U.S. Customs and Border Protection

Slip Op. 09–151

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and PAKFOOD PUBLIC COMPANY LIMITED ET AL., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 08–00283
PUBLIC VERSION

[Plaintiff Ad Hoc Shrimp Trade Action Committee's Motion for Judgment on the Agency Record is DENIED, and the Agency's Determination is AFFIRMED IN PART and REMANDED IN PART to address Plaintiffs Andaman Seafood Co., Ltd. et al.'s Motion for Judgment on the Agency Record.]

Dated: December 29, 2009

Pickard, Kentz and Rowe, LLP (*Andrew W. Kentz* and *Nathaniel Maandig Rickard*) for Plaintiff and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

White & Case LLP (*Walter J. Spak, Christopher F. Corr*, and *Jay C. Campbell*) for Plaintiffs and Defendant-Intervenors Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Rubicon Resources, LLC.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini* and *Joshua E. Kurland*), for Defendant United States.

Trade Pacific PLLC (*Robert G. Gosselink* and *Jonathan M. Freed*) for Defendant-Intervenors Pakfood Public Company Limited, Asia Pacific (Thailand) Company Limited, Chaophraya Cold Storage Company Limited, Okeanos Company Limited, Takzin Samut Company Limited, and Yeenin Frozen Foods Company Limited.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Warren E. Connelly* and *Jarrod M. Goldfeder*) for Defendant-Intervenors Thai Union Seafood Co., Ltd. and Thai Union Frozen Products Public Co., Ltd.

OPINION

Wallach, Judge:

I.
Introduction

This action arises out of the administrative review of an antidumping duty order covering certain warmwater shrimp from Thailand

conducted by the U.S. Department of Commerce ("Commerce" or the "Department"). Plaintiff/Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("Ad Hoc" or the "Committee")[1] and Plaintiffs/Defendant-Intervenors Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Rubicon Resources, LLC (collectively, the "Rubicon Group")[2] challenge Commerce's determinations in *Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 50,933 (August 29, 2008), Public Record ("P.R.") 522 ("*Final Results* "). This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Each Commerce action challenged by Ad Hoc is sustained as being supported by substantial evidence and in accordance with law. The lone aspect of the *Final Results* challenged by the Rubicon Group is remanded to Commerce, as requested by Defendant United States ("Defendant").

II.
Background

A
Initiation Of The Subject Antidumping Review And Respondent Selection

Ad Hoc is an association comprised primarily of domestic producers, processors, and wholesalers of warmwater shrimp. Ad Hoc Complaint ¶ 7. In February 2007, Ad Hoc requested an antidumping review of sales in the United States of certain frozen warmwater shrimp by numerous Thai shrimp producers. *Notice of Initiation of Administrative Reviews of the Antidumping Orders on Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand*, 72 Fed. Reg. 17,100, 17,101 (April 6, 2007) ("*Initiation Notice* "). Commerce in April 2007 initiated the review of an antidumping order covering 142 companies for the period of review ("POR") from Febru-

[1] Ad Hoc is Plaintiff in Court No. 08–00283 and Defendant-Intervenor in Court No. 08–00330, which were consolidated under Consol. Court No. 08–00283 on March 17, 2009.

[2] The Rubicon Group is Defendant-Intervenor in Court No. 08–00283 and Plaintiff in Court No. 08–00330, which were consolidated under Consol. Court No. 08–00283 on March 17, 2009, and was defined in the administrative proceedings as including additional entities. *See Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Administrative Review*, 73 Fed. Reg. 12,088, 12,088 (March 6, 2008), Public Record ("P.R.") 249 ("Preliminary Results").

ary 1, 2006, through January 31, 2007. *Id.* at 17,100–10. The *Initiation Notice* set forth Commerce's intent with respect to the selection of respondents as follows:

> Due to the large number of firms requested for these administrative reviews and the resulting administrative burden to review each company for which a request has been made, the Department is exercising its authority to limit the number of respondents selected for review. . . . In selecting the respondents for individual review, the Department intends to select the largest exporters/producers by U.S. sales/export volume.

Initiation Notice, 72 Fed. Reg. at 17,110 (citation omitted).

Ad Hoc in May 2007 objected to Commerce's intent to select respondents by the largest volume, contending that it was "unprecedented and a deviation, without notice or viable explanation, from prior Department practice." Letter from Bradford L. Ward, Dewey Ballantine LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Antidumping Duty Administrative Review of Certain Warmwater Shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam (2006–2007): Respondent Selection and Request for Verification, P.R. 149 ("*May 22, 2007 Letter*"), at 2.

Commerce thereafter set a June 13 deadline for what it called "a final opportunity to comment on the Department's intended respondent selection methodology." Letter from James P. Maeder, Director, AD/CVD Operations, Office 2, U.S. Department of Commerce, to All Interested Parties (June 6, 2007), P.R. 180 ("*June 6, 2007 Letter* "), at 1. Ad Hoc timely filed a submission encouraging Commerce to select respondents through sampling and again objecting to the announcement of intent to select by volume in the *Initiation Notice*. Letter from Bradford L. Ward, Dewey Ballantine LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Antidumping Duty Administrative Review of Certain Warmwater Shrimp from Thailand (2006–2007): Respondent Selection and Requests for Verification (June 13, 2007), P.R. 187 ("*June 13, 2007 Letter*").

After receiving comments, Commerce in July 2007 announced that due to "resource constraints" it would "limit examination to four" of the producers/exporters subject to the review. Memorandum from James P. Maeder, Director, AD/CVD Operations, Office 2, U.S. Department of Commerce, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, Re: 2006–2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from

Thailand (July 19, 2007), P.R. 219 ("*Respondent Selection Memo*").

Commerce selected:

- the Rubicon Group;
- Defendant-Intervenors Pakfood Public Company Limited, Asia Pacific (Thailand) Company Limited, Chaophraya Cold Storage Company Limited, Okeanos Company Limited, Takzin Samut Company Limited, and Yeenin Frozen Foods Company Limited (collectively, "Pakfood");[3]
- Thai I-Mei Frozen Foods Co., Ltd. ("Thai I-Mei"); and
- Defendant-Intervenors Thai Union Seafood Co., Ltd. and Thai Union Frozen Products Public Co., Ltd. (collectively, "Thai Union").

Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 12,088, 12,088–89 (March 6, 2008), P.R. 422 ("*Preliminary Results*").

Commerce sent questionnaires to the four selected mandatory respondents on the day that it issued the *Respondent Selection Memo. Id*. at 12,089. Ad Hoc subsequently objected to the selection of four respondents. Letter from Bradford L. Ward, Dewey Ballantine LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand (2006–2007): Respondent Selection (July 30, 2007), P.R. 228 ("*July 30, 2007 Letter* "), at 1–6. Ad Hoc asked Commerce to "revisit its mandatory respondent selection in this review and make that decision consistent with its respondent selection decisions in the other five concurrent certain frozen warmwater shrimp reviews by selecting no more than two mandatory respondents here." *Id.* at 6; *see* Letter from Bradford L. Ward, Dewey Ballantine LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand (2006–2007): Respondent Selection (August 10, 2007), P.R. 245 ("*August 10, 2007 Letter*"), at 9.

Commerce in August 2007 addressed Ad Hoc's objection to the *Respondent Selection Memo*. Letter from Gary Taverman, Acting Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce, to Bradford Ward, Dewey Ballantine LLP, Re:

[3] Pakfood was defined in the administrative proceedings as including all but one of these entities. *See Preliminary Results*, 73 Fed. Reg. at 12,088.

2006–2007 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Thailand (August 17, 2007), P.R. 249. Commerce informed Ad Hoc "that it is not appropriate to reconsider the number of companies required to respond to the full questionnaire." *Id.* at 1. Commerce explained as follows:

> [W]e evaluated our existing administrative resources and concluded that we have sufficient resources to examine four Thai exporters. The Department afforded all parties an opportunity to comment on the issue of respondent selection prior to issuing a decision on his topic. . . . With regard to your request that the Department disclose its rationale for selecting four respondents in this proceeding and only two companies in four of the five companion proceedings, we note that . . . we did not make our respondent selection decisions in isolation.

Id. at 1–2.

Commerce received questionnaire responses from the mandatory respondents in August, September, and October 2007. *Preliminary Results*, 73 Fed. Reg. at 12,089. Commerce thereafter sent supplemental questionnaires to these respondents and received supplemental responses in late 2007 through early 2008. *Id.* Commerce conducted a verification of the Thai Union sales and costs in January and February 2008. *Id.* Commerce in March 2008 rendered its preliminary findings for the administrative review of the subject antidumping duty order. *Id.* at 12,088.

B

Preliminary AFA Application To Certain Thai Union Sales

Commerce preliminarily decided to apply the adverse facts available ("AFA") rate to certain Thai Union sales pursuant to 19 U.S.C. § 1677e(a) and (b). *Id.* at 12,092–93. Commerce explained its preliminary finding that:

> Thai Union had failed to report certain U.S. sales transactions during the POR, which should have been included in the company's U.S. sales database . . . .
>
> [T]he Department may use an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . ." Because (1) Thai Union had the necessary information within its control and it did not report this information; and (2) it failed to put forth its maximum effort as required by the Department's questionnaire, we find that Thai Union's failure to respond in this case clearly meets these standards.

Id. (quoting 19 U.S.C. § 1677e(b)).

Commerce preliminarily decided to apply AFA to three types of Thai Union sales, including certain export price ("EP") sales and certain direct constructed export price ("CEP") sales.[4] *Id.* EP sales are those for export to the United States between a foreign producer/exporter and an unaffiliated purchaser before the date of exportation. *See* U.S. Department of Commerce, Antidumping Manual, Glossary of Terms (October 13, 2009). CEP sales are those for export to the United States by a foreign producer/exporter to an affiliated U.S. company that sells the merchandise to an unaffiliated entity, and can occur before or after importation. *See id.* Commerce treats as CEP sales those between a foreign producer's U.S. affiliate and an unrelated U.S. customer where the foreign producer ships directly to the U.S. customer ("direct CEP sales"). *See, e.g., Certain Cut-to-Length Carbon Steel Plate From Romania: Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission*, 70 Fed. Reg. 53,333, 53,335 (September 8, 2005) (using the term "back-to-back CEP sales").

Thai Union thereafter contested the application of AFA to its direct CEP sales. Letter from Phyllis Derrick, Akin Gump Strauss Hauer & Feld LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Administrative Review of Certain Frozen Warmwater Shrimp from Thailand (March 17, 2008), P.R. 428 ("*March 17, 2008 Letter* "). Thai Union argued that it had reported its direct CEP sales in accordance with both the questionnaire instructions and the longstanding methodology of Commerce. *Id.* at 4–12.

On April 15, 2008, Commerce responded to Thai Union. Letter from James Maeder, Director, Office 2, Office of AD/CVD Operations, U.S. Department of Commerce, to Warren Connelly, Akin Gump Strauss Hauer & Feld, Re: Preliminary Margin for Thai Union in the 2006–2007 Administrative Review of the Antidumping Order on Certain Frozen Warmwater Shrimp from Thailand (April 15, 2008), P.R. 454 ("*April 15, 2008 Letter*"). This letter "acknowledge[s] that the Department issued contradictory instructions with regard to the reporting requirements for these sales, which may have led to confusion

[4] Commerce also preliminarily decided to apply adverse facts available AFA to a "small quantity of overlooked U.S. transactions which had not been included in error" by Thai Union. *Preliminary Results*, 73 Fed. Reg. at 12,092. Although Commerce ultimately applied facts available and not AFA to those sales, Ad Hoc does not challenge this aspect of the proceedings. *See* Brief of Thai Union Frozen Products Public Co., Ltd. in Opposition to Plaintiff's Motion for Judgment on the Agency Record under Rule 56.2 ("Thai Union's Opposition") at 13 n.11; Ad Hoc Complaint.

on the part of Thai Union." *Id.* Commerce explained it was reevaluating its preliminary decision to apply AFA to the subject direct CEP sales. *Id.*

Ad Hoc promptly objected to the *April 15, 2008 Letter*. Letter from Bradford L. Ward, Dewey & LeBoeuf, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Second Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand (2006–2007) (April 18, 2008), P.R. 459. In response, Ad Hoc was informed that Commerce neither "issue[d] revised preliminary results in the April 15, 2008, letter to Thai Union, nor . . . inten[ded] to issue revised preliminary results with respect to . . . any Thai respondent." Letter from Irene Darzenta Tzafolias, Acting Director, Office 2, AD/CVD Operations, U.S. Department of Commerce, to Bradford Ward, Dewey & LeBoeuf LLP, Re: Letter to Thai Union Frozen Products Co., Ltd./Thai Union Seafood Co., Ltd. in the 2006–2007 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Thailand (April 23, 2008), P.R. 464 ("*April 23, 2008 Letter*"), at 1. Commerce further created a separate briefing schedule for the parties to submit arguments "regarding the April 15 letter." *Id.* at 1–2.

Commerce thereafter reviewed the numerous administrative case briefs submitted by interested parties relating to both the proceedings generally and the *April 15, 2008 Letter* specifically. *See, e.g.*, Case Brief on Behalf of the Ad Hoc Shrimp Trade Action Committee, Case No. A–549–822, U.S. Department of Commerce, International Trade Administration, Import Administration (April 14, 2008), P.R. 445 ("Ad Hoc Case Brief"); Supplemental Rebuttal Brief on Behalf of the Ad Hoc Shrimp Trade Action Committee, Case No. A–549–822, U.S. Department of Commerce, International Trade Administration, Import Administration (May 15, 2008) P.R. 483 ("Ad Hoc Supplemental Rebuttal Case Brief"); Administrative Case Brief of Thai Union Frozen Products Public Co., Ltd. and Thai Union Seafood Co., Ltd., Case No. A–549–822, U.S. Department of Commerce, International Trade Administration, Import Administration (April 22, 2008), P.R. 463 ("Thai Union Case Brief").

C
The Final Results And This Litigation

In August 2008, Commerce rendered its final determination for the administrative review of the subject antidumping duty order. *Final Results*, 73 Fed. Reg. 50,933. Commerce calculated the following dumping percentage margins: 2.44 for Pakfood, 3.77 for the Rubicon Group, 3.09 for Thai I-Mei, and 2.85 for Thai Union. *Id.* at 50,937–38. The remaining companies subject to the order received either the

weighted-average dumping margin of 3.18 percent, *id.* at 50,937–38 n.6, or the AFA rate of 57.64 percent, *id.* at 50,935–38. Commerce in the *Final Results* reversed its preliminary decision by not applying AFA to Thai Union sales. *Id.* at 50,936–37.

With respect to the Thai Union EP sales in question, Commerce opted to apply facts available pursuant to 19 U.S.C. § 1677e(a) and not AFA. Memorandum from Stephen J. Claeys, Deputy Assistant for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand — February 1, 2006, through January 31, 2007, P.R. 512, appended to *Final Results* ("*Decision Memo* "), cmt. 14 at 41–43. Commerce did so based on the unreported EP sales comprising "a very small quantity of the total reported U.S. sales" and Thai Union having voluntarily disclosed them at the outset of verification with a reasonable explanation. *Id.*, cmt. 14 at 43. Commerce likewise declined to apply AFA to the direct CEP sales in question. Commerce did so based on its reporting instructions having "led to confusion on the part of Thai Union." *Id.*, cmt. 13 at 40. However, rather than apply facts available, Commerce accepted the exclusion of these direct CEP sales from the dataset for the subject POR as reported by Thai Union. *See id.*

The *Final Results* involved numerous issues beyond the application of AFA to Thai Union. *See Decision Memo*. In calculating final dumping margins, Commerce treated "warehousing expenses incurred after the subject merchandise leaves the production facility to be movement expenses . . . and deducted them from CEP for purposes of the final results." *Id.*, cmt. 2 at 9. The Final Results included in the Thai I-Mei dataset a single CEP sale "which entered the United States during the current POR, but which had a sale date . . . falling within the prior POR." *Id.*, cmt. 12 at 32. Commerce determined that the Rubicon Group was not entitled to a CEP offset. *Id.*, cmt. 5 at 12–17.

Ad Hoc initiated this litigation in September 2008. Ad Hoc Complaint. Ad Hoc contested the following Commerce actions in the process that led to the *Final Results*:

- aspects of the respondent selection, *id.* ¶¶ 10–20;
- warehousing expenses being treated as movement expenses, *id.* ¶¶ 22–24;
- issuance of the *April 15, 2008 Letter*, *id.* ¶¶ 26–29;
- alleged failure to respond to a request to disclose *ex parte* contacts, *id.* ¶¶ 31–33;

- calculation of dumping margins, *id.* ¶¶ 35–37;
- AFA not being applied to certain Thai Union sales, *id.* ¶¶ 39–43; and
- inclusion of one Thai I-Mei sale in the U.S. market dataset, *id.* ¶¶ 45–47.

