Pl.'s Mot. for Partial Summ. J. at 14 16.) Defendants subsequently moved to strike Plaintiff's Motion for Partial Summary Judgment on other grounds, and to strike the application for writ of mandamus on the grounds that the refund had, in fact, been made to Ford. (Def.'s Mot. to Strike 9.) Upon further investigation, Plaintiff confirmed that it had received the refund and voluntarily withdrew its application for writ of mandamus. (Pl.'s Opp. to Defendants.' Mot. to Strike and for Stay 10.) While Ford did not voluntarily withdraw all claims relating to Entry A from its Second Amended Complaint, the Court finds for the reasons explained above that the effect of CBP issuing the refund on this Entry in the amount sought by Ford is to dissipate of any case or controversy that may have previously existed with respect to Entry A.

that this protest has now been denied, and is the subject of a separate lawsuit filed in the Court of International Trade pursuant to 28 U.S.C. § 1581(a), *Ford Motor Company v. United States*, Court No. 10 00138. The Court of Appeals for the Federal Circuit ("CAFC") has repeatedly held that "jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Hartford Fire*, 544 F.3d at 1292 (*citing Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)), *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983) (a party "cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i).") (quoting and adopting *Am. Air Parcel Forwarding co. v. United States*, 5 CIT 8, 10, 557 F. Supp. 605, 607 (1983).). It is clear that the appropriate mechanism for evaluating CBP's treatment of Entries B, C, and D is Ford's § 1581(a) case. In that case, the court will be able to evaluate all of Plaintiff's claims regarding Entries B, C, and D through the preferred jurisdictional vehicle established by Congress. Accordingly, Plaintiff's fifth and sixth claims, which pertain exclusively to Entries B, C, and D are dismissed pursuant to USCIT R. 12(b)(1) for lack of subject matter jurisdiction. Also, Plaintiff's first four claims are also dismissed insofar as they relate to Entries B, C, and D for lack of subject matter jurisdiction. Because the Court has determined that it lacks jurisdiction over any claims relating to Entries B, C, and D, Plaintiff's Motion for Partial Summary Judgment, which addresses itself exclusively to these Subject Entries, is denied. Additionally, because Plaintiff's motion for partial summary judgment is denied, Defendants' motion to strike and to stay is moot, and is denied accordingly.

### C. The Remainder of Claim 1 Is Dismissed For Lack Of A Case Or Controversy

In its most recent filing in this case, Plaintiff has abandoned the remainder of the first claim of its Second Amended Complaint which asserts that CBP "did not extend the liquidation of any of the Subject Entries." (2d Am. Compl. ¶ 68.) Defendants have maintained since their initial filing in this case that all the Subject Entries were validly extended. (Mot. to Dismiss, Ex. A.) In Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, Ford acknowledged that Entries E through J have all been extended. (Pl.'s TRO/PI Mot. at 2, Ex. 1.) Accordingly, the Court finds no dispute between the parties, and therefore dismisses the remainder of claim one for lack of a case or controversy.

### D. Claims 2–4 Are Dismissed Insofar as They Relate to Entries E and F for Lack of Subject Matter Jurisdiction

According to the parties, Entry E was liquidated by CBP on May 7, 2010, and is not scheduled to be reliquidated. (Pl.'s TRO/PI Mot. 2; Defs.' TRO/PI Opp. 5.) Entry F was liquidated by CBP on June 4, 2010, and is scheduled to be reliquidated on July 23, 2010. (Defs.' TRO/PI Opp. 4 5.) Once an entry has been liquidated in a manner disputed by the importer, the importer's only remedy is to protest the liquidation, pay the duties owed pursuant to 28 U.S.C. § 2637, and to challenge the denial of the protest in a § 1581(a) case. *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1374 (Fed. Cir. 2002) ("[S]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.") (citations and quotations omitted). As with Entries B, C, and D, the only way for Plaintiff to obtain judicial review of any allegations of improper treatment of Entries E and F is by bringing a case under § 1581(a). Therefore, claims two, three, and four, insofar as they relate to Entries E and F, are dismissed for lack of subject matter jurisdiction.[7]

### E. The Court Has Jurisdiction Over Claims 2, 3, and 4, Insofar as Those Claims Relate to Entries G, H, I and J

This Court has jurisdiction under 28 U.S.C. § 1581(i) to hear Plaintiff's claims two, three, and four, and to issue declaratory relief with respect to Entries G, H, I, and J. While there is no longer a controversy as to whether or not Entries G J were extended, Plaintiff continues to maintain in claims two, three, and four that these extensions were somehow faulty. That controversy falls within the Court's jurisdiction because this case is a civil action that has been commenced against the United States, arising out of laws of the United States providing for the administration of tariffs, namely, 19 U.S.C. §§ 1500, 1504. All of the requisite components to exercise jurisdiction and render a declaratory judgment are therefore in place.

Defendants have offered the Court no persuasive argument as to why the Court should not take jurisdiction over Entries G J pursuant to 28 U.S.C. § 1581(i). First, the Court does not recognize a ripeness issue with respect to these Entries, as Defendants maintain. Plaintiff has only asked the Court to declare that these Entries deemed liqui-

[7] The ongoing liquidation and reliquidation of the Subject Entries is also the basis for Plaintiff's TRO/PI Motion, which is discussed below.

dated one year from the date the reconciliation Entries were filed because CBP's purported extensions of these Entries were somehow improper (because CBP failed to provide notice, provided faulty notice, or extended the Entries without good reason). (2d Am. Compl. ¶¶ 74, 79, 86, Prayer for Relief A.) If, as Defendants assert, there was nothing improper about the extension of liquidation of Entries G J, Plaintiff's claims are not unripe, but rather are defeated on the merits.

Additionally, the Court is not persuaded by Defendants' argument that the only jurisdictional mechanism through which Plaintiff may obtain relief with respect to Entries G J is 28 U.S.C. § 1581(a) at least not while these entries remain unliquidated. This is because Plaintiff does not *dispute* the deemed liquidation, but rather asks the Court to declare that the faults it identified rendered the extensions void, and that deemed liquidation *actually occurred*. *Koyo*, cited by Defendants, does not contradict this view. In *Koyo*, an importer obtained an advantageous result in an administrative review, but lost that benefit when CBP failed to liquidate its entries in accordance with the liquidation instructions issued as a consequence of that review, and the entries deemed liquidated at the higher antidumping duty rate, as entered, instead. *Koyo*, 497 F.3d at 1237. The CAFC held that the deemed liquidations in that case were protestable under 19 U.S.C. § 1514, and could be challenged by bringing a case under § 1581(a). *Koyo* does not suggest that an importer in Ford's position, which does not challenge but rather wants judicial *confirmation* of its rights in this regard, is required to file a protest with Customs and sue under § 1581(a), rather than seeking a declaratory judgment under § 1581(i).

Moreover, as Plaintiff points out, this court has previously suggested that a party in Ford's position believing that its entries deemed liquidated, but unable to confirm this fact with CBP could bring a lawsuit under § 1581(i) seeking a declaratory judgment to that effect. *See Fujitsu*, 24 C.I.T. at 739 ("where an importer believes its entries were deemed liquidated under § 1504(d), and Customs has not actively liquidated the entries anew, the importer's only remedy, at that point, is to seek a declaratory judgment from the CIT confirming that there was a deemed liquidation under 28 U.S.C. § 1581(i)."') For the foregoing reasons, then, the Court has jurisdiction to hear Plaintiff's claims pertaining to Entries G J pursuant to 28 U.S.C. § 1581(i).

## Discussion

### I. *Plaintiff's TRO/PI Application*

The Court will not prohibit CBP's liquidation of the Subject Entries during the pendency of this action. In its motion for a temporary restraining order and preliminary injunction, Plaintiff urges the court to prohibit CBP from liquidating or reliquidating the Subject Entries because they are the subject of this case. According to the parties, Entry F is scheduled to be reliquidated on July 23, 2010, and Entries G J are scheduled to be liquidated at some point in the next couple of months. (Pl.'s TRO/PI Mot. 2; Defs.' TRO/PI Opp. 3 6.) Even a cursory analysis of the four factors the Court is required to consider in determining whether to grant injunctive relief reveals its impropriety.

First, Plaintiff has not established that it faces any threat of irreparable harm as a result of CBP's liquidation of its Entries. In contrast to *Washington Int'l. Ins. Co., v. United States*, 25 CIT 207, 138 F. Supp. 2d 1314 (2001), the primary case cited by Plaintiff in support of this requested relief, CBP's liquidation of Ford's Subject Entries will neither defeat the Court's jurisdiction nor deprive Ford of the opportunity of meaningful judicial review. In *Washington Int'l*, the court found that once an importer had properly protested and paid the duties owing on certain entries, and commenced a suit in this court under § 1581(a), Customs did not have the authority to reliquidate the Subject Entries, divesting the court of jurisdiction, and requiring the importer to re protest, re pay the duties owed and re file a lawsuit under § 1581(a). *Washington Int'l*, 138 F. Supp. 2d at 1323 27. In this case, CBP's liquidation of Ford's Entries does not divest the Court of jurisdiction, but rather ensures that the court's consideration of CBP's treatment of the subject Entries will take place through § 1581(a), rather than § 1581(i).

The remaining three factors also weigh against granting Plaintiff's requested injunctive relief. As explained in the Discussion below, Plaintiff has not demonstrated a strong likelihood of success on the merits. The public interest will be better served by not disturbing CBP's fulfillment of its mandate. Last, the balance of hardship weighs in favor of CBP. In the Court's view, the burden on Plaintiff of completing the administrative protest process to obtain judicial review under § 1581(a) is less than the burden that would be imposed on CBP if it were prohibited from fulfilling its mandate and liquidating Ford's Entries. For the foregoing reasons, then, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction is hereby denied.

## II. *Plaintiff's Surviving Claims*

The Declaratory Judgment Act permits, but does not require, this Court to issue a declaratory judgment in a case of actual controversy within this Court's jurisdiction. 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . *may declare* the rights and other legal relations of any interested party seeking such declaration") (emphasis added). The CAFC has explained, "unlike non declaratory judgment actions, even if there is an actual controversy, the district court is not required to exercise jurisdiction to address the merits of the action, as it retains discretion under the Act to decline declaratory judgment jurisdiction." *Teva*, 482 F.3d at 1338 n.3 (*citing Pub. Serv. Comm'n. of Utah v. Wycoff Co.*, 344 U.S. 237 (1952) and *Spectronics Corp. v. H.B. Fuller Co.*, 940 F.2d 631 (Fed. Cir. 1991). This discretion is "unique and substantial," but "there must be well founded reasons for declining to entertain a declaratory judgment action." *Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1345 (Fed. Cir. 2005) (citations and quotations omitted). In light of Ford's recent acknowledgment that its Subject Entries were, in fact, extended, its remaining claims form a weak basis for granting declaratory relief that Entries G J deemed liquidated one year after the reconciliation was filed. For this reason, and because Ford will not be deprived of the opportunity for meaningful judicial review of CBP's treatment of the Subject Entries, the Court declines to entertain the remainder of Plaintiff's declaratory judgment action.

Plaintiff's second, third, and fourth claims have all been considerably undermined during the course of this litigation. For instance, any harm suffered by Plaintiff in allegedly not receiving notices of extension would appear mitigated by Plaintiff's present acknowledgment that its Entries were extended. Additionally, Defendants included with their motion to dismiss sworn declarations from CBP officials and computer records indicating that notice of extensions for the Subject Entries were mailed to Ford. (Mot. to Dismiss, Ex. A.) Plaintiff's third claim, that any notices of extension "did not give any reasons for the purported extension," is undercut by Ford's insistence that it never received, and therefore has never seen, such notices of extension. (2d Am. Compl. ¶ 77; *see also* ¶ 23 ("Customs never issued a notice to Ford JC that the liquidation of any of the Subject Entries had been extended.").) Plaintiff's fourth claim, that CBP has no valid reason for extending the liquidation, is again undercut by its other arguments in this case, claim seven. By statute, CBP is authorized to extend the liquidation of an entry if "the information needed for the proper appraisement . . . or for ensuring compliance with applicable law, is not available to [CBP.]" 19 U.S.C. § 1504(b)(1). In claim seven,

Ford all but admits that CBP is making "requests and demands" for information needed for the proper appraisement of the Subject Entries. (*See* 2d Am. Compl. ¶ 105 08.) Moreover, even if Ford managed to establish that CBP's extensions of the Subject Entries were illegal in the manner alleged in claims two, three, or four, it does not follow that such extensions would necessarily be void, and that Plaintiff's Entries consequently deemed liquidated one year from the dates the reconciliations were filed. Even if CBP did not have the right to extend Plaintiff's Entries (as Ford maintains), it clearly did not lack the power to do so (as Ford now acknowledges).

Further supporting the Court's decision not to take jurisdiction and issue a declaratory judgment on Plaintiff's behalf is that once Entries G, H, I, and J are liquidated, Plaintiff will be able to obtain meaningful judicial review over all legitimate legal claims pertaining to these Entries. While Ford may not pursue relief through 28 U.S.C. § 1581(a) until the Entries have been liquidated, and all procedural prerequisites have been followed, once these Entries liquidate, that relief will be available to Ford. USCIT R. 41(b)(5) specifies that "[u]nless the court in its order for dismissal otherwise specifies, . . . any dismissal not provided for in this rule, operates as an adjudication on the merits." In order to ensure that the Court's exercise of its discretion not to issue declaratory relief does not prohibit Ford from bringing a potentially meritorious claim in a subsequent § 1581(a) case, the Court will specify in its order of dismissal, below, that this dismissal is not an adjudication on the merits. By preserving the possibility for judicial review of Plaintiff's claims, the Court is ensuring that its decision not to issue declaratory relief is sound.

Finally, the Court turns to Plaintiff's seventh claim. In this claim, Plaintiff asks the court to enjoin CBP from making "requests and demands" on Plaintiff pertaining to the Subject Entries "until a final decision has been made and entered as judgment with respect to Plaintiff's requests for Declaratory Judgment. (2d Am. Compl. ¶ 109.) Because the Court has now dismissed the first six claims of Plaintiff's Second Amended Complaint for lack of case or controversy, lack of subject matter jurisdiction, or in the exercise of the Court's discretion not to issue declaratory relief, Plaintiff's seventh claim will be dismissed as moot.

## Conclusion

For the foregoing reasons, and pursuant to USCIT Rules 12, 41, and 58, the Court will separately issue a Final Order dismissing this case.

Dated: July 22, 2010
New York, NY

*/s/ Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

## Appendix A

<table>
<tr><th></th><th>Entry A</th><th>Entry B</th><th>Entry C</th><th>Entry D</th><th>Entry E</th><th>Entry F</th><th>Entry G</th><th>Entry H</th><th>Entry I</th><th>Entry J</th></tr>
<tr><td>Claim 1: CBP failed to extend or suspend liquidation of the Subject Entries</td><td rowspan="4">Entry A was liquidated and duties were refunded to Plaintiff. Claims 1 4 are dismissed for lack of case or controversy insofar as they apply to Entry A.</td><td colspan="3" rowspan="4">These entries have been liquidated, protested and duty paid and are the subject of a § 1581(a) case. Claims 1 4 are dismissed for lack of subject matter jurisdiction (“SMJ”), insofar as they apply to Entries B D.</td><td colspan="5">Plaintiff now acknowledges that entries E J were extended. Claim 1 is dismissed for lack of case or controversy, insofar as it applies to Entries E J.</td></tr>
<tr><td>Claim 2: CBP did not issue notices of extension or suspension</td><td colspan="2" rowspan="3">Entries E and F have now been liquidated. Claims 2 4 are dismissed for lack of SMJ , insofar as they apply to Entries E and F.</td><td colspan="3" rowspan="3">Claims 2–4 do raise a case or controversy with respect to Entries G-J, and the Court has jurisdiction to hear them. For the reasons set forth in the opinion, the Court exercises its discretion not to grant a declaratory judgment relating to these entries on the basis of these claims. Claims 2–4 are dismissed, insofar as they apply to entries G-J, but this dismissal shall not operate as an adjudication on the merits.</td></tr>
<tr><td>Claim 3: CBP did not provide the reasons for extension or suspension on any notices that were issued</td></tr>
<tr><td>Claim 4: CBP had no statutorily valid reason for extending or suspending the Subject Entries</td></tr>
<tr><td>Claim 5: Entries B & C should have deemed liquidated on the 4th anniversary of the entry date for each, and CBP’s purported reliquidation after this anniversary was unlawful</td><td></td><td colspan="2">Entries B & C are now the subject of a § 1581(a) case. Claim 5 is dismissed for lack of SMJ.</td><td colspan="6"></td></tr>
</table>

## Appendix A

<table>
<tr><th></th><th>Entry A</th><th>Entry B</th><th>Entry C</th><th>Entry D</th><th>Entry E</th><th>Entry F</th><th>Entry G</th><th>Entry H</th><th>Entry I</th><th>Entry J</th></tr>
<tr><td>Claim 6: Entry D was liquidated unlawfully because CBP failed to fix the final appraisement and failed to fix the final amount of duty to be paid, in violation of 19 U.S.C. § 1500(a) and (c).</td><td colspan="3"></td><td>Entry D is now the subject of a § 1581(a) case. Claim 6 is dismissed for lack of SMJ.</td><td colspan="5"></td></tr>
<tr><td>Claim 7: CBP should be enjoined from requesting additional information from Ford until a decision is rendered on the request for declaratory judgment in claims. 1–6.</td><td colspan="9">With the remainder of Plaintiff's case dismissed for lack of case or controversy or lack of SMJ, or dismissed by the Court in the exercise of its discretion, Claim 7 is dismissed as moot.</td></tr>
</table>

Slip Op. 10–81

LAMINATED WOVEN SACKS COMMITTEE, COATING EXCELLENCE INTERNATIONAL, LLC AND POLYTEX FIBERS CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and SHAPIRO PACKAGING AND COMMERCIAL PACKAGING, Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Consolidated
Court No. 09–00343

**Held:** Plaintiffs' Motion for Judgment On the Agency Record is denied. Judgment is entered for Defendant, United States. Case is dismissed.