The Rubicon Group separately initiated litigation challenging the refusal of Commerce to grant a CEP offset. *See* The Rubicon Group Complaint ¶ 6. This court in March 2009 granted Defendant's motion to consolidate these cases because they both challenged the *Final Results*. March 17, 2009 Order at 2–3, 5. In May 2009, Ad Hoc and the Rubicon Group filed motions pursuant to USCIT R. 56.2. Motion of Plaintiff Ad Hoc Shrimp Trade Action Committee for Judgment on the Agency Record Under Rule 56.2 ("Ad Hoc's Motion"); USCIT R.56.2 Motion for Judgment Upon an Agency Record on Behalf of Plaintiff The Rubicon Group ("The Rubicon Group's Motion").

Defendant opposes every Ad Hoc challenge. Defendant's Response to Plaintiffs' Motions for Judgment Upon the Agency Record ("Defendant's Response") at 11–27. Defendant seeks a remand of the Rubicon Group CEP offset issue for Commerce to reconsider its decision. *Id.* at 27–28. Thai Union, Pakfood and the Rubicon Group each oppose Ad Hoc's Motion. Brief of Thai Union Frozen Products Public Co., Ltd. in Opposition to Plaintiff's Motion for Judgment on the Agency Record Under Rule 56.2 ("Thai Union's Opposition"); Defendant-Intervenors' Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Pakfood's Opposition"); The Rubicon Group's Memorandum in Opposition to the Ad Hoc Shrimp Trade Action Committee's Motion for Judgment Upon the Agency Record ("The Rubicon Group's Opposition").

III.
Standard Of Review

This court will uphold an administrative antidumping determination unless it is "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 find-

ing from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

This inquiry 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 contradictory evidence is considered, "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)).

Commerce's statutory interpretation is reviewed using a two step analysis, first examining "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 so, courts must then "give effect to the unambiguously expressed intent of Congress." *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004) (citing *Chevron*, 467 U.S. at 842–43). 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; *Household Credit*, 541 U.S. at 239.

Courts afford "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). The agency's construction need not be the only reasonable one or the result the court would have reached had the question first arisen in a judicial proceeding. Id. (citing *Unemployment Comp. Comm'n of Ala. v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)). Courts are not to "weigh the wisdom of, or to resolve any struggle between, competing views of the policy interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (citing *Chevron*, 467 U.S. at 866).

IV.
Discussion

A
Commerce Properly Selected The Mandatory Respondents

1
Commerce Lawfully Selected Four Mandatory Respondents By Largest Volume

Commerce is provided with options for selecting respondents in an antidumping review. 19 U.S.C. § 1677f–1(c). The statute provides as follows:

> Determination of dumping margin.
>
> (1) General rule. In determining weighted average dumping margins . . . , the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) Exception. If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Id. Ad Hoc recognizes that "the statute affords the agency with discretion to select respondents." Ad Hoc's Motion at 21.

After announcing its intent to select respondents by volume, *Initiation Notice*, 72 Fed. Reg. at 17,110, and receiving an objection from Ad Hoc, *May 22, 2007 Letter* at 2–4, Commerce invited interested parties to comment on this aspect of the proceeding, *June 6, 2007* Letter at 1. In response to the submissions received, Commerce rendered a reasoned analysis setting forth the arguments of interested parties and documenting its rationale for selecting the four respon-

dents by largest volume. *See Respondent Selection Memo*. Commerce concluded as follows:

> Given the large number of companies requested for review . . . , the Department's limited resources, and our statutory discretion . . . , the Department stated in the *Initiation Notice* that it intended to select respondents based on our most common method of selecting respondents with the largest volume. This statement of intent comports with the Department's normal practice but did not preclude any party from submitting comments on the respondent selection methodology following initiation. While the Department acknowledges that sampling has been used in rare cases to select respondents, the sampling methodology is the exception to the Department's normal practice. In addition, selecting respondents using the sampling methodology requires intensive data collection and comments from all parties which would not support an expeditious process of selecting respondents in this administrative review. Therefore, as our statutory discretion allows the Department to choose respondents from either largest volume of imports or sampling, the Department reasonably chose largest volume as the appropriate methodology for selecting respondents in this administrative review.[5]

Id. at 6.

Commerce's respondent selection here is supported by substantial evidence and in accordance with law. The 136 companies for which review was requested,[6] *Respondent Selection Memo* at 1, constitute a sufficiently "large number of exporters or producers" to enable selection by volume. 19 U.S.C. § 1677f-1(c)(2). Commerce's documented explanation for not employing sampling, *Respondent Selection Memo* at 3–4, 6–7, comprises "such relevant evidence as a reasonable mind

[5] Ad Hoc claims that the statement about Commerce comporting with its practice is "patently false." Ad Hoc's Motion at 13. To support its position, Ad Hoc cites the initiation notices of previous reviews of antidumping duty orders on warmwater shrimp that announced Commerce's intent to select respondents either through sampling or the largest by volume. *Id*. at 13–14 (citations omitted). Ad Hoc further explains that "from April 2006 to April 2007, Commerce initiated at least 110 antidumping administrative reviews unrelated to the shrimp antidumping orders" and did not announce an intent to select respondents based on volume in any of them. *Id.* at 14 (citations omitted). However, Pakfood is correct that more likely "Commerce meant only that its practice of 'selecting respondents with the largest volume' comported with the Department's normal practice, which is patently true." Pakfood's Opposition at 14 (emphasis removed). Commerce was not required to explain this statement since, *inter alia*, Ad Hoc did not seek clarification in its case brief. *See infra* Section IV.A.2.

[6] Requests for review were withdrawn for six of the 142 companies for which review was initially sought. *Respondent Selection Memo* at 1.

might accept as adequate to support a conclusion," *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933). Commerce here appropriately chose four respondents "in light of the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources." *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (citing *Heckler v. Cheney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)).[7]

2
Ad Hoc Did Not Exhaust Its Remedies To Challenge The Respondent Selection

Ad Hoc challenges two aspects of the respondent selection process in the underlying review. Specifically, Ad Hoc alleges that Commerce unlawfully: (1) failed to explain its statement of intent to select respondents by volume in the *Initiation Notice*, Ad Hoc Complaint ¶¶ 11–13; and (2) selected four respondents, *id.* ¶ 20. Defendant and Pakfood counter that these claims are barred by the doctrine of exhaustion of administrative remedies. Defendant's Response at 11–13; Pakfood's Opposition at 11–17.

The exhaustion doctrine holds "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). If a party does not exhaust available administrative remedies, "judicial review of administrative action is inappropriate." *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988). This "court generally takes a strict view of the need to exhaust remedies by raising all arguments."[8] *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792 (1999). "In the antidumping context, Congress has

[7] Ad Hoc emphasizes that: Commerce selected twice as many respondents as in similar reviews while basing its methodology on a reduction of staff, Ad Hoc's Motion at 17–18 (citing *Respondent Selection Memo* at 4), 20–21; and despite the increase, "the majority of the subject merchandise . . . was not subject to the proceeding." *Id.* at 18–19 (citations omitted). However, Commerce here properly acted within its discretion to allocate resources by selecting four respondents. *See Torrington*, 68 F.3d at 1351. Moreover, because Ad Hoc did not raise the issue in its case brief, Commerce was not required to clarify its selection of four respondents. *See infra* Section IV.A.2.

[8] This court recognizes limited exceptions to the requirement that litigants must have exhausted their administrative remedies. *See Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp 1549 (1991). Ad Hoc contends that it fully exhausted its administrative remedies regarding respondent selection. Reply Brief of Plaintiff Ad Hoc ("Ad Hoc's Reply") at 2–4. Therefore, Pakfood's argument concerning the inapplicability of the futility exception to the exhaustion doctrine need not be considered. *See* Pakfood's Opposition at 15–16.

prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes it from obtaining review of that issue in the Court of International Trade." *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (citations omitted). It is "appropriate" for litigants challenging antidumping actions to have exhausted their administrative remedies by including all arguments in their case briefs submitted to Commerce. *See* 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the . . . final results, including any arguments presented before the . . . preliminary results.").

Ad Hoc did not object to any aspect of the respondent selection process in its case brief submitted to Commerce. *See* Ad Hoc Case Brief. Prior to the *Preliminary Results*, Ad Hoc objected to both the *Initiation Notice* intent to select by volume, *May 22, 2007 Letter, June 13, 2007 Letter*, and the selection of four respondents, *July 30, 2007 Letter, August 10, 2007 Letter*. Ad Hoc now contends that Commerce failed to adequately explain these aspects of the respondent selection process. Ad Hoc's Motion at 16, 20. However, Pakfood is correct that "to allow Commerce the opportunity to clarify any ambiguity in its explanation of its decision-making process, Ad Hoc should have raised this issue in its brief before the agency and argued its position then." Pakfood's Opposition at 15. Given the regulatory requirement that "all arguments" be set forth in the case brief, Commerce could reasonably have concluded that Ad Hoc was no longer pursuing its respondent selection challenge. *See* 19 C.F.R. § 351.309(c)(2).

The failure to include an "argument in a case brief is a failure to exhaust administrative remedies with respect to that argument because it 'deprives [Commerce] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'" *Ad Hoc Shrimp Trade Action Comm. v. United States*, 616 F. Supp. 2d 1354, 1366 (2009) (quoting *Unemployment Comp. Comm'n*, 329 U.S. at 155). Raising an issue before Commerce in advance of case brief submission does not dispense with the requirement for case brief inclusion. *See Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1597–98, 464 F. Supp. 2d 1347 (2006). In *Carpenter*, this court reasoned as follows:

> Although Plaintiff advocated against [the contested issue of] collapsing in its two submissions prior to the preliminary results, Commerce concluded otherwise. At that point, if Plaintiff believed that the collapsing issue was relevant to the Final Results, Plaintiff needed to include that issue in its case brief, as

> required by regulation. Commerce would then have known that Plaintiff had not waived the issue.

Id. at 1598.

Ad Hoc's claims based on the respondent selection process are likewise barred. Its failure to present the arguments in its case brief equates with a failure to exhaust administrative remedies. *See Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 643–45, 342 F. Supp. 2d 1191 (2004). That these objections were previously communicated to Commerce does not circumvent the exhaustion requirement. *See Carpenter*, 30 CIT at 1597–98. This applies to both the *Initiation Notice* intent to select respondents by volume,[9] *see* Ad Hoc Case Brief, *May 22, 2007 Letter, June 13, 2007 Letter*, as well as the number of companies selected,[10] *see* Ad Hoc Case Brief, *July 30, 2007 Letter, August 10, 2007 Letter*. Commerce did set a timeframe for comments on the selection process to maintain a schedule for sending questionnaires to respondents. *See June 6, 2007 Letter*. However, Ad Hoc remained able to challenge the respondent selection process in its case brief. *See Carpenter*, 30 CIT at 1598. By neglecting to do so, Ad Hoc failed to exhaust its administrative remedies.

B
Commerce Properly Treated Warehousing Expenses As Moving Expenses

Ad Hoc challenges the classification by Commerce of post-importation U.S. warehousing expenses incurred with respect to CEP sales as moving expenses as opposed to direct selling expenses. Ad Hoc's Motion at 21–24. Commerce is required to reduce "the price used to establish" EP and CEP by "the amount" of any "expenses . . .

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[9] In addition to the exhaustion doctrine, parties present other bases to preclude consideration of Ad Hoc's challenge to the statement of intent to select respondents. *See* The Rubicon Group's Opposition at 1 ("An intention does not constitute a final agency action, and thus is not fit for judicial review."), 4 ("This argument should be rejected for failure to state a claim upon which relief can be granted under USCIT R. 12(b)(5)."); Pakfood's Opposition at 8 ("Ad Hoc's complaint was never ripe for review"). Although these arguments need not be addressed because Ad Hoc failed to exhaust its administrative remedies, Pakfood is correct that it is "inappropriate for Ad Hoc to challenge that initial announcement now when Commerce already made a separate, final, superceding respondent selection methodology decision, which Ad Hoc has chosen not to challenge." Pakfood's Opposition at 10 (emphasis removed).

[10] Ad Hoc calls the selection of four respondents "troubling" for facilitating the participation of Thai I-Mei. Ad Hoc's Motion at 19. Although Commerce was not required to clarify its selection of Thai I-Mei because Ad Hoc did not raise this issue in its case brief, the record does contain support for Thai I-Mei being chosen. *See* Letter from Steptoe & Johnson LLP, to the Honorable Carlos M. Gutierrez, U.S. Department of Commerce, Re: Certain Frozen Warmwater Shrimp From Thailand: Response to Domestic Producers' Comments Regarding Respondent Selection (August 8, 2007), P.R. 240.

which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A). Although the statute does not address warehousing expenses, its legislative history explains that the reduction is to "account for: . . . transportation and other expenses, including warehousing expenses." Uruguay Round Agreements Act Statement of Administrative Action, H.R. Doc. 103–316 ("SAA"),[11] *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163. The implementing regulation provides as follows: "The Secretary will consider warehousing expenses that are incurred after the subject merchandise . . . leaves the original place of shipment as movement expenses." 19 C.F.R. § 351.401(e)(2).

Ad Hoc presented Commerce with three arguments to classify warehousing expenses as direct selling expenses. Ad Hoc Case Brief at 2–3. Ad Hoc first contended that it would be inconsistent to treat inventory carrying costs as direct selling expenses but warehousing costs as moving expenses. Id. at 2–3. Commerce gave the following explanation:

> Inventory carrying costs are not actual expenses borne by the respondent, but rather they are imputed financing costs associated with holding inventory for a period prior to its sale. By their nature, financing expenses are not associated with the movement of merchandise, and thus the regulations do not direct the Department to treat them as movement expenses. In contrast, the regulations explicitly instruct the Department to treat warehousing expenses incurred after the merchandise leaves the factory as movement expenses.

Decision Memo., cmt. 2 at 9.

Ad Hoc next claimed that for certain CEP sales, "title passes to the unaffiliated customer at the warehouse location." Ad Hoc Case Brief at 3. Commerce did not consider this to be relevant because the expenses at issue were "associated with storing subject merchandise prior to sale." *Decision Memo*, cmt. 2 at 9. Lastly, Ad Hoc relied upon the respondents having characterized inventory maintenance expenses as selling expenses "in their sales activity charts." Ad Hoc

[11] The Uruguay Round Agreements Act was signed into law on December 8, 1994. The Act approved the new WTO Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The Statement of Administrative Action approved by Congress to implement the Agreements is regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

Case Brief at 3. Commerce explained that this position was "misplaced" given the limited function of the sales activity chart and distinguished inventory maintenance from physical warehousing. Decision Memo, cmt. 2 at 10.

Commerce here properly classified warehousing expenses in compliance with its regulation that advances legislative intent and does not conflict with the statute.[12] *See* 19 C.F.R. § 351.401(e)(2); *Chevron*, 467 U.S. at 843–44; SAA, 1994 U.S.C.C.A.N. at 4163. In response to Ad Hoc, Commerce conducted analyses that distinguished inventory carrying costs, disputed the relevance of title passing, and rejected reliance on respondent sales activity charts. *Decision Memo*, cmt. 2 at 7–10. With these principled bases documented in the record, *see id.*, the challenged expense classification is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933).

C
Commerce Properly Declined To Apply AFA To Thai Union Sales

1
Statutory Overview

Commerce is permitted in certain circumstances to render determinations using facts available or 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

(D) provides such information but the information cannot be verified . . . , the administering authority . . . shall . . . use the facts

[12] Ad Hoc misplaces reliance on the definition of direct selling expenses as those "that result from, and bear a direct relationship to, the particular sale in question." *See* Ad Hoc's Motion at 21 (citing 19 C.F.R. § 351.410(c)). As accurately explained by the Rubicon Group: "Because post-importation U.S. warehousing expenses are more specifically provided for as movement expenses . . . , [Commerce] reasonably did not treat them as direct selling expenses. . . . [Ad Hoc] appears to assume that, in a [CEP] context, only expenses incident to the transportation of the merchandise to the U.S. affiliated reseller — as opposed to the first unaffiliated U.S. customer — constitute movement expenses, but neither the statute nor the regulation contains any such limitation." The Rubicon Group's Opposition at 9, 10.

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 among the facts otherwise available.

Id.

Clarification of 19 U.S.C. § 1677e is set forth in *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003). There, the Federal Circuit explained that "[t]he statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination." *Id.* at 1381. The "facts available" part focuses on the "respondent's failure to provide information. The reason for the failure is of no moment." *Id.* (emphasis removed). By contrast, the AFA part 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 record, 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.[13]

Id. at 1382–83 (citation omitted) (emphasis removed).