Dated: July 23, 2010

*King & Spalding, LLP* (*Joseph W. Dorn, Jeffrey B. Denning, Stephen A. Jones, Stephen R. Keener*) for Plaintiffs, Laminated Woven Sacks Committee; Coating Excellence International, LLC; and Polytex Fibers Corporation.

*Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Delisa M. Sanchez*); *Rebecca Cantu*, Of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Evangeline D. Keenan*), for Defendant, the United States.

*Kutak Rock LLP* (*Ronald M Wisla* and *Lizbeth R. Levinson*) for Defendant-Intervenor, Shapiro Packaging.

*Arent Fox LLP* ("John M. Gurley" and *Diana Dimitriuc-Quaia*) for Defendant-Intervenor, Commercial Packaging.

## *OPINION*

**TSOUCALAS, Senior Judge:**

### Introduction

This matter is before the Court on a Motion for Judgment On the Agency Record brought by Plaintiffs, Laminated Woven Sacks Committee, Coating Excellence International, LLC and Polytex Fibers Corporation (collectively "Plaintiffs" or "LWSC") pursuant to Rule 56.2 of the Rules of the United States Court of International Trade ("USCIT").

Plaintiffs challenge a determination by the United States Department of Commerce ("Commerce" or "Department") that certain products imported by Shapiro Packaging are outside the scope of antidumping and countervailing duty orders published as *Notice of Antidumping Duty Order: Laminated Woven Sacks From the People's Republic of China*, 73 Fed. Reg. 45,941 (Aug. 7, 2008), and *Laminated Woven Sacks From the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 45,955 (Aug. 7, 2008) (collectively the

"*Orders*"). Emphasizing that the *Orders* expressly include laminated woven sacks that are "printed with three colors or more in register," *Orders* at 73 Fed. Reg. 45,942; 73 Fed. Reg. 45,955, and asserting that the products imported by Shapiro Packaging in fact possess three or more printed colors, Plaintiffs contend that Commerce should have reached an affirmative scope determination without resort to descriptions of the merchandise contained in the petition or prior investigation. The administrative determination under review is *Final Scope Ruling: Antidumping and Countervailing Duty Orders on Laminated Woven Sacks from the People's Republic of China* (July 29, 2009) ("*Final Scope Ruling*"). Plaintiffs' motion is opposed by Commerce and by Defendant-Intervenors, Shapiro Packaging and Commercial Packaging, who maintain that Commerce's determination in the *Final Scope Ruling* is supported by substantial evidence and is otherwise in accordance with law, and should therefore be sustained in all respects. For the reasons set forth below, Plaintiffs' Motion for Judgment On the Agency Record is denied.

## Jurisdiction

The Court has jurisdiction over this matter pursuant to Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

## Standard Of Review

The Court grants "significant deference" to Commerce's scope rulings, *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004), and will uphold a given determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) ( *quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). There must be a "rational connection between the facts found and the choice made" in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some

[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

evidence detracts from the Commission's conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citation and quotation marks omitted).

**Procedural History**

On August 7, 2008, Commerce published antidumping and countervailing duty orders covering certain laminated woven sacks from the People's Republic of China. *See Orders* 73 Fed. Reg. 45,941; 73 Fed. Reg. 45,955. On March 20, 2009, Defendant- Intervenor, Shapiro Packaging, requested a scope ruling on whether three different laminated woven sacks the company imported fell within the ambit of the scope language. *See* Letter from Garvey Schubert Barer to the Acting Secretary of Commerce, Re: Laminated Woven Sacks from the People's Republic of China; Scope Ruling Request (Mar. 20, 2009) ("Scope Ruling Request"), Public Rec. 1, Confidential Rec. 1.[2] The scope of the *Orders* is defined as follows:

> The merchandise covered by this investigation is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene ("BOPP") or to an exterior ply of paper that is suitable for high quality print graphics; *printed with three colors or more in register*; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed. . . .

73 Fed. Reg. at 45,942; 73 Fed. Reg. 45,955 (emphasis added).

In its Scope Ruling Request, Shapiro claimed that the three laminated woven sacks at issue[3] are beyond the scope of the *Orders* and therefore not subject to the antidumping or countervailing duties

[2] Hereinafter all documents in the public record will be designated "PR," and all documents in the confidential record designated "CR."

[3] The three laminated woven sacks imported by Shapiro include the Manna Pro Calf Manna sack; the Manna Pro Horse Feed sack; and the Red Head Deer Corn sack. *See* Compl. at 4.

imposed *a priori*. *See* Scope Ruling Request at 2, CR 1. According to Shapiro, the subject merchandise did not meet the "printed with three colors or more in register" criterion and were in fact produced with only two colors in register. *See id.* at 7. On May 12, 2009, Plaintiffs submitted comments to the Department contesting Shapiro's request for exclusion of the subject merchandise from the scope of the *Orders*. *See* Letter from King & Spalding to the Secretary of Commerce, Re: Laminated Woven Sacks From China: Petitioners' Reply To Shapiro Packaging's Request For A Scope Ruling (May 12, 2009) ("Plaintiffs' Comments of May 12, 2009"), CR 2. Additional submissions followed,[4] and on July 29, 009, Commerce issued its *Final Scope Ruling* finding that the three laminated woven sacks identified by Shapiro were printed with only two colors in register and therefore not subject to the duties imposed by the *Orders*. *See Final Scope Ruling*.

On September 18, 2009, Plaintiffs brought the instant action contesting the results of Commerce's *Final Scope Ruling*. Because Commerce's determination in this matter affected the administration of both an antidumping and countervailing duty order separate actions were lodged. *See* Compl., Court No. 09–00343; Compl., Court No 09–00348. These two actions were subsequently consolidated, under Consolidated Court No. 09–00343, at the parties' request. *See* Consolidation and Scheduling Order, Docket. No. 33 (Dec. 7, 2009).

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[4] On May 22, 2009, Shapiro submitted rebuttal comments. *See* Letter from Garvey Schubert Barer to the Secretary of Commerce, Re: Laminated Woven Sacks from the People's Republic of China; Rebuttal to Petitioners' Comments on the Shapiro Scope Ruling Request (May 22, 2009) ("Shapiro's Comments of May 22, 2009"), PR 15. On May 29, 2009, Commercial Packaging submitted rebuttal comments in support of Shapiro's position. *See* Letter from Arent Fox to the Secretary of Commerce, Re: Laminated Woven Sacks from the People's Republic of China: Comments On Scope Ruling Request of Shapiro Packaging (May 29, 2009) ("Commercial Packaging's Comments of May 29, 2009"), PR 16. On June 10, 2009, Plaintiffs submitted rebuttal comments. *See* Letter from King & Spalding to the Secretary of Commerce, Re: Laminated Woven Sacks From China: Petitioners' Second Submission Concerning Shapiro Packaging's Request For A Scope Ruling (June 10, 2009) ("Plaintiffs' Comments of June 10, 2009"), PR 18. On June 15, 2009, Shapiro submitted surrebuttal comments. *See* Letter from Garvey Schubert Barer to the Secretary of Commerce, Re: Laminated Woven Sacks from the People's Republic of China; Response to Petitioners' Second Submission Concerning Shapiro Packaging's Request for a Scope Ruling (June 15, 2009) ("Shapiro's Comments of June 15, 2009"), PR 19. On June 24, 2009, Commercial Packaging submitted surrebuttal comments. *See* Letter from Arent Fox to the Secretary of Commerce, Re: Laminated Woven Sacks from the People's Republic of China: Second Submission of Comments On The Scope Ruling Request of Shapiro Packaging (June 24, 2009) ("Commercial Packaging's Comments of June 24, 2009"), PR 21. Finally, on June 29, 2009, Plaintiffs submitted surrebuttal comments. *See* Letter from King & Spalding to the Secretary of Commerce, Re: Laminated Woven Sacks From China: Petitioners' Third Submission Concerning Shapiro Packaging's Request For A Scope Ruling (June 29, 2009) ("Plaintiffs' Comments of June 29, 2009"), PR 22.

## Discussion

### I. The Scope Ruling

After publication of an antidumping or countervailing duty order, scope rulings may be necessary to afford importers or producers clarification as to the status of their products under the order. In determining whether a product falls within the scope of an antidumping or countervailing duty order, Commerce engages in a three-step process. First, Commerce must examine the language of the order at issue. A "predicate for the interpretive process is language in the order that is subject to interpretation." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). If the terms of the order are dispositive then the order governs. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) ("The language of the order determines the scope of an antidumping duty order."). Therefore, while Commerce enjoys broad discretion in interpreting and clarifying its antidumping duty orders, and scope orders are necessarily written in general terms, the interpretive process cannot substitute for language in the order. *See Duferco*, 296 F.3d at 1096–97 (*citing Novosteel SA v. United States*, 284 F.3d 1261, 1271 (Fed. Cir. 2002)); *see also* 19 C.F.R. § 351.225(a). If the order alone is not dispositive, the interpretive process is governed by 19 C.F.R. § 351.225(d), which directs Commerce to determine whether it can make a ruling based upon the application for a scope ruling and the factors listed in section 351.225(k)(1).[5] If these descriptions are not dispositive, the Department initiates a scope inquiry pursuant to 19 C.F.R. § 351.225(e), and applies the five factors codified in section 351.225(k)(2), commonly referred to as the *Diversified Products* criteria. *See Diversified Products Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983); *see also* 19 U.S.C. § 1677j(d)(1).

In the case at bar, Commerce determined that the three laminated woven sacks at issue are not merchandise covered by the scope of the

[5] In its entirety, section 351.225(k) reads as follows:
With respect to those scope determinations that are not covered under paragraphs (g) through (j) of this section, in considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:
(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
(2) When the above criteria are not dispositive, the Secretary will further consider:
(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product;
(iv) The channels of trade in which the product is sold; and
(v) The manner in which the product is advertised and displayed.

*Orders*. *See Final Scope Ruling* at 1. The Department based this conclusion on an analysis of the factors identified in section 351.225(k)(1).

## II. The Color Criterion

### A. Parties' Arguments

LWSC argues that the color criterion contained in the *Orders*, "printed with three colors or more in register" can only be interpreted as to include laminated woven sacks that display three visible colors printed with the in register process. Pls.' Mem. in Supp. of Mot. for J. On the Agency Rec. ("Pls.' Brief") at 6. According to Plaintiffs, the common definition of the term color, as used in the *Orders*, "references the visual perception of distinct colors," and does not "equate colors with inks, which are raw materials used to produce subject merchandise."[6] *See id.* Plaintiffs maintain that the color criterion of the scope language is based on visible colors and not the actual use of ink colors, noting that the scope language does not include any reference to ink, ink color, or the number of inks used in the production process. *See id.* at 16. Thus, any attempt by the Department to render an interpretation of the scope language as mandating a requirement of a certain number of separate inks would have the effect of improperly modifying the scope of the *Orders*. *See id.* at 18 (*citing Duferco*, 296 F.3d at 1098). Plaintiffs characterize, as undisputed, the notion that Shapiro's imports satisfy the in register requirement embodied in the *Orders*.[7] *See id.* at 11. With regard to whether the laminated woven sacks are "printed with three colors or more," LWSC insists that the appropriate standard for this assessment is the number of visual colors perceived, and not as Defendants allege, the number of inks used.

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[6] Both LWSC and Shapiro rely on a standardized color matching system known as the Pantone Color Matching System. *See* Pls.' Brief at 16; Scope Ruling Request at 3–4. Under the Pantone Matching System, colors are distinguished by numbers which catalog a library of 1,114 colors generated through the mixture of 14 standard base pigments. *See* Pantone.com, http://www.pantone.com/pages/pantone/Pantone.aspx?pg=204598&ca=1 (last visited July 22, 2010).

[7] According to LWSC, merchandise is included in the scope of the *Orders* whenever: (1) the sack is made with one or more plies of fabric consisting of woven polypropylene and/or polyethylene strip, regardless of strip width; (2) the woven fabric is laminated to an exterior ply of plastic film such as biaxially oriented polypropylene or to an exterior ply of paper that is suitable for high quality print graphics; (3) the exterior ply is printed with three colors or more in register; and (4) the sack weighs no more than one kilogram. *See* Pls.' Brief at 10–11.

Defendant and Defendant-Intervenors, on the other hand, take the position that the laminated woven sacks are printed with only two colors in register, and therefore do not meet the physical criteria of merchandise covered by the *Orders*. *See* Def.'s Opp'n to Pls.' Mot. for J. On the Agency Rec. at 16 ("Def.'s Brief); *Final Scope Ruling* at 2. Commerce bases this conclusion on its assertion that the phrase "printed with three colors or more in register" should be construed as the number of inks used in the printing process rather than the number of colors visible on the sacks. *See* Def.'s Brief at 17. According to Shapiro, the presence of multiple colors on the subject merchandise is achieved through a screening process which gives "the appearance of multi-colors, when in fact only one or two color inks are being used." Scope Ruling Request at 4. The use of screens thus permits a variety of shades of the same color eliminating the need for multiple inks. This, according to Commerce, does not satisfy the "printed with three colors or more in register" criterion. Because the words "printed with" immediately precede "three colors or more in register," the words must be read together as a single requirement, and not as separate and independent criteria. *See* Def.'s Brief at 6; Commercial Packaging's Comments of May 29, 2009 at 4–5. Thus, a "bag that is 'printed with three or more colors' is not the equivalent of a bag containing three or more printed colors." Shapiro Packaging's Comments of May 22, 2009 at 5.

As a result, Commerce insists, the color criterion of the *Orders* is ambiguous on its face, and therefore the agency properly elected to interpret the scope language pursuant to section 351.225(k)(1). As part of its analysis, Commerce examined submissions filed by the petitioners in the original antidumping and countervailing duty investigations. *See* Laminated Woven Sacks from the People's Republic of China/Petitioners' Response To The Department's July 2, 2007 Request For Clarification Of Certain Items Contained In The Petition (July 9, 2007) ("Request for Clarification"). In response to the Department's request for clarification of the term "printed with three colors or more in register" petitioners explained that:

> LWS sacks normally have four or more colors in register. Many have 6 to 8 colors in register. Petitioners intend to exclude sacks that have fewer than three colors in register, because they do not have high quality print graphics. Sacks meeting the other specifications but without graphics or printing are not LWS. The printing of multi-colored high quality print graphics is a critical element to the description of LWS, since the print on these bags typically serves as point of sale advertising on the retail shelf.

> Thus, *the exterior ply must be printed in three colors or more in register; it must be aligned and printed at three or more separate print stations, each containing a different color*, creating multi-color, high quality print graphics.

Request for Clarification at 3 (emphasis added); *see also Final Scope Ruling* at 13. Based upon this explanation, Commerce determined that the color criterion of the scope language included only those sacks that "were printed in register with three or more colors, at three or more separate print stations, each containing a different color." *Final Scope Ruling* at 13; Def.'s Brief at 11. With this as its reference, the Department further adduced that the term "color" implicated a requirement for separate colored inks printed in register at separate print stations. *See Final Scope Ruling* at 13; Def.'s Brief at 11.

Plaintiffs contest Commerce's decision to invoke the interpretive guidelines of section 351.225(k)(1), arguing that Commerce should have confined its analysis to the text of the scope as set forth in the *Orders*. *See* Pls.' Brief at 11–12. Because the issue can be resolved by considering only the *Orders*, Plaintiffs argue, Commerce is precluded from considering the other sources cited in section 351.225(k)(1). *See id.* at 12. Moreover, says LWSC, Commerce cannot interpret an antidumping duty order in a manner contrary to its terms. *See id.* (*citing Duferco*, 296 F.3d at 1095). Relying on the Federal Circuit's decision in *Duferco*, LWSC maintains that Commerce "should have first determined whether the scope language was clear on its face." Pls.' Brief at 19. If thereafter, Commerce found ambiguity in the scope language it would have been permitted to proceed to the interpretive steps of section 351.225(k)(1). Instead, "Commerce launched into an impermissible discussion of what the petitioners intended . . . without ever establishing that the scope of the *Orders* was unclear." *Id.* at 20. Therefore, Plaintiffs claim, because "Commerce was able to resolve Shapiro's scope request solely by reference to the language in the *Orders*, it was prohibited from looking further." *Id.* at 21 (*citing Duferco*, 296 F.3d. at 1096).

Not unexpectedly, Defendant and Defendant-Intervenors challenge Plaintiffs' interpretation of the Federal Circuit's holding in *Duferco*. The Department contends that "*Duferco* does not stand for the proposition that Commerce is required to make a finding of ambiguity before it can interpret the scope language in accordance with 19 C.F.R. § 351.225(k)(1)." Def.'s Brief at 13. To the contrary, says Defendant, there is nothing in the holding of *Duferco* that requires Commerce to engage in a "stepped analysis" in which it must first make an explicit determination of ambiguity. *Id.* at 15. Commerce

distinguishes *Duferco* on the grounds that the issue for the Federal Circuit was whether the Department could find that "a product is within the scope of an antidumping order on the basis that there is no language in the order specifically excluding the product at issue." *Id.* at 13 (*citing Duferco* 296 F.3d at 109697). In fact, *Duferco* made clear that the petition and investigation "may provide valuable guidance as to the interpretation of the final order." *Duferco*, 296 F.3d at 1097. Thus, Defendant concludes, given that the phrase "printed with three colors or more in register" is subject to interpretation, Commerce properly extended its scope analysis to those factors listed in section 351.225(k)(1). *See* Def.'s Brief at 15.