Commerce is by statute afforded discretion in applying facts available and AFA. *See* 19 U.S.C. § 1677e(a), (b). This discretion is predicated on "Commerce's special expertise in administering the antidumping law [which] entitles its decisions to deference from the courts." *Nippon Steel*, 337 F.3d at 1379. Commerce "enjoys broad, although not unlimited, discretion with regard to the proprietary use of facts available," *NTN Corp. v. United States*, 28 CIT 108, 117, 306 F. Supp. 2d 1319 (2004), as well as "in the application of adverse facts available," *AK Steel Corp. v. United States*, 28 CIT 1408, 1417, 346 F. Supp. 2d 1348 (2004).

2
Commerce Properly Declined To Apply AFA To Thai Union EP sales

Commerce asked Thai Union to report U.S. sales during the POR, including EP sales. March 17, 2008 Letter Ex. 1: Response of Thai Union to Section C of the Department's July 19, 2007 Questionnaire ("Thai Union Questionnaire Response") at C–2. Because Thai Union did not report [[a small number of]] EP sales, Thai Union's Opposition at 12, Commerce preliminarily decided to apply AFA. *Preliminary Results*, 73 Fed. Reg. 12,092–93. Thai Union explained that the omission was inadvertent and "due to a coding error. Specifically, Thai Union's sales ledger incorrectly recorded the customer's name . . . , which in turn resulted in failure by the computer program to select these transactions for the sales data file." Thai Union Case Brief at 52. Commerce ultimately accepted this explanation and applied facts available as follows:

> Thai Union itself discovered that it had not reported these sales during its preparation for verification, and it informed the Department of its omission at the earliest possible opportunity (*i.e.*, prior to starting verification of the relevant topic). Moreover, Thai Union proffered a reasonable explanation as to why it had not reported these transactions (*i.e.*, a computer error related to the miscoding of the customer name), and it was able to sub-

[13] Ad Hoc contends that Commerce may not permissibly inquire into the *mens rea* of a respondent. Ad Hoc's Motion at 32. However, Thai Union is correct that "a respondent's intent is a permissible, but not a required, consideration in the AFA decision." Thai Union's Opposition at 23. "The fact that a test is 'subjective' means that it can include consideration of a respondent's intentions and motivations." *Id.* citing *Nippon Steel*, 337 F.3d at 1383.

> stantiate this explanation to our satisfaction at verification. Further, based on extensive testing procedures performed at verification, we are confident that Thai Union identified the complete universe of unreported transactions that fell under this scenario.
>
> Therefore, we have reversed our preliminary decision to apply AFA to Thai Union's unreported EP sales because: 1) Thai Union voluntarily disclosed the unreported sales to the Department very early on at verification; 2) we find Thai Union's explanation regarding why it did not report these U.S. sales to be plausible; 3) these sales constitute a very small quantity of the total reported U.S. sales; and 4) the Department satisfied itself that it obtained the full universe of these transactions at verification. Therefore we find it appropriate to use facts available without adverse inference for these transactions . . . .[14]

Decision Memo, cmt. 14 at 43 (citations omitted).

The record supports Commerce having concluded that Thai Union acted to the best of its ability despite not reporting these EP sales initially. *See Decision Memo*, cmt. 14 at 41–43; 19 U.S.C. § 1677e(b); *Nippon Steel*, 337 F.3d at 1379–83. Thai Union's explanation and Commerce's acceptance are both reasonable.[15] *See* Thai Union Case Brief at 52–54; *Decision Memo*. cmt. 14 at 41–44. As Thai Union points out, this error involved only [[a small number]] of the more than 12,000 separate sales transactions in its relevant databases. Thai Union's Opposition at 3; *see Decision Memo*, cmt. 14 at 41. That Thai Union caught and reported the error itself supports the reason-

[14] Ad Hoc challenges Commerce's characterization of the subject EP sales as a "very small quantity." Ad Hoc's Motion at 37. However, Ad Hoc does not provide the total number of reported Thai Union U.S. sales necessary to evaluate Commerce's characterization. *See id.* Without such numerical support, this Ad Hoc argument will not be considered because of the generally applicable maxim that *de minimus non curat lex* ("The law does not concern itself with trifles."). *See* BLACK'S LAW DICTIONARY (9th Ed. 2009); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 902–03 (Fed. Cir. 1999) (citations omitted).

[15] Ad Hoc portrays Thai Union's explanation for not reporting the EP sales as contradicting its explanation for not reporting certain direct CEP sales. Ad Hoc's Motion at 36. However, as Thai Union accurately identifies, "[t]he fatal defect in the Plaintiff's effort to point out a supposed inconsistency is that it wrongly asserts that Thai Union miscoded as direct CEP sales the [subject] EP sales . . . . The record does not contain any evidence that this miscoding occurred." *See* Thai Union's Opposition at 31.

ableness of Commerce's decision to decline to apply AFA.[16] *Cf. Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 53,677 (September 2, 2004), accompanying Issues and Decision Memorandum cmt. 4 ("the information related to these sales was presented to the Department as clerical error at the outset of verification and . . . constitutes a minor correction").

Commerce acted within its broad discretion under 19 U.S.C. § 1677e(a) by applying facts available to the subject EP sales. *See NTN*, 28 CIT at 117. Because Thai Union did not report these sales, Commerce was able to use facts available. *See* 19 U.S.C. § 1677e(a)(2)(A); *Nippon Steel*, 337 F.3d at 1382. Application of facts available instead of AFA here is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933).

3
Commerce Properly Declined To Apply AFA To Thai Union Direct CEP Sales

Ad Hoc advances a series of arguments based on the process through which Commerce reversed its preliminary decision to apply AFA to certain Thai Union direct CEP sales. Ad Hoc's Motion at 24–34. Its challenges predicated on *ex parte* contacts and the *April 15, 2008 Letter* are both legally insufficient. *Infra* Sections IV.C.3(b), (c). As an analysis of the underlying reporting instructions to Thai Union demonstrates, *infra* Section IV.C.3(a), Commerce's determination not to apply AFA to the subject direct CEP sales and its resultant margin calculations are supported by substantial evidence and in accordance with law, infra Sections IV.C.3(d), (e).

(a)
Commerce's reporting instructions to Thai Union concerning CEP sales

In the initial questionnaire, Commerce instructed Thai Union to "[r]eport each U.S. sale of merchandise entered for consumption during the POR, except . . . for CEP sales made after importation, report each transaction that has a date of sale within the POR." Thai Union Questionnaire Response at C-2. Thai Union reported [[a large number of]] direct CEP sales to its largest U.S. customer that entered the

[16] Ad Hoc argues that "Thai Union never actually reported the EP sales in question; . . . it only provided Commerce with the total volume of those sales." Ad Hoc's Motion at 35. However, Commerce acted within its broad discretion under 19 U.S.C. § 1677e in finding that the self-reporting by volume warranted application of facts available and not AFA. *See supra* Section IV.C.1.

United States during the POR. Thai Union's Opposition at 6. Thai Union did not report an additional [[small number of]] direct CEP sales to this customer that were made during the POR but entered the United States after the POR. *Id.*

At issue is whether these direct CEP sales were required to be included as part of Thai Union's reportable "universe." *Decision Memo*, cmt. 13 at 34. Thai Union claims that they were not because of the instruction that date of sale be used only for "CEP sales made after importation" (*i.e.*, non-direct CEP sales). *See* Thai Union's Opposition at 7; Thai Union Case Brief at 18–20. Thai Union contends that Commerce has a longstanding and consistent practice of requiring the reporting of only those direct CEP sales which enter the United States during the POR. Thai Union's Opposition at 7–8; Thai Union Case Brief at 22–27 (citations omitted).

Commerce in October 2007 issued a supplemental questionnaire to Thai Union. Letter from Shawn Thompson, Program Manager, AD/CVD Operations, Office 2, U.S. Department of Commerce, to D. Michael Kaye, Akin Gump Strauss Hauer & Feld, Re: Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from Thailand (October 31, 2007), P.R. 315. "For CEP sales," Thai Union was asked to "confirm that you have reported all sales during the POR, regardless of entry date." *Id.* at 10. The response stated as follows: "For CEP sales made prior to importation, Thai Union has . . . reported all entries for consumption during the POR." *March 17, 2008 Letter* Ex. 2 at 34. Thai Union characterizes this response as having "clearly explained that it had identified the universe of reportable direct CEP sales using the entry date, not the date of sale, based on its understanding of the required reporting universe." Thai Union's Opposition at 9.

Commerce in December 2007 issued a second supplemental questionnaire to Thai Union. Letter from Shawn Thompson, Program Manager, AD/CVD Operations, Office 2, U.S. Department of Commerce, to D. Michael Kaye, Akin Gump Strauss Hauer & Feld, Re: Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from Thailand (December 13, 2007), P.R. 357. Commerce asked: "Did Thai Union have any CEP sales which were shipped directly to the unaffiliated U.S. customer . . . prior to the end of the POR? If so, revise the U.S. sales listing to report them." *Id.* at 2. Thai Union describes this as "[t]he first arguable, but still unclear, indication that the Department might have decided to implement a new type of reporting universe." Thai Union's Opposition at 10 (emphasis removed).

In response to the second supplemental questionnaire, Thai Union informed Commerce that it "has again reviewed its records to ensure that it has reported all direct CEP sales that entered during the POR." Response of Thai Union Frozen Products PCL and Thai Union Seafood Company Ltd. to the Department's December 13, 2007 Questionnaire, Volume 2 of 2, Supplemental Response: Sections A–C, P.R. 369, at 7. Thai Union asserts that this reaction evidences its "continued understanding that it was required to report entries of direct CEP sales during the second POR." Thai Union's Opposition at 12. In early 2008, a Commerce official informed Thai Union that "you should have reported the universe of direct CEP sales based on date of sale . . . . *I realize that the instruction in the original questionnaire was somewhat misleading*. However, our supplemental questionnaires requested that you do so, and . . . you didn't follow our latest instruction." *March 17, 2008 Letter* Ex. 4: E-mail from Irina Itkin, U.S. Department of Commerce, to Phyllis Derrick et al., Re: U.S. sales (January 11, 2008) (emphasis added).

(b)

Commerce properly disclosed its *ex parte* contacts with Thai Union

On March 6, 2008, Commerce rendered its preliminary decision to apply AFA to the subject Thai Union direct CEP sales. *Preliminary Results*, 73 Fed. Reg. at 12,092–93. On March 12, 20, and 27, 2008, Commerce held *ex parte* meetings with Thai Union.[17] *See* Memorandum from Irina Itkin, Senior Analyst, AD/CVD Operations, Office 2, U.S. Department of Commerce, to the File, Re: Disclosure [of] Meeting with Thai Union Frozen Products PCL and Thai Union Seafood Company, Ltd. in the 2006–2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand (March 20, 2008), P.R. 431 ("*March 12 Meeting Memo*"); Memorandum from Irina Itkin, Senior Analyst, AD/CVD Operations, Office 2, U.S. Department of Commerce, to the File, Re: Ex-Parte Meeting with Thai Union Frozen Products PCL and Thai Union Seafood Company, Ltd. in the 2006–2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand (March 20, 2008), P.R. 430 ("*March 20 Meeting Memo*"); Memorandum from James Maeder, Director, Office 2, AD/CVD Operations to the File, Re: 2006–2007

[17] Throughout the administrative process, Commerce held *ex parte* meetings with parties other than Thai Union, including Ad Hoc. *See, e.g.*, Memorandum from Irene Darzenta Tzafolias, Acting Director, Office 2, AD/CVD Operations, U.S. Department of Commerce, to the File, Re: Ex-Parte Meeting with Petitioner's Counsel in the 2006–2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand (April 10, 2008), P.R. 443.

Administrative Review on Certain Frozen Warmwater Shrimp from Thailand: Ex-Parte Meeting with Thai Embassy Officials and Thai Union Officials, (March 28, 2008) P.R. 440 ("*March 27 Meeting Memo*").

Ad Hoc claims that Commerce failed to address its request that Commerce disclose all *ex parte* contacts. *See* Ad Hoc's Motion at 26–28. Commerce is required to document its *ex parte* meetings. *See* 19 U.S.C. § 1677f(a)(3); 19 C.F.R. § 351.104(a). Commerce here memorialized the discussion topics and individuals present at its three ex parte meetings with Thai Union in March 2008. *See March 12 Meeting Memo; March 20 Meeting Memo; March 27 Meeting Memo*. Ad Hoc in April 2008 stated that Commerce should "report all *ex parte* contacts between any Department employees and any parties . . . with regard to Thai Union." Letter from Bradford L. Ward, Dewey & LeBoef LLP, to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Thai Union (April 16, 2008), P.R. 455, at 9.

Commerce promptly responded to Ad Hoc. *April 23, 2008 Letter*. Commerce explained that, "with respect to your request that the Department document all *ex parte* communications between it and outside parties in this review, we note that the record is complete on the issue in question up to this point in time in that it contains all of the Department's ex parte memoranda as required by law." *Id.* at 2. Ad Hoc thereafter "reiterate[d] [its] request that the Department disclose all *ex parte* contacts, to the extent they have not all been disclosed, regarding or related to the application of AFA to Thai Union, so as to complete the administrative record in this proceeding." Ad Hoc Supplemental Rebuttal Case Brief at 25. Ad Hoc now contends that Commerce unlawfully neglected to respond to this issue in the *Final Results*. Ad Hoc's Motion at 28.

Commerce acted properly concerning its *ex parte* contacts with Thai Union. The documenting memoranda comply with legal requirements. *See March 12 Meeting Memo; March 20 Meeting Memo; March 27 Meeting Memo*; 19 U.S.C. § 1677f(a)(3); 19 C.F.R. § 351.104(a). Commerce was not obligated to revisit the matter in the *Final Results* given that Commerce had already disclosed all ex parte contacts and Ad Hoc qualified its final request with "to the extent they have not all been disclosed." Ad Hoc Supplemental Rebuttal Case Brief at 25; *see* Thai Union's Opposition at 37 (describing this claim as "a mere quibble because the Committee asked the question, and the Department answered it."). Because all *ex parte* contacts between Commerce and Thai Union were properly communicated to Ad Hoc and memo-

rialized in the administrative record,[18] Ad Hoc's argument predicated on these contacts is without merit.

(c)

Commerce properly issued the *April 15, 2008 Letter*

Ad Hoc challenges Commerce's issuance to Thai Union of the *April 15, 2008 Letter*. Ad Hoc's Motion at 24–26. In that correspondence, Commerce references meetings with Thai Union and states as follows:

> [W]e have carefully reviewed the initial and supplemental questionnaires the Department issued to Thai Union in the context of this review, as well as Thai Union's responses to those questionnaires, with respect to the reporting requirements for direct CEP transactions. Upon our review, we acknowledge that the Department issued contradictory instructions with regard to the reporting requirements for these sales, which may have led to confusion on the part of Thai Union. Therefore, we are reevaluating our preliminary decision to apply adverse facts available to these sales. We will make a final determination regarding this issue no later than the date of the final results in this review.

April 15, 2008 Letter. After receiving objections from Ad Hoc, Commerce set up a separate briefing schedule for "parties to submit affirmative arguments regarding the April 15 letter . . . and rebuttal comments." *April 23, 2008 Letter* at 1–2.

Ad Hoc argues that the April 15, 2008 "Letter clearly altered the agency's findings in the *Preliminary Results*, and did so without any legal authority." Ad Hoc's Motion at 25. However, Commerce correctly explained that it "did not issue revised preliminary results in the April 15, 2008, letter . . . . Instead, the Department merely stated that it would re-evaluate the issue for the final results, just as it will for every decision made in the preliminary results raised by the parties." *April 23, 2008 Letter* at 1. Ad Hoc's repeated contention that the *April*

[18] Ad Hoc claims that, "in the underlying review, the record does not support the conclusion that . . . all *ex parte* contacts had been recorded consistent with" legal requirements. Ad Hoc's Motion at 27. However, Defendant accurately responds that Ad Hoc could "have sought supplementation" of the administrative record to document additional contacts. Defendant's Response at 21 (citing *Alloy Piping Prods. v. United States*, 26 CIT 330, 344, 201 F. Supp. 2d 1267, 1270 (2001), *aff'd* 334 F.3d 1284 (Fed. Cir. 2003)). Ad Hoc reinforces that this available recourse was not pursued by replying that it "has not asked this Court to find that the administrative record is incomplete." Ad Hoc's Reply at 15.

15, 2008 Letter "amended the preliminary results" is incorrect.[19] *See* Reply Brief of Plaintiff Ad Hoc ("Ad Hoc's Reply")[20] at 10.

Ad Hoc next contends that the "letter short-circuited the agency's promulgated regulations regarding written argument." Ad Hoc's Motion at 26. Those regulations set forth the process for submitting case briefs to Commerce but do not preclude additional, issue-specific briefing. *See* 19 C.F.R. § 351.309. Indeed, Commerce is authorized to "request written argument on any issue from any person . . . at any time." *Id.* § 351.309(b)(2). Commerce may supplement the case brief submission process by providing parties with the opportunity to address a particular issue, as it did here.[21] Defendant is correct that "Commerce acted consistent with its regulatory authority and communicated its intention to re-evaluate its determination." Defendant's Response at 20. Commerce therefore properly issued the *April 15, 2008 Letter*.[22]

(d)
Commerce properly declined to apply AFA to Thai Union direct CEP sales

Commerce reversed its preliminary decision concerning application of AFA to the subject direct CEP sales. *Final Results*, 73 Fed. Reg. at 50,936. It provided the following rationale:

> [B]ecause the instructions issued by the Department in its original questionnaire differed from those issued in the supplemen-

[19] Because the *Preliminary Results* were not amended, Commerce need not have referenced any ministerial error as Ad Hoc contends. *See* Ad Hoc's Motion at 25–26. Moreover, Thai Union establishes that Commerce has "issue[d] revised Preliminary Results on several occasions that did not involve the mere correction of ministerial errors." Thai Union's Opposition at 34 (citations omitted).

[20] In its reply, Ad Hoc improperly uses footnotes unrelated to the text as a means to evade page limits. *See* Ad Hoc's Reply at 4–5 nn.2–3; *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 636, 640 (2d Cir. 1994) (citing *Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1407 (7th Cir. 1992)). Ad Hoc should have filed a motion to exceed the page limitation.

[21] Ad Hoc claims prejudice because the briefing schedule worked to the advantage of Thai Union. *See* Ad Hoc's Motion at 25. However, Thai Union accurately responds that "the Committee had the opportunity to submit arguments and did in fact submit arguments on numerous occasions concerning the correctness of the Department's preliminary determination to apply AFA to Thai Union's unreported CEP sales." Thai Union's Opposition at 35.

[22] Ad Hoc alleges that the *April 15, 2008 Letter* resulted from "an aggressive lobbying campaign by Thai Union attacking the *Preliminary Results*." Ad Hoc's Motion at 24. However, Thai Union is correct that this claim is "unaccompanied by evidence. . . . Plaintiff does not identify any aspect of Thai Union's advocacy of its position that was either unlawful or otherwise inappropriate." Thai Union's Opposition at 36.

> tal questionnaires with respect to a key reporting issue[] (*i.e.*, the appropriate universe of sales), and that difference appears to have led to confusion on the part of Thai Union, we find that it would be inappropriate to find that Thai Union did not cooperate to the best of its ability in this instance. Accordingly, we have reconsidered our preliminary decision to apply facts available with an adverse inference to these unreported direct CEP sales and rather find that the acceptance of Thai Union's direct CEP sales listing, as submitted, is appropriate for purposes of these final results.

Decision Memo, cmt. 13 at 40. Commerce therefore declined to apply either AFA or facts available to the subject direct CEP sale, and instead accepted the direct CEP sales data as reported by Thai Union. *Final Results*, 73 Fed. Reg. at 50,936.

Commerce properly reached its conclusion that Thai Union had acted appropriately in reporting direct CEP sales. *See Decision Memo*, cmt. 13 at 38–41; 19 U.S.C. § 1677e(b); *Nippon Steel*, 337 F.3d at 1382–83. The questionnaires contain confusing and varied instructions. *See supra* Section IV.C.3(a). Thai Union's repeated response that it was using date of entry establishes a genuine misunderstanding concerning the reportable universe.[23] *See id.* As Thai Union states, "the Department reasonably concluded that Thai Union did not understand the Department's two sets of supplemental instructions in the same manner as the Department did. . . . [T]here was no evidence that Thai Union intentionally disregarded a known reporting obligation." Thai Union's Opposition at 21–22. The record contains ample bases for Commerce's conclusion, *see* Thai Union Case Brief at 3–52, including:

- Commerce in the same review directed Thai I-Mei to report direct CEP sales based on date of entry, *id.* at 20;
- Commerce in 11 previous reviews required respondents to report direct CEP sales based on date of entry, *id.* at 20–27 (citations omitted), and did not here undertake procedural steps to implement a change in practice, *id.* at 31–35;[24]

[23] Although Thai Union and Commerce disagree as to the clarity of the supplemental questionnaire instructions when considered alongside the original instructions, this dispute need not be resolved "in order to find that Thai Union acted to the best of its ability." Thai Union's Opposition at 17 n.14.

[24] Given the different reporting instructions from Commerce and candid responses from Thai Union, *supra* Section IV.C.3(a), Commerce's determination can be upheld without resolution of the greater "issue of what the Department's policy or practice is with respect to the reporting universe for direct CEP sales." *See* Thai Union's Opposition at 17.

- "Thai Union had absolutely nothing to gain" by not reporting these sales that it would report in the next POR, as opposed to concealing them from Commerce, *id.* at 15; and
- Commerce did not cancel or postpone verification, as it had in instances where respondents submitted deficient information, *id.* at 15–16 (citations omitted).

Ad Hoc contends that AFA is appropriate because Thai Union "intentionally withheld information" from Commerce. Ad Hoc's Motion at 33. However, Thai Union accurately responds by explaining as follows:

> [A] respondent cannot "intentionally withhold" information without first knowing that the Department has requested it. Since the Department accepted Thai Union's explanations as to how it interpreted the supplemental questionnaire instructions, and since there is no evidence that Thai Union understood those instructions in the way that the Department intended, but then deliberately disregarded them, the record does not permit a finding of an intentional withholding of information.

Thai Union's Opposition at 24.

The record supports Commerce having acted within its broad discretion under 19 U.S.C. § 1677e(a) by not applying facts available to the subject direct CEP sales. *See NTN*, 28 CIT at 117. In recognizing its contradictory instructions, Commerce justifiably concluded that Thai Union did not "withhold[] information" so as to trigger the application of facts available. 19 U.S.C. § 1677e(a)(2)(A); *see Decision Memo*, cmt. 13 at 38–41. Thus, with respect to Commerce's decision to apply neither facts available nor AFA to the subject direct CEP sales, there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aimcor*, 154 F.3d at 1378 (quoting *Matsushita*, 750 F.2d at 933).

(e)

Commerce properly excluded the subject Thai Union direct CEP sales to calculate margins

Ad Hoc challenges Commerce's calculation of antidumping margins in the subject administrative review. Ad Hoc's Motion at 29–30. According to Ad Hoc, "with respect to certain unreported 'direct' CEP sales made by Thai Union, Commerce excluded these sales volumes from Thai Union's U.S. sales quantity during the POR. . . . In so doing, Commerce . . . understated the assessment rate to be assigned to all non-investigated companies." *Id.* Ad Hoc frames this claim in terms of Commerce improperly and inexplicably including certain other CEP

and EP sales volumes in calculating margins. *See id.* However, Defendant is correct that "this attempt to reargue Commerce's conclusion that Thai Union was cooperative is unpersuasive. . . . Commerce could not include the volume of the direct [CEP] sales that it determined should be reported in the subsequent [POR] in its calculation of the review[-]specific assessment rates for this [POR]." Defendant's Response at 26. Accordingly, Commerce's proper exclusion of the subject direct CEP sales from the relevant POR defeats Ad Hoc's challenge to the margin calculations. *See supra* Section IV.C.3(d).

D

Commerce Properly Included One Thai I-Mei CEP Sale

Ad Hoc challenges Commerce's inclusion of a single CEP sale in the Thai I-Mei U.S. sales dataset. Ad Hoc's Motion at 37–40. Subsequent to the *Preliminary Results*, Ad Hoc challenged the inclusion of Thai I-Mei CEP sales with sale dates prior to the beginning of the POR. Ad Hoc Case Brief at 24–25. In issuing the *Final Results*, Commerce agreed with Ad Hoc for three such sales but retained the fourth as follows:

> [W]e find that it is not appropriate to include three of these transactions in our analysis because they had dates of sale, as well as entry dates, prior to the POR. As a consequence, these sales were covered by the 2004–2006 administrative review, and they should have been reported in the context of that segment of the proceeding. Therefore, we have removed these three sales from the database for the final results of this review.
>
> Regarding the fourth sale at issue, however, we note that this sale was of subject merchandise which entered the United States during the current POR, but which had a sale date (based on its date of shipment) falling within the prior POR. Because we instructed Thai I-Mei in the 2004–2006 administrative review to report only direct CEP sales . . . which entered U.S. customs territory during that POR, the first opportunity to examine this particular transaction occurred during this administrative review. For this reason, we have maintained this sale in the U.S. database for the final results, as it entered during this POR.

Decision Memo, cmt. 12 at 32. Ad Hoc claims that the retention of this sale departs from "Commerce's longstanding and consistent practice . . . to only include sales with sale dates within the POR in a respondent's U.S. sales dataset." Ad Hoc's Motion at 38.

Inclusion of the remaining sale was proper. Commerce "shall determine— (i) the normal value and [EP] (or [CEP]) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). Including this sale comports with the statutory requirement to examine and calculate margins for "each entry." *Id.* Commerce documented a principled basis for retaining the sale that supports its determination. *See Decision Memo*, cmt. 12 at 32; *Aimcor*, 154 F.3d at 1378. Defendant is correct that Commerce here rendered "a reasonable decision based upon the facts surrounding a nonstandard sale." Defendant's Response at 27.

E

The Rubicon Group CEP Offset Determination Is Remanded To Commerce

In the *Final Results*, Commerce concluded "that the Rubicon Group has not demonstrated that a CEP offset is warranted in this case." *Decision Memo*, cmt. 5 at 17. The Rubicon Group challenges this determination. The Rubicon Group's Motion. However, Defendant, "after examining the record, as well as the reasoning behind Commerce's determination [in a subsequent administrative review] . . . , and without confessing error, . . . request[ed] that the Court remand this matter for Commerce to reconsider and further explain its decision as to whether Rubicon is entitled to a [CEP] offset." Defendant's Response at 28. Pursuant to the Rubicon Group's Motion and Defendant's Response, a remand is granted for Commerce to reconsider and further explain whether the Rubicon Group is entitled to a CEP offset.

V.

Conclusion

For the above stated reasons, Ad Hoc's Motion for Judgment on the Agency Record is DENIED, Defendant's request for a voluntary remand to address the Rubicon Group's Motion is GRANTED, and Commerce's determination in *Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 50,933 (August 29, 2008), is Affirmed In Part and Remanded in Part. Commerce's determination is partially sustained and partially remanded for action consistent with this Opinion.

Dated: December 29, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 10–9

PRESITEX USA INC., Plaintiff, v. UNITED STATES, PUBLIC VERSION Defendant.

Before: WALLACH, Judge
Court. No.: 08–00379

[Defendant's Motion to Dismiss is GRANTED.]

Dated: January 26, 2010

Peter S. Herrick, P.A. (*Peter S. Herrick*) for Plaintiff Presitex USA Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Justin R. Miller*); and *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I.
Introduction

This action arises after nearly three years of correspondence between Plaintiff Presitex USA Inc. ("Presitex") and United States Customs and Border Protection ("Customs") regarding the classification of certain apparel that Presitex imported from Nicaragua in 2005. Pursuant to Rules 12(b)(1) and 12(b)(5) of the United States Court of International Trade, Defendant United States ("Defendant") has moved to dismiss this action "for lack of jurisdiction over the subject matter" and "for failure to state a claim upon which relief can be granted." Defendant's Memorandum in Support of Its Motion to Dismiss ("Defendant's Motion") at 1. Because this court lacks jurisdiction over Presitex's 19 U.S.C. § 1520(d) claim and will not exercise whatever jurisdiction it may have over Presitex's unripe 19 U.S.C. § 4034 claim, Defendant's motion is GRANTED and this action is dismissed in its entirety.

II.
Background

In September 2005, Presitex[1] filed entry summaries and paid estimated duties of 16.6 percent ad valorem at the Port of Los Angeles-LAX for seven entries ("the subject entries") of apparel from Nicara-

[1] Presitex acted through its customs broker up to and including its March 2007 protest and through its counsel from its May 2008 protest onward.

gua ("the subject goods") that it classified under subheading 6204.62.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Defendant's Motion Ex. 1: Entry Summaries for Entry Nos. HSY 1020712–4, HSY 1020612–6, HSY 1020453–5, HSY 1020655–5, HSY 1020663–9, HSY 1020664–7, and HSY 1020671–2 ("Entry Summaries").

In February 2006, Presitex reclassified the subject goods under HTSUS subheading 9820.11.27 in order to obtain the duty-free treatment provided by the United States-Caribbean Basin Trade Partnership Act, Trade and Development Act of 2000, Title II, P.L. 106–200, 114 Stat. 251 (May 18, 2000) ("CBTPA"). *See* Defendant's Motion Ex. 3: Post Summary Adjustment Coversheets for Entry Nos. HSY 1020712–4, HSY 1020612–6, HSY 1020453–5, HSY 1020655–5, HSY 1020663–9, HSY 1020664–7, and HSY 1020671–2 ("Post Summary Adjustment Coversheets").[2] The Post Summary Adjustment Coversheets submitted to Customs for this purpose made legal reference only to HTSUS, CBTPA, and 19 U.S.C. § 1520(c). *See* Post Summary Adjustment Coversheets. 19 U.S.C. § 1520(c) is a provision concerning reliquidation that Congress had repealed in 2004. *See* Miscellaneous Trade and Technical Corrections Act of 2004, P.L. 108–429, 118 Stat. 2434 (December 3, 2004).

Customs rejected Presitex's reclassification by notating the Post Summary Adjustment Coversheets on receipt with "Disagree. Cutting & sewing done in China, so CBTPA does not apply." Post Summary Adjustment Coversheets. In July 2006, Customs liquidated the subject entries at the original duty rate of 16.6 percent *ad valorem*. Defendant's Motion at 3.

In March 2007, Presitex protested Customs' adjustment decisions on the ground that "cutting & sewing was done in Nicaragua." U.S. Customs and Border Protection, Protest Nos. 2720–07–100148, 2720–07–100149, 2720–07–100150, 2720–07–100151, 2720–07–100152, 272007–100153, and 2720–07–100154 (March 26, 2007). Customs denied each protest on receipt as "[u]ntimely filed". *Id.* More than one year later, Presitex filed another protest covering all seven adjustment decisions. *See* U.S. Customs and Border Protection, Protest No. 2720–08–100289 (May 27, 2008). Customs again denied this protest on receipt as untimely. *See id.*

In July 2008, Presitex sent a letter to Customs requesting reliquidation of the subject entries and "refunds of duty and interest . . . pursuant to 19 U.S.C. § 1520(d)." Defendant's Motion Ex. 4: Letter

[2] A "Post Summary Adjustment coversheet" is the form on which an importer submits a Supplemental Information Letter and Post Entry Amendment ("SIL/PEA"). *See* Defendant's Motion Ex. 2: U.S. Customs and Border Protection, Submission Changes for Supplemental Information Letters and Post Entry Amendments.

from Peter S. Herrick to Port Director, U.S. Customs and Border Protection (July 17, 2008) ("July 2008 Letter") at 1. 19 U.S.C. § 1520(d) permits reliquidation of qualifying goods in accordance with legislation implementing certain free trade agreements, including the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"). *See* 19 U.S.C. § 1520(d); *see also infra* Part IV.A.

Customs received Presitex's letter at the Port of Long Beach and treated it as a protest. *See* July 2008 Letter; Defendant's Motion at 4. In September 2008, Customs directed Presitex to withdraw the letter and resubmit it at the Port of Los Angeles-LAX, the port at which the subject goods had been entered. *See* Defendant's Motion at 5. When Presitex resubmitted the letter that month, Customs returned it with an "insufficiency notice" explaining that Presitex's two previous protests were untimely and noting a "[p]ossible issue for the Court of International Trade." Plaintiff' [sic] Memorandum in Support of Its Opposition to Defendant's Motion to Dismiss ("Plaintiff's Response") Ex. A: Letter from Peter S. Herrick to Port Director, U.S. Customs and Border Protection (September 8, 2008) ("September 2008 Letter"); Plaintiff's Response Ex. B: U.S. Customs and Border Protection, Insufficiency Notice (September 26, 2008). Presitex commenced this action in October 2008 and asserted jurisdiction under 28 U.S.C. § 1581(i). *See* Complaint for Damages (October 27, 2008).

On April 8, 2009, Presitex submitted an "administrative request for the retroactive application of [CAFTA-DR's] tariff provisions" to the subject entries pursuant to the Customs regulation implementing 19 U.S.C. § 4034. *See* Plaintiff's Ex. E: Letter from Peter S. Herrick to Port Director, U.S. Customs and Border Protection (April 8, 2009) ("April 2009 Letter") at 1 (citing 19 C.F.R. § 10.625).[3] 19 U.S.C. § 4034 "provides for the retroactive application of [CAFTA-DR] and payment of refunds for any excess duties paid with respect to entries of textile and apparel goods of eligible CAFTA-DR countries that meet certain conditions and requirements." 19 C.F.R. § 10.625(a). Presitex's April 2009 request was still pending before Customs as of August 28, 2009. Defendant's Reply Memorandum in Support of Its Motion to Dismiss ("Defendant's Reply") at 7.[4]

The dispute between Presitex and Customs occurred within an evolving legal framework. In August 2005, Congress amended 19 U.S.C. § 1520(d) to reflect CAFTA-DR and enacted 19 U.S.C. § 4034.