**B. Analysis**

A common issue in scope cases is whether Commerce acted properly in determining whether a particular product is covered by an order's general terminology. Indeed, the Department's regulations themselves recognize that the agency must conduct scope determinations in the first instance because descriptions of the subject merchandise are "written in general terms." 19 C.F.R. § 351.225(a). It is important to distinguish such cases, however, from those circumstances in which an order's relevant terms are unambiguous. For, as LWSC correctly points out, Commerce cannot make a scope determination that conflicts with an order's terms, nor can it interpret an order in a way that changes the order's scope. *See Duferco* 296 F.3d at 1089 ("Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it."). In the case at bar, Plaintiffs present a bifurcated scope argument. The first part consists of the claim that Commerce's decision to apply the framework of section 351.225(k)(1) in its interpretive analysis was improper — i.e., the *Orders'* relevant terms were unambiguous. The second part attacks the Department's interpretation itself, arguing that the color criterion implicates the number of colors visible on the sacks not the number of inks or printing stations used in their production — i.e., the Department's interpretation altered the *Orders'* scope. The two parts of this argument will be addressed *seriatim*.

The first part of the Court's analysis is conducted under the controlling principle that Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language. *See Novosteel*, 284 F.3d at 1272. While it is true that it is not justifiable to identify an ambiguity where none exists, this is simply not the case here. The description of the merchandise contained in the scope language does not establish that the laminated woven sacks at issue

unambiguously fall within the purview of the *Orders*. As Commercial Packaging notes, if the terms "printed with;" "three colors;" and "in register" were meant as unrelated requirements of the scope language, it would make no sense to couch them in such idiomatic form ("printed with three colors or more in register"). *See* Commercial Packaging's Comments of May 29, 2009 at 5. Thus, the phrase "printed with three colors or more in register" cannot be read as unrelated requirements, but rather as one complete grammatical unit. To properly construe this term and discern its effect on other components of the scope language, Commerce looked to the regulatory guidelines of section 351.225(k)(1). LWSC's assertion that the Department failed to establish an ambiguity in the *Orders* prior to its invocation of the interpretive guidelines of section 351.225(k)(1) is flatly contradicted by the agency's declaration that:

[T]he Department has examined the criteria set forth in its regulations under section 19 C.F.R. § 351.225(k)(1) to *assist it in determining the meaning of the phrase*, "printed with three colors or more in register."

*Final Scope Ruling* at 13 (emphasis added). Though this may not rise to the level of an explicit finding of ambiguity, none is required.[8] All that is necessary before Commerce may consider secondary documents from the original investigation is "language in the order that is subject to interpretation." *Duferco*, 296 F.3d at 1097. The circumstances present here are precisely those for which Commerce's interpretive regulations and the holding in *Duferco* both apply; to aid in the resolution of a scope issue when reference to the language in the order itself will not suffice. Mindful of the low threshold requirement needed to establish ambiguity, the Court finds that Commerce has met this standard.

The second part of Plaintiffs' scope argument that the color criterion of the *Orders* contemplates the visible perception of distinct colors, and not the number of inks used is similarly flawed. In seeking guidance as to the proper meaning of "printed with three colors or more in register," Commerce applied the interpretive process outlined in section 351.225(k)(1). In so doing, Commerce examined documents submitted during the underlying investigation. One such document directly addressed the Department's uncertainty with regard to the scope language. In the Department's Request for Clarification, Commerce specifically requested that petitioners provide further expla-

[8] LWSC concedes that there is no judicial or regulatory precedent for requiring an explicit determination of ambiguity. *See* Pls.' Reply Brief at 5 n.6.

nation of the term "printed with three colors or more in register." *See* Request for Clarification at 2–3. The operative portion of the petitioners' response to this question states that:

> [T]he exterior ply must be printed in three colors or more in register; it must be aligned and printed at three or more separate print stations, each containing a different color, creating multicolor, high quality print graphics.

Request for Clarification at 3. Thus, the phrase "printed with three colors or more in register" is described with greater specificity, and provides the context of petitioners' objectives in formulating the scope language. For instance, "printed with three colors or more in register" is followed by the phrase "it must be aligned and printed at three or more print stations, each containing a different color, creating multicolor, high quality print graphics." These two clauses are separated by a semicolon. A common method of interpretation holds that an ending clause or phrase applies to the last subject matter to which it is pertinent. *See Sero v. New York Cent. Lines, LLC*, No. 07-CV-6397-CJS, 2010 WL 2294440, at *3 (W.D.N.Y. June 4, 2010) (internal citations omitted). Likewise, use of the semicolon in this manner serves to link the two closely related independent clauses, and is indicative of the petitioners' intention that the second clause act as a modifier of the first. *See* John C. Hodges et al., *Harbrace College Handbook* 145 (12th ed. 1994). Hence, in order to adequately meet the criterion of "printed with three colors or more in register," a laminated woven sack must have been "aligned and printed at three or more separate print stations, each containing a different color." Request for Clarification at 3. This is because a printing process varying from this specification would not meet petitioners' stated goal of including, in the scope language, only those sacks with "high quality print graphics." *Id.* ("Petitioners intend to exclude sacks that have fewer than three colors in register, because they do not have high quality print graphics."). Although LWSC complains that the Department did not revise the scope of the *Orders* as a result of petitioners' comments in the Request for Clarification, "the absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order." *Novosteel*, 284 F.3d at 1269 (*quoting Wirth Ltd. v. United States*, 22 CIT 285, 294, 5 F. Supp. 2d 968, 976 (1998)).

As previously noted, Commerce enjoys substantial freedom to interpret and clarify its antidumping orders, *see Duferco*, 296 F.3d at 1096–97; *Novosteel*, 284 F.3d at 1269, thus Plaintiffs' have failed to overcome the high burden necessary to compel a rejection of Commerce's scope interpretation. In a less technical setting LWSC's ad-

equation of color and shade may hold some sway, but the descriptions of merchandise in antidumping and countervailing duty investigations contain nomenclature specific to both product and process. Such is the case here. Therefore, the definition of colors, in this case, is inspired by the context of the industry in which it is used — i.e., the production of laminated woven sacks with high quality print graphics.

Therefore, the Court finds, the Department's determination with respect to the color criterion is supported by substantial evidence and otherwise in accordance with law.

### III. Administration of the *Orders*

#### A. Parties' Arguments

LWSC complains that Commerce's interpretation of the scope language increases the likelihood of circumvention.[9] According to Plaintiffs, the requirement that the subject merchandise be printed in three or more inks at three or more print stations would impede the ability of agents from the United States Customs and Border Protection ("Customs") to properly determine a product's inclusion or exclusion from the *Orders*. This is because Customs agents "will be required to speculate on how a product was manufactured to determine whether distinct visible colors are the result of a specialized printing technique using a single ink at a single print station or another technique using multiple inks and multiple print stations." Pls.' Brief at 23. In addition, Plaintiffs resist the arguments made in favor of the Department's utilization of a certification program, arguing that past reliance on such programs has proven "burdensome" and "difficult to administer." *Id.* at 24 (*citing Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480 (July 15, 2008). Moreover, says Plaintiff, because Commerce has already declined implementation of a certification program for laminated woven sacks, the Department's scope requirement of three or more inks at separate print stations becomes all the more unreasonable. *See id.* at 25.

According to Commerce, the administration of these *Orders* "is no different than the administration of other antidumping or countervailing duty orders when the product description contains inputs that are not readily discernible by visible inspection which Commerce and

[9] The possibility of circumvention arises when "later-developed merchandise" frustrates the collection of antidumping or countervailing duties on subject merchandise. *See* 19 U.S.C. § 1677j(d).

Customs already properly administer on a daily basis." Def.'s Brief at 18. Further, Commerce rejects the notion that a certification program is warranted under the present circumstances. *See Final Scope Ruling* at 15. Because no party has provided any evidence to demonstrate that an importer has attempted to evade classification, under the *Orders*, of its imports of laminated woven sacks that would otherwise meet the criteria of the scope language, a certification program is unnecessary. *See id.*

**B. Analysis**

LWSC's argument that Commerce somehow abdicated its responsibility by failing to interpret the scope language in such a manner as to prevent the likelihood of circumvention lacks merit. This Court has previously held that a "scope ruling is not the proper mechanism for addressing circumvention concerns." *East Jordan Iron Works, Inc. v. United States*, 32 CIT , , 556 F. Supp. 2d 1355, 1358 (2008). The "appropriate method to resolve such [a] concern would appear to be proceedings under the provisions specifically designed to prevent circumvention." *Mitsubishi Elec. Corp. v. United States*, 16 CIT 730, 739, 802 F. Supp. 455, 462–63 (1992). This is because the issues of concern for the Department in a scope ruling do not address those considerations that Congress has deemed relevant in the context of circumvention. *See id.* An anticircumvention inquiry is a specific type of scope inquiry governed by its own statutory provision, 19 U.S.C. § 1677j(d), which codifies Commerce's administrative practice. *See* 19 C.F.R. § 351.225(j).

Equally unconvincing is Plaintiffs' argument that Customs requires a certification program, attesting to the number of inks and print stations used, in order for it to properly administer Commerce's interpretation of the scope language. While use of a certification program had been proposed by Commercial Packaging, the Department rejected this proposal outright. *See Final Scope Ruling* at 15. Therefore, LWSC's characterization as "unreasonable," the Department's refusal to implement a certification program that LWSC itself opposes, strains logic. Pls.' Brief at 25. Moreover, like the circumvention argument LWSC advances, certification is not part of an ordinary scope analysis.

In sum, Plaintiffs' concerns that the Department's scope interpretation expands the likelihood of circumvention, and makes impracticable the proper administration of the *Orders*, are not valid. Commerce has other means at its disposal to protect against the potential evasion of the payment of antidumping duties. In addition, both

Commerce and Customs are well-equipped to administer the *Orders* without the burden of implementing a certification program. Thus, LWSC has failed to overcome the "significant deference" afforded Commerce in the interpretation of its own orders. *Allegheny Bradford*, 28 CIT at 842, 342 F. Supp. 2d 1172, 1183. Because Commerce has articulated a satisfactory explanation for its actions including a rational connection between the facts found and the choices made, the Court is unable to reweigh the record evidence even if it so desired. *See Burlington Truck Lines*, 371 U.S. at 168.

Accordingly, the Court finds as supported by substantial evidence and otherwise in accordance with law, Commerce's determination in the *Final Scope Ruling*.

## Conclusion

For the reasons set forth above, the Motion for Judgment On the Agency Record, filed by Laminated Woven Sacks Committee, is denied. Judgment shall be entered accordingly.

Dated: July 23, 2010
New York, New York

*/s/ Nicholas Tsoucalas*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 10–82

ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Plaintiff, v. UNITED STATES, Defendant, and SHANGHAI LIAN LI PAPER PRODUCTS CO., LTD., Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 09–00163

[Plaintiff's Motion for Judgment on the Agency Record is GRANTED IN PART and DENIED IN PART.]

Dated: July 27, 2010

Wiley Rein LLP (*Timothy C. Brightbill*, *Alan H. Price*, and *Maureen E. Thorson*) for Plaintiff Association of American School Paper Suppliers.

*Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Todor*); and *Joanna Theiss*, Office of Chief Counsel for Import Administration, Department of Commerce, Of Counsel, for Defendant United States.

Dorey & Whitney LLP (*William E. Perry*) for Defendant-Intervenor Shanghai Lian Li Paper Products Co., Ltd.

## *OPINION*

**Wallach, Judge:**

### I
### Introduction

This action arises out of an administrative review by the U.S. Department of Commerce ("Commerce") of an antidumping duty order covering certain lined paper products from the People's Republic of China ("PRC"). Plaintiff Association of American School Paper Suppliers ("AASPS") challenges determinations by Commerce in Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 Fed. Reg. 17,160 (April 14, 2009) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

AASPS's Motion for Judgment on the Agency Record ("AASPS's Motion") is GRANTED IN PART and DENIED IN PART. Commerce's selection of information to calculate surrogate financial values is unsupported by substantial evidence. Commerce's other challenged determinations are supported by substantial evidence and otherwise in accordance with law.

### II
### Background

In September 2006, Commerce issued an antidumping duty order on certain lined paper products from the PRC ("subject merchandise"). *See* Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined 2007, Commerce initiated the first administrative review of that order for the period of review from April 17, 2006 through August 31, 2007 ("the POR"). *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews, 72 Fed. Reg. 61,621, 61,621 (October 31, 2007). Commerce selected Defendant-Intervenor Shanghai Lian Li Paper Products Co., Ltd. ("Lian Li") as a mandatory respondent. *Id.*

In antidumping duty proceedings concerning merchandise from the PRC, Commerce determines the normal value of that merchandise through an approach specific to non-market economy ("NME") countries. *See* 19 U.S.C. § 1677b(c); 19 C.F.R. § 351.408; Department of Commerce, Antidumping Manual (October 13, 2009) ("AD Manual"),

Chap. 10; Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 73 Fed. Reg. 58,540, 58,542 (October 7, 2008) ("Preliminary Results").[1] This approach uses surrogate data from a comparable market economy country to value the factors of production ("FOPs") (including materials, labor, and energy) and other costs of production ("non-FOP costs of production") (including factory overhead; selling, general, and administrative expenses; and profit) for the merchandise. *See* Department of Commerce, Antidumping Manual (October 13, 2009) ("AD Manual"), Chap. 10 at 14–18; *see also* 19 CFR § 351.408(c)(4). In valuing non-FOP costs of production, Commerce calculates surrogate financial values using the publicly available financial statements of a producer of comparable merchandise from the surrogate country. *See* 19 CFR § 351.408(c)(4). For the instant review, Commerce chose India as the surrogate country, because India is a market economy country that (1) is "at a level of economic development comparable to that of" the PRC and (2) is a significant producer of comparable merchandise. Preliminary Results, 73 Fed. Reg. at 58,542.

In November 2007, Commerce began issuing questionnaires to Lian Li regarding, *inter alia*, production and sale of subject merchandise. *See, e.g.*, Certain Lined Paper Products from the People's Republic of China Questionnaire (November 8, 2007), Public Document ("P.D.") 11. From December 2007 through April 2008, Lian Li submitted information in response to these questionnaires. *See, e.g.*, Lined Paper Products from China; Section A Response of Shanghai Lian Li Paper Products Co., Ltd. (December 6, 2007), P.D. 23 ("Section A Response"); Lined Paper Products from China; Fourth Supplemental Response of Shanghai Lian Li Paper Products Co., Ltd. (April 11, 2008), P.D. 69. This information included FOP databases for two of Lian Li's suppliers, Shanghai Sentian Paper Product Co., Ltd. ("Sentian") and Shanghai Miaopanfang Paper Product Co., Ltd. ("MPF"), and 2006–2007 financial information for Sundaram Multi Pap Ltd. ("Sundaram"), an Indian paper producer. *See* Lined Paper Products from China; Supplemental Section D Response of Shanghai Lian Li Paper Products Co., Ltd. (January 23, 2008), P.D. 45; Letter from Garvey Schubert Barer to Carlos Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China; Submission of Surrogate Value Information (April 1, 2008), P.D. 63 at 5. As a domestic

[1] U.S. antidumping law requires the imposition of an antidumping duty upon imported merchandise that is being, or is likely to be, sold in the United States at less than fair value and that results in material injury or the threat of material injury to a domestic industry. *See* 19 U.S.C. § 1673. That antidumping duty is equal to the "amount by which the normal value exceeds the export price . . . for the merchandise." *Id.*

interested party to the proceeding, *see* Preliminary Results, 73 Fed. Reg. at 58,540, AASPS submitted 2006–2007 financial information for Navneet Publications (India Limited) ("Navneet"), another Indian paper producer, *see* Letter from Wiley Rein LLP to Carlos M. Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China, First Antidumping Duty Administrative Review: Comments on the Valuation of Factor Inputs (April 8, 2008), Confidential Document ("C.D.") 16 at 7.

In October 2008, Commerce issued the Preliminary Results. *See* Preliminary Results, 73 Fed. Reg. 58,540. Commerce chose to use the Sundaram financial information to calculate surrogate financial values, because it found that information to be "complete, publicly available, and contemporaneous with the [POR]." *Id.* at 58,547. Commerce chose not to use the Sentian and MPF data, because these data were "arbitrary and inaccurate" and therefore "unreliable." *Id.* at 58,543. Commerce also determined that these suppliers had failed to act to the best of their ability and therefore used "adverse facts available" to select a preliminary dumping rate of 217.23 percent for Lian Li. *Id.* at 58,543, 58,547.[2]

In January 2009, Commerce conducted onsite verification of Lian Li's data. *See* Memo from Cindy Robinson and Victoria Cho, Case Analysts, U.S. Department of Commerce, to The File, Re: Verification of Factors of Production Response of Shanghai MiaoPanFang Paper Products Co., Ltd. ("MPF") (February 26, 2009), C.D. 32 ("MPF Verification Report"); Memorandum from Cindy Robinson and Victoria Cho, Case Analysts, U.S. Department of Commerce, to The File, Re: Verification of the Sales and Factors of Production Responses of Shanghai Lian Li Paper Products Co. Ltd. (February 26, 2009), C.D. 33; Memorandum from Cindy Robinson and Victoria Cho, Case Analysts, U.S. Department of Commerce, to The File, Re: Verification of the Sales and Factors of Production Responses of Sentian Paper Products Co., Ltd. (February 26, 2009), C.D. 34 ("Sentian Verification Report").