[3] This request is also addressed to Customs at the Port of Long Beach rather than at the Port of Los Angeles-LAX. *See* April 2009 Letter.

[4] The parties have not apprised this court of any subsequent developments with respect to Presitex's April 2009 request.

See Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, P.L. 109–53, 119 Stat. 462 (August 2, 2005) ("CAFTA-DR Act"). In April 2006, CAFTA-DR entered into force with respect to Nicaragua. *See* Proclamation 7996 of March 31, 2006 To Implement the Dominican Republic-Central America-United States Free Trade Agreement With Respect to Honduras and Nicaragua, 71 Fed. Reg. 16,971 (April 4, 2006) ("Proclamation 7996"); Defendant's Motion Ex. 6: Press Release, U.S. Trade Representative, Statement of USTR Portman Regarding Entry Into Force of the U.S. — Central America — Dominican Republic Free Trade Agreement (CAFTA-DR) for Honduras and Nicaragua (March 31, 2006). As a result, Nicaragua no longer qualified as a CBTPA country for the purposes of CBTPA. *See* Proclamation 7996, 71 Fed. Reg. at 16,971. On January 1, 2009, CAFTA-DR entered into force with respect to Costa Rica, the final state party. *See* Proclamation 8331 of December 23, 2008 To Implement the Dominican Republic-Central America-United States Free Trade Agreement With Respect to Costa Rica and for Other Purposes, 73 Fed. Reg. 79,585 (December 23, 2008); Press Release, U.S. Trade Representative, Statement of U.S. Trade Representative Susan C. Schwab Regarding Entry into Force of the CAFTA-DR for Costa Rica (December 23, 2008). [5]

III.
Standard Of Review

In deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271 (Fed. Cir. 1991)).

"Dismissal for failure to state a claim upon which relief can be granted is proper if the plaintiff's factual allegations are not 'enough to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Int'l Customs Prods., Inc. v. United States*, 549 F. Supp. 2d 1384, 1389 (CIT 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere

[5] Presitex states that CAFTA-DR entered into force with respect to Costa Rica on January 14, 2009. Plaintiff's Response at 2. January 14, 2009 is the date on which the U.S. Trade Representative provided notice of its "determination that Costa Rica is an eligible country for purposes of retroactive duty treatment as provided in [19 U.S.C. § 4034]." Determination of Eligibility for Retroactive Duty Treatment Under the Dominican Republic-Central America- United States Free Trade Agreement, 74 Fed. Reg. 2,142, 2,142 (January 14, 2009).

possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)).

When a court's jurisdiction is challenged, "[t]he party seeking to invoke . . . jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Employees of Sonoco Prods. Co. v. United States*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)).

IV.
Discussion

Presitex asserts that this court has jurisdiction under 28 U.S.C. § 1581(i) and appears to claim two independent legal bases for the customs duty refunds that it ultimately seeks. *See* Plaintiff's Response at 2–7. [6] These legal bases are 19 U.S.C. § 1520(d), as implemented by 19 C.F.R. § 10.590, and 19 U.S.C. § 4034, as implemented by 19 C.F.R. § 10.625. Presitex's claim under 19 U.S.C. § 1520(d) fails because it falls outside this court's jurisdiction under 28 U.S.C. § 1581(i). *See infra* Part IV.A. Presitex's claim under 19 U.S.C. § 4034 fails because it is not ripe. *See infra* Part IV.B. Contrary to Presitex's apparent assertion, nothing in the Customs Modernization Act mitigates either of these threshold deficiencies. *See infra* Part IV.C.

A
Presitex's 19 U.S.C. § 1520(d) Claim Falls Outside This Court's Jurisdiction Under 28 U.S.C. § 1581(i)

19 U.S.C. § 1520(d) permits Customs to "reliquidate an entry to refund any excess duties . . . paid on a good" if the good qualified under the CAFTA-DR Act's rules of origin "at the time of importation," the importer files a claim "within 1 year after the date of importation," and both the entry and the claim meet certain other requirements. 19 U.S.C. § 1520(d); *see also* 19 C.F.R. § 10.590. Such reliquidation may occur "[n]otwithstanding the fact that a valid protest was not filed." 19 U.S.C. § 1520(d). However, the refusal to reliquidate pursuant to 19 U.S.C. § 1520(d) is itself a protestable decision. 19 U.S.C. § 1514(a)(7). 19 U.S.C. § 1520(d) makes no reference to CBTPA. *See* 19 U.S.C. § 1520(d).

Presitex cannot invoke this court's jurisdiction under 28 U.S.C. § 1581(i) in order to challenge the denial of its 19 U.S.C. § 1520(d) request. Jurisdiction under 28 U.S.C. § 1581(i) "may not be invoked

[6] Presitex erroneously conflates these bases. *See, e.g.*, Plaintiff's Response at 2–3, 4, 5, 6.

when jurisdiction under another subsection of [28 U.S.C. § 1581] is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)). The "refusal to reliquidate an entry under" 19 U.S.C. § 1520(d) is susceptible to the filing of a protest. 19 U.S.C. § 1514(a)(7). Jurisdiction to review the denial of such a protest is in turn available under 28 U.S.C. § 1581(a). *See* 28 U.S.C. § 1581(a); *see also Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210, 1214 (Fed. Cir. 2001) (discussing exhaustion of administrative remedies). Plaintiff concedes that "the denial of a claim under [19 U.S.C. § 1520(d)] is a protestable decision" and does not dispute the adequacy of this remedy. Plaintiff's Response at 5.[7] For these reasons, jurisdiction is not available under 28 U.S.C. § 1581(i).

Even if Presitex had exhausted its administrative remedies and then commenced an action under 28 U.S.C. § 1581(a), its claim under 19 U.S.C. § 1520(d) would still fail. The CAFTADR Act's rules of origin require that a qualifying good originate in "one or more of the CAFTADR countries." 19 U.S.C. § 4033(b). These countries include Nicaragua "for such time as [CAFTA-DR] is in effect between the United States and that country." 19 U.S.C. § 4033(n)(2)(B). Presitex imported the subject goods from Nicaragua in August and September 2005. *See* Entry Summaries. CAFTA-DR entered into effect with respect to Nicaragua in April 2006, more than six months later. *See* Proclamation 7996, 71 Fed. Reg. at 16,971. Accordingly, the goods did not "qualify[] under [CAFTA-DR's] rules at the time of importation." 19 U.S.C. § 1520(d).

B
Presitex's 19 U.S.C. § 4034 Claim Is Not Ripe

19 U.S.C. § 4034 requires the liquidation or reliquidation of an entry made prior to CAFTA-DR's entry into force "with respect to [the country of origin] or any other CAFTA-DR country" if a timely "request therefor is filed . . . that contains sufficient information to enable" Customs to locate or reconstruct the entry and "determine that the good satisfies" certain other requirements. 19 U.S.C. § 4034(a)–(c); *see also* 19 C.F.R. § 10.625. To be timely, the request must be "filed with the [Customs] port where the entry was originally filed within 90 days after the date of the entry into force of [CAFTA-DR] for the last CAFTA-DR country." 19 C.F.R. § 10.625(c).

[7] Plaintiff's Response contains no argument that the remedy provided by 28 U.S.C. § 1581(a) is inadequate. *See* Plaintiff's Response.

This court has not considered whether, and if so how, the protest provisions of 19 U.S.C. § 1514 apply to the refusal to liquidate or reliquidate an entry under 19 U.S.C. § 4034. Such liquidation or reliquidation is to occur "[n]othwithstanding [19 U.S.C. § 1514] or any other provision of law." 19 U.S.C. § 4034(a); 19 C.F.R. § 10.625(a). 19 U.S.C. § 1514 references other bases for liquidation and reliquidation as well as a different section of the CAFTA-DR Act, but it is silent as to 19 U.S.C. § 4034. *See* 19 U.S.C. § 1514(a), (h).

This ambiguity has jurisdictional implications. If the refusal to reliquidate an entry under 19 U.S.C. § 4034 is not a protestable decision, then jurisdiction might exist under 28 U.S.C. § 1581(i) to directly review that refusal. But if the refusal is a protestable decision, then jurisdiction would exist under 19 U.S.C. § 1581(a) to review a denial of a protest to that refusal. 28 U.S.C. § 1581(a). In that case, as long as the remedy provided by 19 U.S.C. § 1581(a) is not "manifestly inadequate," jurisdiction would not exist under 28 U.S.C. § 1581(i). *Int'l Custom Prods.*, 467 F.3d at 1327 (quoting *Norcal/Crosetti Foods*, 963 F.2d at 359); *see also supra* Part IV.A.

Although courts would ordinarily "ask and answer" the question of subject-matter jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), this action does not compel determination of the proper jurisdictional basis for a 19 U.S.C. § 4034 claim. Courts may "choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)). These grounds may be constitutional or prudential in nature, since the "court makes no assumption of law declaring power . . . when it decides not to exercise whatever jurisdiction it may have." *Id.* at 428 (quotations omitted), 431.[8]

[8] The Supreme Court has identified some of these grounds. *See Ruhrgas*, 526 U.S. at 577 (personal jurisdiction); *Steel Co.*, 523 U.S. at 101 (Article III standing); *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004) (prudential standing); *Sinochem*, 549 U.S. at 429 (forum non conveniens); *Tenet v. Doe*, 544 U.S. 1, 6 n.4, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005) (*Totten* dismissal), *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 Ed. 2d 669 (1971) (*Younger* abstention), *cited in Steel Co.*, 523 U.S. at 100; *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970) (exhaustion under the All Writs Act), cited in *Steel Co.*, 523 U.S. at 100; *see also Ruhrgas*, 526 U.S. at 577 (quoting *Steel Co.*, 523 U.S. at 100 (O'Connor, J. concurring) for the proposition that *Steel Co.* "did not catalog an exhaustive list" of such grounds). In addition, where "the jurisdictional issue and the merits are inextricably intertwined, and the former cannot be resolved without considering and deciding (at least in part) the latter," this court may "bypass[] the jurisdictional question and decid[e] the merits." *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000).

Supreme Court jurisprudence demonstrates that ripeness is one such ground. *See Toca Producers v. Fed. Energy Reg. Comm'n*, 411 F.3d 262, 265 (D.C. Cir. 2005). Ripeness is a "justiciability doctrine" that "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (quotations omitted). These prudential reasons include a desire to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* (quotations omitted).[9] "[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Id.* at 808 (citations omitted).

"In determining whether an appeal from an administrative determination is ripe for judicial review," courts look "to (1) 'the fitness of the issue for judicial decision' and (2) 'the hardship to the parties of withholding court consideration.'" *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (discussing discretionary remedies)).

Presitex's 19 U.S.C. § 4034 claim, however, does not even satisfy the prerequisite for this two-part test. Prior to April 2009, Customs had no opportunity to make any relevant administrative determination from which Presitex could have appealed, because Presitex did not request reliquidation of the subject entries pursuant to 19 U.S.C. § 4034.[10] Any claim based on Presitex's April 2009 request is not properly before this court, since Presitex filed its complaint in October

[9] Other judicial and statutory mandates also limit judicial review of non-final agency action. *See, e.g., supra* Part IV.A (noting that jurisdiction under 28 U.S.C. § 1581(a)–(h) can preclude jurisdiction under 28 U.S.C. § 1581(i)); 19 U.S.C. § 4034(c) (conditioning liquidation or reliquidation on the timely filing of a proper request with Customs); 28 U.S.C. § 2637(d) (directing this court to, "where appropriate, require the exhaustion of administrative remedies" in actions relying on 28 U.S.C. § 1581(i), among others); *Seafood Exps. Ass'n of India v. United States*, 479 F. Supp. 2d 1367 (CIT 2007) (applying the Administrative Procedure Act's finality requirement to an action relying on 28 U.S.C. § 1581(i)) (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–06 (Fed. Cir. 2004)); *Precision Specialty Metals, Inc. v. United States*, 25 CIT 1375, 1382–83, 182 F. Supp. 2d 1314 (2001) (discussing the doctrine of primary jurisdiction).

[10] Presitex asserts without support that its September 2008 request "was filed in accordance with 19 U.S.C. § 4034 and 19 C.F.R. § 10.625." Plaintiff's Response at 6. This assertion appears to reflect Plaintiff's erroneous conflation of 19 U.S.C. § 1520(d) and 19 U.S.C. § 4034. *See supra* n.6. If the assertion is actually an argument that a request under 19 U.S.C. § 1520(d) can nonetheless satisfy the requirements of 19 U.S.C. § 4034, this court need not consider it. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Fujian Lianfu Forestry Co. v.*

2008 and has not sought leave to file a supplemental complaint pursuant to USCIT Rule 15(d). Moreover, any such claim would be inappropriate for judicial review, as Customs has not yet made a final determination with respect to the underlying reliquidation request. *See supra* Part II; *see also Tokyo Kikai*, 529 F.3d at 1362 (discussing the first prong of the ripeness test).

Presitex has not demonstrated that it would suffer hardship if judicial review is withheld. Its April 2009 request was still pending before Customs as of August 28, 2009, *see supra* Part II, and dismissal for lack of ripeness does not preclude recourse to this court upon conclusion of the administrative process, *see* 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2004) § 3532.1 ("[I]t should be clear that dismissal for lack of ripeness is not a decision on the merits for purposes of preclusion by judgment.").

Customs cannot have refused an administrative request that Presitex did not make, and this court cannot review an administrative determination that Customs has not yet made. Accordingly, Presitex's 19 U.S.C. § 4034 claim is not ripe for adjudication.

C
The Customs Modernization Act Does Not Support Presitex's Claims

The Customs Modernization Act ("Mod Act"), as Title VI of the North American Free Trade Agreement Implementation Act is commonly called, made a number of changes to the statutory framework for Customs. *See* North American Free Trade Agreement Implementation Act, Title VI, P.L. 103–182, 107 Stat. 2057 (December 8, 1993). It required Customs to provide notice of and an opportunity for comment on certain proposed interpretive rulings and decisions that deviated from past practice or would limit the application of a court decision. *See* 19 U.S.C. § 1625(c) & (d). It also authorized Customs to "make available . . . all information, including [that which is] necessary for importers and exporters to comply with the Customs laws and regulations." *Id.* § 1625(e).

United States, 638 F. Supp. 2d 1325, 1350 (2009) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Regardless, Presitex's September 2008 request was unambiguously "a claim for refunds of duty and interest … pursuant to 19 U.S.C. § 1520(d)." Defendant's Reply at 8, 13 (quoting September 2008 Letter). Presitex made no reference to 19 U.S.C. § 4034, 19 C.F.R. § 10.625, or CAFTADR in this request. *See* September 2008 Letter; Defendant's Reply at 8, 13. Indeed, it made no such reference in any of its relevant correspondence with Customs prior to commencing this action. *See supra* Part II. Because the September 2008 request omitted any reference to 19 U.S.C. § 4034 and relied explicitly and exclusively on an entirely different statutory mechanism, it lacked "sufficient information to enable [Customs] … to determine that the good satisfies the" particular requirements of 19 U.S.C. § 4034. 19 U.S.C. § 4034.

The Mod Act accordingly "implement[ed] the concept of 'informed compliance,' which is premised on the belief that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and an opportunity for comment." S. Rep. No. 103–189 at 64 (1993); *see also Int'l Custom Prods.*, 549 F. Supp. 2d at 1390–94; *United States v. Optrex Am., Inc.*, 30 CIT 650, 667–68 (2006); *Am. Bayridge Corp. v. United States*, 22 CIT 1129, 1144–52, 35 F. Supp. 2d 922 (1998) (subsequent history omitted).

Presitex quotes similar language before asserting that Customs "had the obligation to advise Presitex that it had to invoke section 1520(d) not section 1520(c)" and "had the obligation to inform Presitex that its claim must be made under CAFTA-DR." Plaintiff's Response at 4.[11] As Defendant replies, however, "Presitex provides no authority for [its] proposition that Customs has an obligation under the Mod Act to inform individual importers of errors in their legal strategy." Defendant's Reply at 11 (citing Plaintiff's Response at 3–4). In the case cited by Presitex, the concept of informed compliance assisted this court's interpretation of a particular provision of the Mod Act. *See Int'l Custom Prods.*, 549 F. Supp. 2d at 1393–94 (holding in part that a Notice of Action issued by Customs "was an 'interpretive ruling or decision' within the meaning of" 19 U.S.C. § 1625(c)). In this action, Presitex neither argues that Customs failed to comply with 19 U.S.C. § 1625 nor explains how the concept of informed compliance is otherwise relevant.