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[2] If Commerce lacks complete information to make a determination because of, *inter alia*, a party's failure to cooperate, it must resort to "facts otherwise available" pursuant to 19 U.S.C. § 1677e(a). In some circumstances, however, Commerce must first provide a party that submitted a deficient response an opportunity to remedy that deficiency pursuant to 19 U.S.C. § 1677m(d). "Facts otherwise available" include "information or inferences which are reasonable to use under the circumstances" to make the applicable determination or substitute for the missing information. *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994) ("SAA") at 869, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. "[I]n selecting from among the facts otherwise available," Commerce "may use an inference that is adverse to the interests of" a party that has failed to cooperate. 19 U.S.C. § 1677e(b).

In April 2009, Commerce issued the Final Results. *See* Final Results, 74 Fed. Reg. 17,160. In the Final Results, Commerce calculated an antidumping duty rate of 22.35 percent for Lian Li. *See id.* at 17,161. Commerce continued to use the Sundaram financial information to calculate surrogate financial values. *See id.* at 17,162; Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, Issues and Decisions for the Final Results of the First Administrative Review (April 6, 2009), P.D. 117 ("IDM") at 39. Commerce used Lian Li's FOP database, *see* Final Results, 74 Fed. Reg. at 17,164. It also used the FOP databases for MPF and Sentian for the materials input but resorted to "adverse facts available" for the labor and electricity inputs. *See* id at 17,163–64.

AASPS initiated this action on April 17, 2009, *see* Summons; Complaint, and Lian Li subsequently intervened as of right, *see* May 8, 2009 Order. AASPS moved for summary judgment, arguing that Commerce's "(1), reli[ance] on certain surrogate financial information put forth by Lian Li as the complete, contemporaneous financial statement of an Indian paper producer (2), accept[ance of] certain contradictory documents and statements proffered by Lian Li regarding production of subject merchandise in 2007; and (3), use[ of] certain surrogate value information to account for respondent's use of paper" are not supported by substantial evidence or are otherwise not in accordance with law. Brief in Support of Plaintiff AASPS' Rule 56.2 Motion ("AASPS's Brief") at 2.

## III
## Standard of Review

In an antidumping case, the court will hold a determination by Commerce unlawful if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

A determination by Commerce is supported by substantial evidence if the record contains "evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Id.* (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir.

2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996); *Universal Camera*, 340 U.S. at 487–88).

## IV
## Discussion

### A
### Commerce's Selection Of Information To Calculate Surrogate Financial Values Is Unsupported By Substantial Evidence

AASPS argues that substantial evidence supports neither (1) Commerce's selection of the Sundaram financial information for the purpose of calculating surrogate financial values, AASPS's Brief at 20, nor (2) Commerce's rejection of the Navneet financial information as inaccurate, AASPS's Reply Brief to Defendant and Defendant-Intervenor's Response Briefs ("AASPS's Reply") at 6–7. AASPS is correct.

19 U.S.C. § 1677b(c)(1)(B) requires Commerce to calculate surrogate financial values "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). [3] The process of calculating surrogate financial values is "difficult and necessarily imprecise." *Allied Pacific Food (Dalian) Co. v. United States*, 587 F. Supp. 2d 1330, 1342 (CIT 2008) (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)) (discussing the valuation of FOPs). As this court has noted:

> The term "best available" is one of comparison, i.e., the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping [rate]. . . . This "best" choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.

*Zhejiang DunAn Hetian Metal Co. v. United States*, Slip Op. 10–41 at 5 n.7, 2010 Ct. Int'l Trade LEXIS 42 (CIT April, 19 2010) (quoting *Dorbest Ltd. v. United States*, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262 (2006) (subsequent history omitted)).

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[3] The plain language of 19 U.S.C. § 1677b(c) suggests that the "best available information" standard applies only to the valuation of FOPs. *See* 19 U.S.C. § 1677b(c). However, the Federal Circuit has also applied this standard to calculating surrogate financial values for the valuation of non-FOP costs of production. *See Dorbest Ltd. v. United States* , 604 F.3d 1363, 1373 (Fed. Cir. 2010).

"Congress has vested Commerce with considerable discretion in selecting the best available information." *Allied Pacific*, 587 F. Supp. 2d at 1342. However, Commerce's selection must still be supported by substantial evidence on the record and be otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). In order for a determination to satisfy this standard, "[t]here must be '[a] rational connection between the facts found and the choice made.'" *Nucor Corp v. United States*, 594 F. Supp. 2d 1320, 1331–32 (Fed. Cir. 2008) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)).

In the instant review, Commerce failed to articulate a rational connection between the evidence on the record and its selection of the Sundaram financial information. In the Preliminary Results, Commerce asserted that it selected the Sundaram financial information because that information was "complete, publicly available, and contemporaneous with the [POR]." Preliminary Results, 73 Fed. Reg. at 58,546. However, Commerce neither cited any facts to support that determination nor discussed its reasoning in any way. *See id.* In the IDM, Commerce again stated that the Sundaram financial information was the "best available information" because it was "complete, publicly available, and contemporaneous with the POR." IDM at 40. Again, however, Commerce offered no support for that determination. *See id.* Moreover, Commerce did not substantively address AASPS's arguments that the information was incomplete and incorrect. *See id.* at 38–40. Likewise, Defendant's Response to Plaintiff's Motion for Judgment upon the Agency Record ("Defendant's Response") provides no support for Commerce's determination. *See* Defendant's Response at 14. Because Commerce at no point offered any support for its selection of the Sundaram financial information, it has failed to articulate a "rational connection between the facts found and the choice made," *Nucor Corp. v. United States*, 594 F. Supp. 2d at 1331–32. Accordingly, Commerce's use of the Sundaram financial information is unsupported by substantial evidence.

Contrary to Lian Li's argument, Commerce could not have selected the Sundaram financial information "by default," Response Brief of Shanghai Lian Li Paper Products Co., Ltd. ("Lian Li's Response") at 17–18, because there is no evidence supporting Commerce's determination that the Navneet financial information was inaccurate. Commerce stated that (1) during an earlier investigation, it had determined that the Navneet financial information was inaccurate and (2) nothing in the record contradicts that determination. IDM at 40. Neither of these statements is correct.

Commerce did not determine that the Navneet financial information was inaccurate during the earlier investigation. Rather, it declined to use Navneet's financial information in that investigation because it determined that Navneet's cost-of-production questionnaire responses were not useable. *See* Memorandum from David M. Spooner, Assistant Secretary for Import Administration, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Certain Lined Paper Products from the People's Republic of China (August 30, 2006), *cited in* Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 Fed. Reg. 53,079, 53,081 (September 8, 2006), at cmt. 1; Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India, 71 Fed. Reg. 45,012 (August 8, 2006).

The record contains evidence suggesting that Commerce considered the Navneet financial information to be accurate. In its administrative case brief, AASPS noted that Navneet had "successfully and completely participated in the first countervailing duty administrative review of the orders on [Certain Lined Paper Products] from India." AASPS's Case Brief at 58. In Certain Lined Paper Products from India, Commerce relied on Navneet's 2006 financial statements to calculate the countervailable subsidy rate. *See* Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Certain Lined Paper Products from India (February 3, 2009), *cited in* Certain Lined Paper Products From India: Final Results of Countervailing Duty Administrative Review, 74 Fed. Reg. 6,573, 6,574 (February 10, 2009), at cmts. 1–2. Commerce's decision to rely on this information undermines its statement that the information was inaccurate.

For these reasons, Commerce's determination that the Sundaram financial information is the best available information for calculation of surrogate financial values is unsupported by substantial evidence. This matter is remanded for Commerce to revisit this determination.

## B
## Commerce's Acceptance of Lian Li's Suppliers' Production Information Is Supported by Substantial Evidence

AASPS claims that Lian Li misled Commerce as to the levels of production by Lian Li's suppliers for 2006–2007. AASPS's Brief at 27–31.[4] AASPS bases its claim on a seeming discrepancy concerning 2007 production by MPF and Sentian. *Id.* The administrative record demonstrates Commerce's awareness of the production discrepancy. The record also demonstrates that (1) Commerce verified that neither MPF nor Sentian produced any subject merchandise in 2007 and (2) Lian Li explained that the discrepancy was due to the suppliers' joint tax-cutting sales and cost transfer system. As such, Commerce's determinations are supported by substantial evidence.