Presitex's implicit denial of its responsibility to understand its own legal remedies is even less persuasive because "importers are presumed to know the law." *Esso Standard Oil Co. (PR) v. United States*, 559 F.3d 1297, 1307 (Fed. Cir. 2009) (holding in part that an importer's reliance on a Customs regulation that had been contravened by statute was a mistake of law rather than a mistake of fact under former 19 U.S.C. § 1520(c)) (quoting *V. Casazza & Bro. v. United States*, 25 CCPA 184, 188 (1937) and citing *Schrikker v. United States*, 13 Ct. Cust. App. 562, 565 (1926)); *cf. Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the House*

[11] Any advice that Presitex "had to invoke section 1520(d)" would have been both incorrect, because 19 U.S.C. § 1520(d) provides no cause of action under the instant facts, *see supra* Part IV.A, and irrelevant, because Customs "[d]isagree[d]" with Presitex for a reason other than the reference to 19 U.S.C. § 1520(c), *see supra* Part II (quoting Post Summary Adjustment Coversheets). Moreover, Customs provided notice of its implementation of 19 U.S.C. § 4034 in both the Federal Register and the Customs Bulletin. *See, e.g., Dominican Republic—Central America—United States Free Trade Agreement*, 73 Fed. Reg. 33,673 (June 13, 2008); *Dominican Republic-Central America-United States Free Trade Agreement*, Customs Bulletin and Decisions, Vol. 41, No. 24 at 1–9 (June 6, 2007).

Comm. On Ways and Means, Subcomm. On Trade, 102d Cong. 91 (1992) (statement of Comm'r Carol Hallet, U.S. Customs Service), quoted in *Precision Specialty Metals, Inc. v. United States*, 25 CIT 1375, 1388, 182 F. Supp. 2d 1314 (2001) ("The guiding principle in our discussions with the trade community is that of 'shared responsibility.' Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules."). None of these authorities even imply that Customs is required to act as an importer's lawyer.

V.
Conclusion

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED and this action is dismissed in its entirety.

Dated: January 26, 2010
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 10–10

NUCOR CORPORATION, Plaintiff, and UNITED STATES STEEL CORPORATION and AK STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Consol. Court No. 07–00454
PUBLIC VERSION

[The Court affirms, in its entirety, the United States International Trade Commission's Remand Determination, dated July 8, 2009.]

Dated: January 27, 2010

Wiley Rein LLP, (*Daniel B. Pickard* ; *Alan H. Price* ; *Maureen E. Thorson* ; *Lori E. Scheetz*) for Plaintiff, Nucor Corporation.

Skadden, Arps, Slate, Meagher & Flom, LLP, (*James C. Hecht* ; *John J. Mangan* ; *Robert E. Lighthizer*; *Stephen P. Vaughn* ; *Stephen J. Narkin*) for Plaintiff-Intervenor, United States Steel Corporation.

King & Spalding, LLP, (*Joseph W. Dorn* ; *Jeffrey M. Telep*) for Plaintiff-Intervenor, AK Steel Corporation.

Kelley Drye and Warren, LLP, (*Kathleen W. Cannon*; *Paul C.Rosenthal* ; *R. Alan Luberda*) for Amicus, ArcelorMittal USA.

James M. Lyons, General Counsel; *Andrea C. Casson*, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*Marc A. Bernstein* ; *Robin L. Turner*), for Defendant, United States.

OPINION

CARMAN, Judge:

I.
Introduction

This matter comes before the Court following its decision in *Nucor Corp. v. United States*, 33 CIT ___, 605 F. Supp. 2d 1361 (2009), in which the Court remanded a decision of the United States International Trade Commission ("ITC" or "Commission") which found that revocation of certain antidumping and countervailing duty orders would not be likely to lead to the continuation or recurrence of material injury to the domestic hot-rolled steel industry. *See Hot-Rolled Steel Products From Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine* ("*Final Determination* "), USITC Pub. 3956, Inv. Nos. 701-TA-404–408 and 731-TA-898–902 and 904–908 (Review) (Oct. 2007) (PR 453) (CR 427).[1] This lawsuit arose from Plaintiff's and Plaintiff-Intervenors' challenges to the Commission's *Final Determination*, and ensuing Motion for Judgment on the Agency Record under USCIT Rule 56.2. The parties allege, *inter alia*, that the ITC's negative injury determination in the five-year sunset review of the countervailing duty order on hot-rolled steel products from South Africa and the antidumping duty orders on hot-rolled steel from Kazakhstan, Romania and South Africa was unsupported by substantial evidence. In its opinion, the Court found that the ITC had failed to provide an adequate explanation or substantial evidentiary support for certain findings relating to the likely volume, price effect, and impact of subject imports from the affected countries. As a result, the Court remanded the matter and instructed the Commission to reevaluate and explain more fully its negative injury determination in light of the Court's findings. *See Nucor*, 33 CIT at ___, 605 F. Supp. 2d 1361, 1381–82.

The Court now reviews the Commission's findings pursuant to the Court's remand[2] ("Remand Determination"), dated July 8, 2009, in which the ITC's revocation decision remains unchanged from the *Final Determination*. Plaintiff, Nucor Corporation ("Nucor") and Plaintiff-Intervenors, United States Steel Corporation ("U.S. Steel") and AK Steel Corporation ("AK Steel") (collectively "Plaintiffs" or "Domestic Producers") assert that the Remand Determination is also unsupported by substantial evidence or otherwise contrary to law and

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

[2] All references are made to the confidential version of this document filed under CR 441R.

urge the Court to remand the matter for further consideration. The Commission, joined by Amicus, ArcelorMittal USA,[3] argues that the decision should be sustained. For the reasons set forth below, the Court affirms the Remand Determination of the ITC.

II.
Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2006).

III.
Standard Of Review

Review of the Commission's redetermination pursuant to the Court's remand is conducted under the substantial evidence and in accordance with law standard, which is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) (2006) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citations and quotation marks omitted). 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).

IV.
Background

The Court presumes familiarity with its decision in *Nucor*, which provides background discussion on the five-year sunset review that Plaintiffs contest in this judicial proceeding. Below, the Court pro-

[3] ArcelorMittal USA ("Mittal USA") is an affiliate of ArcelorMittal International ("ArcelorMittal") which is the corporate parent of the subject producers.

vides only that background information specific to the Remand Determination now before the Court.

In August and November of 2001, the Commission unanimously determined that the domestic hot-rolled steel industry was materially injured by reason of subsidized imports of hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand, and by reason of less than fair value imports of hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine. *See Hot Rolled Steel Products From Argentina and South Africa*, Inv. Nos. 701–TA–404 and 731–TA–898 and 905 (Final), USITC Pub. 3446 (Aug. 2001) (PR 65); *Hot-Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Inv. Nos. 701–TA–405–408 and 731–TA–899–904 and 906–908 (Final), USITC Pub. 3468 (Nov. 2001) (PR 66) (collectively "*Original Determinations*"). Accordingly, between September 2001 and December 2001, the United States Department of Commerce ("Commerce") published countervailing duty orders on hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand, as well as antidumping duty orders on hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand and Ukraine. *See Final Determination* at I–2.

On August 1, 2006, the Commission initiated five-year sunset reviews to determine whether revocation of the countervailing duty and antidumping duty orders on hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand and Ukraine would likely lead to the continuation or recurrence of material injury to the domestic hot-rolled steel industry. *See Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 71 Fed. Reg. 43,521 (Aug. 1, 2006) (PR 3). At the conclusion of the sunset reviews, the Commission determined that revocation of the antidumping and countervailing duty orders on hot-rolled steel from China, India, Indonesia, Taiwan, Thailand and Ukraine would likely lead to the continuation or recurrence of material injury. *See Final Determination* at 3 (PR 453). However, the Commission determined that revocation of the orders on hot-rolled steel from Argentina, Kazakhstan, Romania and South Africa ("subject countries") would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. [4] *Id.*

[4] Plaintiffs do not challenge the Commission's negative final determination with respect to

Domestic Producers subsequently initiated actions in this Court seeking review of the ITC determinations. On March 9, 2009, after briefing and oral argument the Court remanded the Commission's negative determinations in part, ordering the ITC to:

> (1) reevaluate its flawed reasoning for the finding that ArcelorMittal companies and/or Mittal USA would limit subject imports from the subject countries; (2) reassess and further explain the basis for its findings that significant imports in any region of the country are likely to have a disruptive impact on the overall U.S. market, and that any pricing practices that would negatively impact Mittal USA's competitors are likely to also impact Mittal USA; (3) reassess and further explain the behavior of ArcelorMittal and its predecessor, the Ispat organization, with respect to their business practices in exporting to countries in which they maintain production facilities; (4) reassess and further explain evidence opposed to the ITC's volume determination, including excess capacity, export orientation of the subject countries' producers, attractiveness of the U.S. market, and capacity increase sin alternative export markets; (5) reassess the potential price effects in accordance with its revised volume determination; and (6) reassess its likely impact analysis in accordance with its revised volume and price effects determinations, and account for and explain the poor performance of the domestic industry in the latter portion of the period of review.

See Nucor, 33 CIT at ___, 605 F. Supp 2d 1361, 1381–83.

On remand, the Commission reopened the record with respect to certain issues, inviting parties to offer additional information on matters relating to the remand and submit written comments. *See Hot-Rolled Steel Products From Kazakhstan, Romania, and South Africa*, Inv. Nos. 701–TA–407 and 731–TA–902, 904, 905 (Review) (Remand) 74 Fed. Reg. 21,821 (May 11, 2009). As much of the Court directed inquiry focused on the business practices of ArcelorMittal, the Commission permitted Mittal USA to participate as a party in the proceeding. The Commission issued its Remand Determination on July 8, 2009, once again finding that revocation of the countervailing duty order on hot-rolled steel from South Africa and the antidumping duty orders on hot-rolled steel from Kazakhstan, Romania and South Africa would not be likely to lead to the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. *See* Remand Determination at 2.

hot-rolled steel products from Argentina. *See* Plaintiff's Rule 56.2 Mot. for Summ. J. On the Agency R. at 1 n.1.

V.
Discussion

This Court's remand instructions were carefully delineated into six areas for further review by the Commission: four involving volume, one involving price effects and one involving likely impact on the domestic industry. *See Nucor*, 33 CIT at ___, 605 F. Supp 2d 1361. The Court will hew to that framework in evaluating the Commission's determination on remand.

1. *ArcelorMittal's Limitation of Subject Imports*

A. The Commission's Determination on Remand

Pursuant to the Court's instructions, the Commission specifically examined whether, upon revocation of the antidumping and countervailing duty orders, ArcelorMittal or Mittal USA would limit imports from the subject countries. *See Nucor* 33 CIT at ___, 605 F. Supp. 2d 1361, 1381. The Commission's analysis once again led it to the conclusion that ArcelorMittal's likely behavior with respect to the hot-rolled steel mills it operates in Kazakhstan, Romania and South Africa would not result in significant volumes of subject imports entering the U.S. market. *See* Remand Determination at 10. The Commission relied on information submitted by Arcelormittal, in both the five-year reviews and remand proceeding, as evidence of the firm's decision to serve the U.S. market principally through its American subsidiary, Mittal USA. *See id*. According to the ITC, this strategy of constraining imports in furtherance of maximizing domestic production did in fact serve to maintain price stability and promote Arcelormittal's overall corporate interests. *See* Defendant's Rebuttal to Plaintiff's Comments on Remand Determination ("ITC Rebuttal Comments") at 15.

B. Parties' Arguments

The Commission argues that ArcelorMittal's strategy for its subsidiaries to supply home and regional markets, and not to serve export markets where the company is a producer, limits the motivation of the subject producers in Kazakhstan, Romania and South Africa to significantly increase shipments to the U.S. market.[5] As support for this position, Defendant points to the substantial invest-

[5] Mills owned by ArcelorMittal are responsible for virtually all production of subject hot-rolled steel in Kazakhstan, Romania and South Africa. *See Final Determination* at 44 n.255.

ment ArcelorMittal has made in its subsidiary, Mittal USA.[6] Because Mittal USA accounts for such a large segment of ArcelorMittal's production overall, and in light of the domestic producer's prominence in the U.S. market, the Commission concludes, it is in ArcelorMittal's best interests to limit the amount of imports of hot-rolled steel. Similarly, the ITC points to the decision by ArcelorMittal to provide Mittal USA with the right to veto any imports from other ArcelorMittal facilities, and its policy of serving the U.S. market principally through Mittal USA. *See* Remand Determination at 10. Inasmuch as the production of hot-rolled steel in the subject countries is controlled entirely by ArcelorMittal, these practices, according to the Commission, "serve as a powerful deterrent to significant volumes of subject imports entering the U.S." *See id.*

Specifically, the Commission relies on statements from two of ArcelorMittal's corporate officers. The first, Louis L. Schorsch, the company's president and chief executive officer, provided testimony during the hearing describing the approval required for the entry of merchandise from other ArcelorMittal mills. [7] *See* Administrative Record, Tr. at 218–19 (PR 253). The second, an affidavit from [[ ]] discusses the factors ArcelorMittal considers in deciding whether or not to export to the United States merchandise produced in overseas ArcelorMittal facilities. [8] *See* ArcelorMittal Factual Submission on Remand, Ex. 8, ¶ 5 (CR 433R). In addition, the ITC identifies empirical data from the importer questionnaires which indicate that U.S. hot-rolled steel imports by ArcelorMittal decreased noticeably subsequent to the merger of Arcelor SA and Mittal Steel Co. NV. *See* Remand Determination at 12. This, says the Commission, is the effect of ArcelorMittal's corporate strategy which perceived that maintaining the profit-

[6] Mittal USA is the composite of acquisitions and consolidations of former U.S. steel companies owned and operated by Mittal Steel Co. NV. In 2006, Mittal Steel Co. NV merged with Arcelor SA, creating the new entity ArcelorMittal International. *See* Final Determination at 17 n.88. Over six billion dollars were spent in acquiring the companies that make up Mittal USA, which accounts for approximately [[ ]] of Arcelormittal's worldwide production (this figure includes ArcelorMittal's U.S. and Canadian based operations). *See* ArcelorMittal Factual Submission on Remand, ex. 7 (CR 433R); Remand Determination at 13.

[7] The relevant portions of Schorsch's testimony include the statement "Now, we do import some material into the [S]tates in a variety of products. The way that is done is: Nothing comes into this market or, for that matter, any other market where we operate, where we bring material in from another part of the world without, let's say, the approval and management of the marketing, or the commercial organization, in that home country. So the interest of the home country takes precedence." Hearing Tr. pp. 218–19 (PR 253).

[8] [[ ]] ArcelorMittal Factual Submission onRemand, Ex. 8, ¶ 5 (CR 433R).

ability and market share of Mittal USA was in its overall interest. *See id.*

In response to Plaintiffs' theoretical model showing how ArcelorMittal would likely benefit from subject imports even if doing so caused harm to Mittal USA, the Commission found this scenario "lacking in probative value." *Id.* at 14. Citing the lack of any documentation to support the figures reported, the ITC argues that even a slight variation of these figures results in adverse financial consequences for ArcelorMittal. Moreover, the ITC points to the difficulty in precisely gauging the price effects of subject imports in such a manner as to calculate accurately the level of imports necessary to achieve such a favorable result. *See id*. at 15.

By contrast, Plaintiffs argue that the record does not support the premise that ArcelorMittal will restrain subject imports from lower production cost facilities if such imports would maximize overall corporate profits. *See* Nucor Corporation's Comments on Remand Determination ("Nucor Comments") at 9. As Plaintiffs recite the record, the evidence demonstrates that if ArcelorMittal can produce and sell steel for consumption in the U.S. more profitably through its mills overseas, "thereby increasing company-wide profits, it will do so." *Id*. According to this theory, any potential harm to Mittal USA would be outweighed by the benefit to Arcelormittal's overall operations. Plaintiffs argue that it is a core principal of the director/officer's fiduciary duty to maximize profits of the entire company for the benefit of its shareholders. *See* id. This basic tenet of corporate law is discussed in two affidavits submitted by Plaintiffs. The first, [[ ]] discusses the obligation a corporate officer has to his shareholders, which is the maximization of corporate profits even at the expense of one of its subsidiaries. *See* Nucor Factual Submission on Remand, Attachment 1, Affidavit of [[ ]] ¶ 3 (CR 434R) ("I have never witnessed a company make a decision that benefits its subsidiary at a cost to overall operational profits.") The second, Michael Meyers, the general manager of sales of U.S. Steel, speaks to the "imperative that the producer do what is in the best interest of its overall operation, not that of each affiliated entity." Nucor Comments at 10; U.S. Steel Factual Submission on Remand, Affidavit of Michael Meyers, ¶ 5 (CR 435R). Thus, according to Plaintiffs, "a rational business model requires companies to maximize profits for the entire enterprise, rather than protecting one business unit at the expense of total corporate profits." Nucor Comments at 10.