Lian Li informed Commerce that Sentian closed its factory in November 2006. *See* Section A Response at 12. Soon thereafter, Lian Li submitted FOP databases for MPF and Sentian that showed that neither supplier produced subject merchandise after December 2006. *See* IDM at 16; Lined Paper Products from China; Supplemental Section D Response of Shanghai Lian Li Paper Products Co., Ltd. (January 23, 2008), P.D. 45 at 11–12. However, Lian Li also submitted financial statements and tax returns that "showed that all three factories [Lian Li, MPF and Sentian] were engaged in significant production and sales throughout both 2006 and 2007, and that they maintained significant assets." AASPS's Brief at 27; *see* Lined Paper Products from China; Supplemental Section A Response of Shanghai Lian Li Paper Products Co., Ltd. (January 22, 2008), P.D. 44 at Appendix S1–4.

Lian Li explained that the seeming inconsistency concerning 2007 production occurred because, after the Sentian factory closed, Sentian and MPF transferred materials and finished products other than subject merchandise between each other in order to take advantage of a tax benefit. *See* IDM at 16; Post-Preliminary (Fifth) Supplemental Response of Shanghai Lian Li Paper Products Co., Ltd. (October 16, 2008), C.D. 26 ("Fifth Supplemental Response") at 1–2. Lian Li further explained that Sentian and MPF did not share a consolidated financial statement even though they shared management and accounting staff, because sharing such a statement would have "de-

[4] AASPS also alleges that Lian Li committed tax fraud against the PRC. *See* AASPS's Brief at 31. AASPS fails to support this allegation with citation to the tax law of the PRC or to any other authority. *See generally id.*; Reply Brief to Defendant and Defendant-Intervenor's Response Briefs ("AASPS's Reply"). Instead, AASPS demonstrates why its unsupported allegation is also irrelevant: Lian Li and Sentian did not mislead Commerce with respect to the accounting practices that AASPS characterizes as fraudulent precisely because they "openly admit[ted]" to those practices. AASPS's Brief at 31; *see id.* at 4.

feat[ed] the purpose of having two separate companies to take advantage of the" tax benefit. Fifth Supplemental Response at 2.

Commerce confirmed that there was no production of subject merchandise by either Sentian or MPF in 2007. *See* IDM at 15–16. At verification, Commerce spoke to MPF officials who confirmed that the Sentian factory had closed prior to January 2007. *See* MPF Verification Report at 5. Commerce found that the "great majority" of Lian Li's shipments were made in 2006 and that, "of the few shipments which were made in 2007, almost all purchases invoices were dated in 2006." IDM at 16. Commerce also verified the process by which MPF and Sentian transferred costs and sales between each other and found that the actual consumption of materials in Lian Li's post-preliminary responses corresponded to the company-specific production quantity provided at verification. *See* MPF Verification Report at 12–13; Sentian Verification Report at 11–13; IDM at 12.

Commerce concluded that the tax-benefit strategy, in light of Lian Li's reported information and supplemental responses, was a reasonable explanation for the seeming inconsistency. *See* IDM at 16. Commerce accordingly determined that this seeming inconsistency did not invalidate the FOP information that Lian Li submitted for MPF and Sentian. *See id.* at 15. Substantial evidence supports Commerce's use of this information.

**C**

**Commerce's Use of Lian Li's Paper Input Data Is Supported By Substantial Evidence**

AASPS argues that Lian Li (1) did not disclose to Commerce its use of both ream sheet paper ("ream paper") and roll paper (instead claiming to use only roll paper); and (2) failed to "make any revisions to its FOP database" or "make corrections to its consumption rate tables" to reflect the difference in cost between the paper types. AASPS's Brief at 12. AASPS also argues that Commerce should have used the facts otherwise available and applied adverse inferences to Lian Li because Lian Li failed to disclose its use of ream paper and adjust its FOP. *See id.* at 13. In fact, however, Lian Li disclosed to Commerce its use of both ream and roll paper and explained its reasons for not differentiating between these paper types. *See* Re: Lined Paper Products from the People's Republic of China; Submission of Lian Li's Rebuttal Brief (March 16, 2009), C.D. 37 ("Lian Li's Case Brief") at 21–22. Accordingly, Commerce's use of Lian Li's paper input data is supported by substantial evidence.

AASPS states that Lian Li withheld information from Commerce regarding its use of ream paper. *See* Re: Certain Lined Paper Products from the People's Republic of China; AASPS Case Brief (March 6,

2009), C.D. 35 ("AASPS's Case Brief") at 41; AASPS's Brief at 13. However, Lian Li did provide Commerce with information on its use of ream and roll paper. *See* Lined Paper Products from China; Fourth Supplemental Response of Shanghai Lian Li Paper Products Co., Ltd. (April 11, 2008) C.D. 17 at Appendices S4–2b (Sentian), S4–3b (MPF), S4–4 (total POR). Commerce was on notice as early as April 11, 2008—nearly six months before issuance of the Preliminary Results—that Lian Li used ream and roll paper. *See id.*[5]

Lian Li explained that its ream paper consisted of very large sheets that did not cost significantly more than roll paper and that, like roll paper, required significant processing by Lian Li. Lian Li's Case Brief at 21–22. In support, Lian Li submitted production charts to Commerce that specified that all paper was cut as part of the production process. *See* Lined Paper Products from China; Section D Response of Shanghai Lian Li Paper Products Co., Ltd. (January 10, 2008), C.D. 6 ("Section D Response") at Appendices A-1, B-2, C-2.

Commerce substantiated Lian Li's explanation during onsite verification of MPF. IDM at 33. At verification, Commerce saw sheets of ream paper and noted that they were not custom-cut or printed; rather, they were very large sheets that were so similar to roll paper that they were "completed" on the same machines as was the roll paper. *See* IDM at 33–34; MPF Verification Report at 4–5. Commerce therefore determined that "there is no reason to suggest a significant cost difference between papers in roll and ream." IDM at 34.

AASPS argues that Commerce's determination should be remanded because it "neither acknowledged nor addressed the undeniable fact . . . that there are substantial cost differences inherent in the purchase of unrolled, pre-cut paper (reams or sheets) versus rolled, uncut paper." AASPS's Brief at 37. However, AASPS offers no affirmative evidence to prove the "undeniable fact" that there are substantial cost differences between the two kinds of paper. *See id.* Indeed, when asked at oral argument to point to any such evidence in the record,

[5] AASPS cites Honey from the People's Republic of China: Intent to Rescind and Preliminary Results of Antidumping Duty New Shipper Reviews (June 7, 2006), 71 Fed. Reg. 32,923, 32,926 ("Honey from PRC") for the proposition that where Commerce "has discovered misreported [or unreported] factor inputs, [Commerce] has opted to utilize partial adverse facts available with respect to that input." AASPS's Case Brief at 40–41; AASPS's Brief at 38. In Honey from PRC, Commerce preliminarily held that the use of a partial adverse inference was warranted due to the importer's failure to accurately report consumption of inputs during the period of review—a failure that Commerce did not discover until verification. Honey from PRC, 71 Fed. Reg. at 32,926. In contrast, Lian Li submitted information about its use of ream and roll paper six months before the Preliminary Results and nine months before verification. *See* Lined Paper Products from China; Fourth Supplemental Response of Shanghai Lian Li Paper Products Co., Ltd. (April 11, 2008), C.D. 17 at Appendices S4–2b (Sentian), S4–3b (MPF), S4–4 (total POR). Accordingly, Honey from PRC is inapposite.

AASPS offered only conjecture. *See* May 21, 2010 Oral Argument at 00:01:37–08:12.[6]

Because Commerce could reasonably have determined that ream paper does not cost significantly more than roll paper, and because AASPS has offered no evidence to prove otherwise, Commerce's determination is well within the discretion generally afforded to Commerce in such matters. *See Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1397 (Fed. Cir. 1997) (noting that the plaintiff bears the burden of proving that Commerce's determinations are unsupported by substantial evidence). Accordingly, substantial evidence supports Commerce's use of Lian Li's paper input data.

## V
## Conclusion

For the reasons stated above, AASPS's Motion for Judgment on the Agency Record is GRANTED IN PART and DENIED IN PART. This matter is REMANDED to Commerce for action consistent with this opinion.

Dated: July 27, 2010
New York, New York

*__/s/ Evan J. Wallach____*
EVAN J. WALLACH, JUDGE

[6] In support of its position, AASPS pointed to price lists of an Indian paper producer, *see* Letter from Garvey Schubert Barer to Carlos Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China; Submission of Surrogate Value Information (April 1, 2008), P.D. 63 ("Surrogate Value Submission Letter") at Attachment 1, and descriptions of Lian Li's production processes, *see* Lined Paper Products from China; Section D Response at Appendix A-2. The price lists offer no support, because the price differences between newsprint and other listed papers—upon which AASPS entirely relies—could be the result of any number of factors. *See* Surrogate Value Submission Letter at Attachment 1. Similarly, Lian Li's production processes offer only the most tenuous and inferential of support, if any. *See* Section D Response at Appendix A-2.