In support of this assertion, U.S. Steel presented two hypothetical profit maximization scenarios purporting to show how ArcelorMittal

could serve its overall corporate interest by importing hot-rolled steel from the subject countries, while concomitantly causing U.S. prices to fall. *See* Comments on the Remand Determination Filed by United States Steel Corporation ("U.S. Steel Comments") at 11.

C. Analysis

During a five-year review, the ITC determines whether revocation of an antidumping or countervailing duty order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). In making this decision, the Commission "is required to consider whether the likely volume, price effect, and impact of imports of the subject merchandise on the industry will be significant if an order is revoked." *United States Steel Corp. v. United States*, 32 CIT ___, 572 F. Supp. 2d 1334, 1341 (2008) (internal citation omitted). Plaintiffs argue that the ITC made several erroneous findings which it contends are not supported by substantial evidence. U.S. Steel and Nucor attack the substantiality of the Commission's likely volume determination by offering their own evidence in support of an alternative result. Essentially, Plaintiffs claim that the testimony on which they rely is a more adequate basis from which to draw a conclusion. The task for the reviewing court, however, is not to evaluate the evidence the Commission collects during its review, or to decide the weight to be assigned to a particular piece of evidence. *See United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). It is the Commission's task to evaluate the evidence it collects in conducting an investigation or review, and "certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." *See id*.

In the case at bar, the Commission acted within its discretionary authority when it discounted the probative value of Plaintiffs' profit maximization scenarios. On the basis of the data that was compiled with respect to the risk of adverse price effects on the circumstances of Plaintiffs' hypothetical, the Commission evaluated the competing economic data to reach a well-supported conclusion. The risk of adverse price effects may well be considered high in instances, such as the one here, where there is a high degree of interchangeability between hot-rolled steel from a variety of sources. Thus, the likelihood that prices could be driven to a point that would adversely affect both ArcelorMittal and Mittal USA is significant. In addition, the Commission now points to data from the importer questionnaires which reveal that imports from ArcelorMittal mills overseas were noticeably [[ ]] in interim 2007 than in interim

2006. *See* Remand Determination at 12 n.45; *see also* Mittal Steel NA, Importer Questionnaire at 11–13 (CR 155); Arcelor International, Importer Questionnaire at 10–11 (CR 137). Such evidence is consistent with Defendant's argument concerning the effects of ArcelorMittal's corporate policy of providing Mittal USA with the right to veto any imports from other ArcelorMittal production facilities. While it is true, as Plaintiffs point out,[9] that there are circumstances under which ArcelorMittal could conceivably increase its overall profits in the U.S. market even if doing so caused harm to Mittal USA, the mere plausibility of a set of given circumstances is insufficient to overcome the high barrier to reversal of an agency determination. ArcelorMittal's fiduciary obligations to its shareholders and its role as corporate parent are not mutually exclusive. The welfare of one does not inevitably result in the demise of the other, and Plaintiffs' have offered only innuendo and speculation as evidence to the contrary. The ITC's reliance on testimony from ArcelorMittal officials about the policies and practices of which these witnesses have first hand knowledge cannot be considered unreasonable. Therefore, all the agency has done is reach an alternate conclusion based upon data it has assigned greater evidentiary weight.

In its prior opinion, the Court voiced concerns over the sufficiency of the ITC's explanation for its findings on ArcelorMittal's likely behavior upon revocation of the orders at issue here. On remand, however, the Commission has proffered additional grounds on which it based its original decision. This explanation is sufficient to meet the ITC's burden of offering a rational basis between the facts found and the choices made. Accordingly, the Court finds the Commission's determination, in this regard, to be supported by substantial evidence and otherwise in accordance with law.

2. *Regional Imports and Pricing Practices*

A. The Commission's Determination on Remand

This Court previously objected to the basis cited for the Commission's determination that significant imports into any region of the country are likely to have a disruptive impact on the overall U.S. market, and that any price impact on Mittal USA's competitors would also negatively impact Mittal USA. *Nucor*, 33 CIT at ___, 605 F. Supp. 2d 1361, 1379. The Court explained that the "only data" cited by the Commission in support of its conclusions was "a chart listing produc-

[9] The two hypothetical scenarios provided by U.S. Steel demonstrate that there are a number of potential combinations of prices and costs that could incentivize the importation of hot-rolled steel from the subject countries. *See* U.S. Steel Comments at 11.

ers and importers by region," and that with nothing more to rely upon, the Commission's volume determination could not be sustained. *Id.* (*citing Final Determination* at Table II–1 (PR 453)). The Court also pointed to the testimony of "an executive of ArcelorMittal that its imports may affect competitors in this market who are in different geographies or serve different market segments, and so on." *Id.* Accordingly, the Court instructed the Commission to reassess and further substantiate its findings. *Id.* 33 CIT at ___, 605 F. Supp. 2d 1361, 1381.

On remand, the Commission explained that the record does not reveal any regional markets within the United States to which ArcelorMittal could direct subject imports while maintaining stability in the U.S. market overall and protecting its domestic subsidiary from harm. Remand Determination at 17. The Commission obtained additional information from Mittal USA during the remand proceeding and concluded that "the record does not indicate any gaps in Mittal USA's geographic coverage." *Id.* at 17.

Additionally, the Commission obtained nationwide pricing data for hot-rolled steel and determined that while prices in the United States show some regional variation (owing to freight costs and distances between producers and purchasers), the prices in the different regions show a high degree of correlation. *Id.* at 19. The Commission therefore concluded that even if ArcelorMittal were to bring subject imports to a region of the United States where Mittal USA does not produce hot-rolled steel, "any significant influx of imports into a particular region that would cause a regional price dislocation would affect prices nationwide — including those in the regions where Mittal USA does operate mills." *Id.* at 20.

Finally, the Commission again considered whether there was any evidence that ArcelorMittal might manufacture niche products in the subject countries that it could import to compete with Mittal USA's competitors. In concluding that this was unlikely, the ITC pointed to three pieces of evidence. First, in the *Final Determination*, the ITC found a high degree of interchangeability between the products, regardless of source. *Id.* at 21. Second, there were no purchasers of hot-rolled steel that indicated in response to ITC questionnaires that Kazakhstan, Romania or South Africa were the source of any unique niche products. *Id.* Finally, witnesses for Nucor and U.S. Steel could not identify any niche products that ArcelorMittal is manufacturing in the subject countries. *Id.*

B. Parties' Arguments

In response, Plaintiffs point to the testimony of witnesses Louis Schorsch and [[ ]]. Schorsch testified that subject imports "may affect competitors in this market who are in different geographies or serve different market segments, and so on." Nucor Comments at 13; U.S. Steel Comments at 20. Whereas [[ ]] suggested that ArcelorMittal is capable of supplying particular market segments or geographic regions that Mittal USA would be unable to supply. Nucor Comments at 13; U.S. Steel Comments at 20–21. Plaintiffs are of the opinion that these statements work as something of an admission against interest by ArcelorMittal, and should be dispositive on the ITC's likely volume determination.

Both Nucor and U.S. Steel, once again, rely on the hypothetical scenarios purporting to show how ArcelorMittal could benefit financially from importing subject goods, in spite of having a large domestic presence in the U.S. market. Nucor Comments at 15; U.S. Steel Comments at 25. Nucor also emphasized that a "large percentage of Mittal USA's domestic sales are sold on a contract basis." Nucor Comments at 16. Nucor reasoned that if a [[ ]] amount of production by Mittal USA is already accounted for by long-term contracts, then Mittal USA is only competing on the spot market for a portion of its overall production, making it easier to import subject goods without harming itself. *Id.*

Friend of the Court Mittal USA rebuts Plaintiffs' arguments by invoking the pricing data and customer list Mittal USA provided to the Commission on remand which demonstrated "largely identical" prices by region, and a "widespread" customer base. ArcelorMittal USA Rebuttal Comments ("Mittal USA Rebuttal Comments") at 8. Mittal USA also provided evidence of its "actual business practices" of "ensur[ing] that prices in a geographic region that might be served by imports of an affiliate were consistent with prices in other regions in which Mittal Steel USA was selling, and did not disrupt U.S. market prices." *Id.* at 9.

Defendant, ITC, rebuts Plaintiffs' arguments by pointing out that it explicitly considered the testimony of the two ArcelorMittal executives in its Remand Determination. ITC Rebuttal Comments at 16 (*citing* Remand Determination at 17). Defendant points out that neither of the witnesses affirmatively declared that there *were* "U.S. regional markets or specialty products that Mittal USA could not serve or supply," but instead had phrased their comments "in the conditional." Id. The Commission also defended its consideration of the niche products argument by pointing out that neither Nucor nor U.S. Steel identified "any hot-rolled steel products that they produce,

but Mittal USA does not." Id. at 20. The ITC found this inability of Plaintiff and Plaintiff-Intervenor to be weighty, and thereby concluded that "there are no such actual products." *Id.*

C. Analysis

The Court finds that there is substantial evidence in the record to support the Commission's finding that significant imports in any region of the country are likely to have a disruptive impact on the overall U.S. market. The strongest evidence that the ITC points to in support of this finding consists of pricing data submitted by Mittal USA on remand. The ITC analyzed the regional price data in pairs, and concluded that the correlation coefficient for prices between the West and Midwest, the Midwest and Gulf, and the Gulf and the West, each exceeded 0.98, respectively. Remand Determination at 20 n.69. It is true that the ITC's analysis does not include any empirical historical observation of the actual national price effect of some burst of regionally-confined imports in the past. As such, it would be difficult to state with absolute certainty what effect an influx of regionally-confined imports would have on nationwide prices. However, the Commission did not attempt to make such a bold prognostication. Instead, it merely concluded that "any significant influx of imports into a particular region *that would cause* a regional price dislocation *would affect* prices nationwide." *Id.* at 20 (emphasis added). The Court finds that a reasonable mind would accept the high level of correlation between regional prices as adequate support for this conclusion, formed as a conditional statement, and therefore constitutes substantial evidence within the meaning of the standard of review. *See Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374.

The Court finds that there is also substantial evidence in the record to support the Commission's finding that pricing practices that would negatively impact Mittal USA's competitors are likely also to impact Mittal USA. Specifically, the Court notes the evidence indicating that there are no regional markets in the United States to which ArcelorMittal could direct imports while maintaining stability in the U.S. market and protecting its domestic subsidiary from harm. On remand, Mittal USA submitted a chart purporting to show domestic shipments of hot rolled steel more than 1000 miles from Chicago. *See* ArcelorMittal Factual Submission on Remand, Ex. 6, (CR 433R). This chart indicates that between 2005 and the first quarter of 2007, Mittal USA shipped hot rolled steel to 12 continental states that have some portion of land further than 1000 miles from Chicago. *See id.* The chart clearly indicates that Mittal USA's domestic shipments reach all regions of the United States. The Court further notes the

Producers' Questionnaire, filled out by Mittal USA, explicitly indicates that every geographic market area in the United States is served by the firm's hot-rolled steel. *See* Mittal USA Producers' Questionnaire, Part IV–B–9 (CR 126). The Court finds that taken together, the questionnaire response and chart constitute more than a mere scintilla of evidence in support of the ITC's conclusion that there are no regions of the U.S. where ArcelorMittal could import hot rolled steel, to which Mittal USA does not already ship domestically. *See Altx, Inc.*, 370 F.3d at 1116.

The Court also finds that the arguments advanced by Plaintiff and Plaintiff-Intervenor do not effectively undermine the Commission's conclusion. Specifically, the ITC has given appropriate consideration to the testimony of Louis Schorsch and the affidavit of [[ ]] which are the subject of much ado by Plaintiffs. *See* Remand Determination at 16–17. Not only is it inappropriate for the Court to re-weigh this evidence, or to require the ITC to do so, but when the statements are viewed in context, it is clear that they do not amount to the veritable admissions against interest as Plaintiffs suggest. [10] As for Plaintiffs' contentions that "a large percentage" of Mittal USA's sales are made pursuant to contract, and therefore do not compete on the spot market; the Court notes Plaintiffs' own concession that, "large percentage" or not, [[ ]] of Mittal USA's sales *do* compete on the spot market—a percentage large enough to ensure Mittal USA's ongoing concern with spot market prices. Nucor Comments at 16. In sum, the Court sustains this aspect of the ITC's volume determination as supported by substantial evidence and otherwise in accordance with law.

3. *Prior Business Practices*

A. The Commission's Determination on Remand

In its remand instructions, the Court required the Defendant to further explain the behavior of ArcelorMittal and its predecessor company, Ispat International, with respect to their past practice of exporting to countries in which they maintained production facili-

[10] Schorsch prefaces his statement about the effect imports may have on ArcelorMittal's competitors by explaining that import decisions are made in a way that ensures the price and volume levels will not disrupt Mittal USA's domestic operations. *See* Administrative Record, Tr. at 219 (PR 253) [[ ]] statement about the decision to permit ArcelorMittal International to serve certain geographic regions outside of Mittal USA's scope was framed strictly in the hypothetical. *See* ArcelorMittal Factual Submission on Remand, Ex. 8, ¶ 6 (CR 433R).

ties.[11] Consistent with its earlier findings, the Commission determined that the record does not support an inference that ArcelorMittal will likely make significant shipments of hot-rolled steel from its low cost production facilities into the U.S. market. *See* Remand Determination at 26. Unlike its previous position, however, the ITC does not rely solely on a market share analysis of Ispat and its affiliates. Instead, the Defendant identifies changes in the policy, structure and export trends of the ArcelorMittal organization since the original period of investigation.

B. Parties' Arguments

On remand, the Commission offers three distinct evidentiary points as the basis for its determination. First, Arcelormittal exerts a more centralized system of control over its exports from affiliated producers than did its predecessor Ispat International. *See* Remand Determination at 23. According to the ITC, this is an important change in the evolution of Mittal USA and distinguishes its practices from those of Ispat. After the formation of ArcelorMittal the newly formed entity continued the policy, [[ ]] of not using third-party trading companies.[12] *See id.* Prior to the adoption of this policy, whereby Ispat — and ultimately ArcelorMittal — became the solitary sales agent for corporate affiliates abroad, imports of subject merchandise from these affiliates were not controlled by the corporate parent. *See id.* The efficacy of this policy, argues Defendant, is evidenced by the decrease in quantity of hot-rolled steel imported by Ispat from Kazakhstan during the original period of investigation. Because Ispat was responsible for approximately [[ ]] of the imports from Kazakhstan in 1998, but only [[ ]] of those imports in 2000, the increase in subject imports during the original period of investigation was due not to Ispat, but rather the third-party traders that the new corporate policy was intended to eliminate. *Compare* Final Staff Report at Table I–1 (CR 376) (U.S. import data from Kazakhstan during original period of investigation), with ArcelorMittal Factual Submission on Remand, Ex. 5 (CR 433R) (breakdown of hot-rolled steel imports from Kazakhstan by Ispat during the original period of investigation); *see also* Remand Determination at 23–24.

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[11] During the original period of investigation, Ispat International owned Ispat Inland, Inc. (a U.S. producer) as well as Ispat Karmet, the only hot-rolled steel producer in Kazakhstan. Within this period, U.S. imports from Kazakhstan went from 130,329 short tons in 1998 to 192,470 short tons in 2000, an increase of 47.7 percent. *See Final Determination* at I–8 (TableI–1) (PR 453).

[12] [[ ]] Remand Determination at 23.

Second, the Commission restates its previous position that Mittal USA has a [[ ]] larger presence in the U.S. market than did Ispat Inland, and that this larger market share provides a strong incentive to strictly adhere to its stated policy of maintaining market stability through the restriction of imports from affiliated producers. *See* Remand Determination at 24.

Finally, in accordance with the court's instructions, the ITC examined the pattern of Mittal USA's exports to Western Europe in light of the presence of other ArcelorMittal production facilities. The ITC can identify only one shipment of hot-rolled steel to a European country in which ArcelorMittal maintained a presence, a single 12,000 ton shipment to Belgium.[13] *See* Remand Determination at 25. Therefore, the Commission argues, the record does not support the inference that ArcelorMittal will likely export significant shipments of subject merchandise to countries in which it operates hot-rolled steel production facilities. *See id.* at 26.

In Plaintiffs' first assertion of error, they posit that the behavior of the Ispat organization prior to the assignment of the antidumping and countervailing duty orders is "far more probative" of ArcelorMittal's future behavior than crediting a policy instituted after the orders were put in place. U.S. Steel Comments at 28. Therefore, Plaintiffs argue, the Commission is in error to give more weight to policies made effective after the institution of relief as opposed to those actions taken when the subject countries had unlimited access to the U.S. market — a condition that would be replicated if the orders are revoked. *See id*. For example, the 47.7 percent increase in imports of hot-rolled steel by Ispat from Kazakhstan, during the original period of investigation, is identified by Plaintiffs as evidence of the likely future behavior of ArcelorMittal based upon the theory that should the orders be revoked, ArcelorMittal will similarly increase the volume of hot-rolled steel exported to the U.S. market. *See* Nucor Comments at 17.

Next, Plaintiffs challenge the ITC's conclusion that the record is limited to only one specific instance in which ArcelorMittal exported hot-rolled steel to a European country wherein it maintained a production facility. As alleged by Plaintiffs, "the record actually contains very significant evidence about Mittal USA's exports to Europe." U.S. Steel Comments at 29. The evidence to which Plaintiffs refer includes two press releases; one in which Mittal USA acknowledges the previously identified 12,000 ton shipment to Belgium; and another describing Mittal USA's intention to become an active exporter of steel.

[13] Because the questionnaires relied on by the Commission did not break down export quantities by destination, there is a dearth of record evidence on this point.

See U.S. Steel's Post-Hearing Brief, Ex's. 15, 16 (PR 328). The third piece of evidence Plaintiffs cite to is the testimony of Louis Schorsch who speaks briefly about exports to Western Europe. *See* Administrative Record, Tr. at 334 (PR 253). Plaintiffs suggest that this evidence is indicative of ArcelorMittal's intention to take advantage of the relatively attractive market conditions in the U.S. even if that market contains another ArcelorMittal facility. *See* U.S. Steel Comments at 30.

Lastly, Plaintiffs discount the Commission's reiteration of its market analysis claim, arguing that it is essentially the same explanation rejected by the Court in its previous opinion. *See* U.S. Steel Comments at 27; Nucor Comments at 18.

C. Analysis

In evaluating whether the likely volume of subject imports will contribute to the recurrence or continuation of material injury within a reasonably foreseeable time, the ITC is statutorily required to take into account numerous factors including its previous injury determination conducted prior to the order being issued. *See* 19 U.S.C. § 1675a(a)(1)(A). As the Statement of Administrative Action accompanying the statute explains, the purpose of this inquiry is to examine the most recent period of time in which subject imports competed without the discipline of an antidumping or countervailing order in place. *See* Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. 5110 (H.R. Doc. No. 103–316), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209. Section 1675a(a)(1)(A) does not, however, require a "full blown reconsideration" of the original injury determination in a sunset review. *See Consolidated Fibers, Inc. v. United States*, 30 CIT 1820, 1823, 465 F. Supp. 2d 1338, 1341 (2006). Instead, that provision simply requires the Commission take into account its findings as to volume, price, and impact of subject imports prior to the institution of an order. Neither the statute nor its legislative history direct the ITC to distinguish every factor of its original investigation findings from those made in a sunset review. Presently, the ITC did not disregard the findings from its original investigation, but rather cited to such findings repeatedly. *See, e.g.*, Remand Determination at 22–25. The Commission discussed its negative determination in terms of the likely volume of imports from the subject countries while incorporating and distinguishing various aspects of the original investigation. *See id.* at 21–26. Therefore, Plaintiffs' claim that the behavior of ArcelorMittal's predecessor, Ispat, is far more probative than the current practices of the corporation and its affiliates, merely replicates their previous position urging the Court

to re-weigh the evidence considered by the Commission. Once again, the Court is disinclined to accept Plaintiffs' invitation to displace the agency's interpretation of that evidence with its own.

The Court rejects Plaintiffs' argument on additional grounds. Namely, that they have pointed to no evidence impeaching the credibility of the data relied on by the Commission. Other than the single 12,000 ton shipment to Belgium, the press reports cited by Plaintiffs make no mention of any actual exports of hot-rolled steel to a country with an ArcelorMittal affiliate. At most, the statements relied upon by Plaintiffs indicate a willingness on the part of Mittal USA to expand its export activity to parts of Western Europe, which may or may not include countries in which ArcelorMittal has a production facility. Such vague and circumstantial evidence is simply insufficient to overcome Plaintiffs' high burden in this case. In this way, the witness testimony, e-mail correspondence and producer's questionnaire utilized by the Commission in making its determination must preponderate. Accordingly, the Court holds that the ITC adequately investigated and explained the basis for its finding that the prior business practices of ArcelorMittal's predecessor, Ispat International, do not support an inference that ArcelorMittal will likely make significant export shipments to other countries in which it operates hot-rolled steel production facilities.

4. *Neglected Volume Considerations*

A. The Commission's Determination on Remand

This Court previously found that there were several pieces of evidence in the record that had not been properly considered by the Commission in its initial sunset review determination, and that if considered, may have weighed against revoking the relevant orders. On remand, the ITC was instructed to "reassess and further explain evidence opposed to the ITC's volume determination, including excess capacity, export orientation of the Mittal Countries' producers, attractiveness of the U.S. market, and capacity increases in alternative export markets." *Nucor*, 33 CIT at ___, 605 F. Supp. 2d 1361, 1382.

With respect to excess capacity of the subject countries, the Commission determined that while the Court had correctly identified excess capacity at the end of the period of review, it was not persuaded that the subject producers could or would utilize that capacity. Remand Determination at 26–27. In support, the Commission pointed out that through the duration of the period of investigation and the period of review, capacity utilization remained well below maximum. *Id.* at 27. On this basis, the Commission concluded that the subject producers' excess capacity is nothing more than "theoreti-

cal." *Id.* The Commission also concluded that "ArcelorMittal lacks the incentive to increase capacity utilization . . . in light of its corporate policies." *Id.* at 28. Moreover, the excess capacity of the subject countries is [[ ]] and Mittal USA has shown higher levels of capacity utilization as well. *Id.*

With respect to export orientation of the subject countries, the ITC found that exports, when viewed as a proportion of total shipments, remained "relatively stable throughout the period of review, ranging between [[ ]] percent and [[ ]] percent during the six calendar years." *Id.* at 28–29. The Commission found that these percentages did not "signify that the subject industries are heavily export-oriented." *Id.* at 29. The ITC also noted that the majority of these subject producers' exports were directed to regions outside the U.S.: from Kazakh and Romanian producers to [[ ]], from Romania to [[ ]], and from South Africa [[ ]] *Id.* at 29 n.104.

With respect to the attractiveness of the U.S. market, the Commission included a footnote in its remand determination acknowledging that the U.S. market has a "relatively open nature" and "higher prices than some other world markets." *Id.* at 29 n.105. However, the Commission reasoned that in light of ArcelorMittal's U.S. and Canadian operations and stated corporate policies, the attractiveness of the U.S. market was unlikely to incentivize the subject producers to target the U.S. market. *Id.*

With respect to capacity increases in export markets, specifically China, the ITC's finding was twofold. First, China had not been a primary export market for any of the subject producers before it shifted from being a net-importer to being a net-exporter, so the subject countries did not lose an export market as a result of China's shift. *Id.* at 29. Second, the ITC found that the subject countries' primary export markets were not in southeast Asia, where it reasoned China would be directing most of its exports. *Id.* Consequently, the ITC determined that the subject countries did not face increased competition from China as a result of China's shift in status from net-importer to net-exporter. *Id.* at 29–30.

B. Parties' Arguments

Plaintiffs focus their remand comments on excess capacity by highlighting what appears to be large excess capacity in the subject countries. Nucor points out that the subject countries experienced a "nearly [[ ]] increase in capacity" during the period of review, which, in absolute terms, is "[[ ]] volume of subject imports from the Mittal Countries during the last year

of the period of investigation." Nucor Comments at 20. Accordingly, Nucor asserts that the Commission's conclusion that the subject countries have experienced "'at most incremental growth in capacity and incremental declines in capacity utilization in the subject countries,'" is fallacious. *Id.* (*quoting* Remand Determination at 8); *see also* U.S. Steel Comments at 31–35.

Nucor also takes issue with the Commission's characterization of the subject countries' excess capacity as merely "theoretical." Nucor Comments at 21. Nucor argues that data relating to excess capacity was obtained by questionnaires which "specifically instructed the Mittal country producers to report actual, not theoretical, capacity, and [that] there is no evidence to suggest that they did not report actual capacity." *Id.* U.S. Steel points out that the questionnaire instructions specifically request that the respondent provide "'[t]he level of production that [the producer] could reasonably have expected to attain during the specified periods.'" U.S. Steel Comments at 15 (*quoting* Foreign Producer Questionnaire Instructions at 8 (PR 132)).

Nucor and U.S. Steel also both push back on the Commission's finding about the export orientation of the subject countries. Nucor argues that Romania, Kazakhstan and South Africa export a "[[ ]] of total shipments than [[ ]] and [that] in its affirmative determination for China, India, Indonesia, Taiwan, Thailand, and Ukraine, the Commission relied on subject producers' export orientation to support continuation of the orders." Nucor Comments at 22–23. Nucor claims that it is "arbitrary for the Commission to cite a particular factor in support of continuation in one instance, but discount it entirely in another wherein the evidence in support is greater." *Id.* at 23. U.S. Steel argues that the figures the Commission identified as reflecting the proportion of subject producers' export shipments to total shipments ([[ ]] percent), are misleading because [[ ]] U.S. Steel Comments at 32–33. U.S. Steel claims that the proportion of export shipments to commercial shipments suggests [[ ]] *Id.* at 33.

With respect to the attractiveness of the U.S. market, U.S. Steel charges that the extent of the Commission's treatment of this issue — a footnote — is insufficient. *Id.* at 33–34. And last, U.S. Steel challenges the Commission's remand determination on the capacity increases of alternative export markets, namely, China. U.S. Steel claims that in 2006, [[ ]] percent of exports from the

subject producers "went to Asian markets other than China." *Id.* at 35. In the same year, of "the Chinese producers who responded to the Commission's questionnaire" 57.7 percent of their exports were shipped to this same market. *Id.* U.S. Steel thereby concludes that Chinese producers are focused on a market that is critical to producers in the Mittal Countries. *Id.*

In its rebuttal comments, the Commission reiterated that during the nine-year period examined by the ITC, [[ ]] tons of excess capacity in the subject countries was never utilized. ITC Rebuttal Comments at 26. The ITC also acknowledged that U.S. Steel is correct in pointing out that a relatively large portion of the subject countries' shipments were exports, but pointed out that this proportion of exports during the period of review remained "relatively stable." *Id.* The Commission attempted to defend its characterization of the subject countries' excess capacity as "theoretical" by emphasizing that in using that term, it only meant to draw attention to the fact that the subject producers have no history of operating at full capacity, and are unlikely to do so in the near future. *Id.* at 27. Moreover, the ITC asserts that the mere existence of excess capacity in the subject producers "is insufficient to mandate a finding of significant likely subject import volume." *Id.* at 28 (*citing Nucor Corp. v. United States*, 32 CIT ___, 569 F. Supp. 2d 1328, 1349 (2008)).

With respect to U.S. Steel's arguments about the effect of China on the subject producers, the ITC points out that it considered China's production extensively, and determined that the subject producers' exports to third countries were not affected by increasing exports from China. *Id.* at 28–29. The Commission also extensively and repeatedly emphasized its belief that ArcelorMittal will abide by corporate policies to have producers focus on local markets, to limit production to promote market stability, and to permit Mittal USA veto power over subject imports. *See generally id.* at 26–31. The Commission concludes by accusing Nucor and U.S. Steel of wanting the Court to do nothing more than re-weigh the evidence that the Commission already considered. *Id.* at 31.

C. Analysis

The Court shares Plaintiffs' concerns about the Commission's characterization of the excess capacity of the subject countries as "theoretical," to the extent that this suggests that subject producers are incapable of utilizing the excess capacity that they have reported. *See* Remand Determination at 27. As U.S. Steel pointed out, the subject producers were explicitly instructed to provide data about the level of production that the producer "could reasonably have expected to

maintain during the specified periods." Foreign Producer Questionnaire Instructions at 9. Moreover, closer inspection of the Foreign Producer Questionnaire responses provided by the Mittal affiliated producers in Romania, South Africa and Kazakhstan confirms that all three producers complied with that instruction. In their responses, each Mittal affiliated subject producer indicated that production capacity had been adjusted downward to take into account lost production time due to planned and unplanned repairs, delays, maintenance and other shutdowns. *See* Foreign Producer Questionnaire of Mittal Steel Galati at Ex. 3 (CR 113); Foreign Producer Questionnaire of Mittal Steel South Africa at 23 (CR 78); and Foreign Producer Questionnaire of Temirtau at 15 (CR 145). In light of what appear to be carefully calculated responses, the ITC's characterization of subject producer excess capacity as merely "theoretical" is problematic.

Presumably, the purpose of the Commission's query into subject producer excess capacity during a sunset review is to determine whether the subject producers would be capable of ramping up production if the orders are permitted to expire. While a report of little or no excess capacity would weigh in favor of permitting the antidumping orders to sunset, a report of significant excess capacity may be a legitimate cause of concern for the domestic industry. The Commission should not seek to diminish the weight of reported subject producer excess capacity by characterizing it as "theoretical," and thereby implying that the subject producers are somehow incapable of utilizing their reported unused capacity. The numbers speak for themselves.

Nevertheless, the Court's objection is primarily with the Commission's terminology. The excess capacity figures do not suggest that the subject producers are *incapable* of expanding output, but when considered in light of historically low capacity utilization rates, there is reason to believe that the subject producers are *unlikely* to expand output, even upon revocation of the orders. Moreover, the Court also finds significant that the scale of the subject producers' excess capacity is [[ ]] by the excess capacity of Mittal USA. *See* Remand Determination at 28. Given ArcelorMittal's policy to source locally, these figures support the Commission's conclusion that dumping or injury is not likely to recur if the orders are revoked.

With respect to export orientation of the subject producers, the Court finds that the arguments of Plaintiff and Plaintiff-Intervenor are ineffective. First, U.S. Steel's contention that the percentages cited by the Commission [[

]] rather than of total shipments, as the Com-

mission claims, is untrue. *See* U.S. Steel Comments at 32. Based on the data found in the Final Staff Report at Tables IV–31, IV–35, and IV–40, the Court finds that the percentage of exports as a share of total shipments does, indeed, range from [[ ]] percent.[14] Moreover, U.S. Steel fails to offer a compelling reason why this figure does not accurately represent the extent to which the subject producers are export oriented, and why the better ratio to consider is total exports to total commercial shipments. Surely, the volume of production that is internally consumed is pertinent to the question of how export-oriented a particular producer is.[15]

Turning to Plaintiff's concerns regarding export orientation, the Court is similarly unconvinced. Plaintiff is correct that in the Commission's initial sunset review determination, the ITC referred to the hot-rolled steel industries of Kazakhstan, Romania, and South Africa, along with the six other countries for which antidumping orders remained in place, as "export[ing] a large percentage of total shipments." Views of the Commission at 20 (CR 427). Context, however, is everything. In this portion of its opinion, the Commission was deciding whether or not to cumulate the respective subject countries for the purposes of the sunset review. *See id.* at 13–29. Specifically, as a part of that inquiry, the Commission was addressing the question of whether the subject imports "are likely to have no discernible adverse impact on the domestic industry in the event of revocation of orders covering those imports." *Id.* at 20. The Commission characterized the percentage of exports from the Mittal Countries as "large" in the course of deciding that imports from the Mittal Countries were *not* likely to have no discernible adverse impact. In other words, because of the specific question the Commission was addressing at the cumulation stage, the bar had been set low. The Court finds that it is not

[14] Total shipments is a composite figure that includes internal consumption, commercial home market shipments, and total exports. The figure for total shipments is usually close to, but not identical to total production, the difference owing primarily to carryover end of period inventories. In [[ ]], the total exports from the Mittal countries totaled [[ ]] short tons, while total shipments from the Mittal countries totaled [[ ]] short tons, for a ratio of [[ ]] percent. In [[ ]], by comparison, the total exports from the Mittal countries totaled [[ ]] short tons, while total shipments from the Mittal countries totaled [[ ]] short tons, for a ratio of [[ ]] percent. *See* Final Staff Report at Table IV–31, IV–35, and IV–40 (CR 376).

[15] For example, suppose 98% of a subject producer's total shipments was internally consumed, 2% of total shipments were exported, and nothing was shipped commercially to the home market. Under U.S. Steel's reasoning, such a producer would be considered extremely export dependent, because *all* of its commercial shipments are being exported. However, under the Commission's more logical analysis, it is clear that such a producer is not that export-dependent at all, exporting a mere 2% of total shipments.

arbitrary, nor even inconsistent to characterize export percentage as "large" because a country's exports are not likely to have no discernible adverse impact, and then subsequently, to find that the same country is not "heavily export-oriented" when those percentages fall in the range of [[ ]] percent[16]. *See id.*; *see also* Remand Determination at 28–29.

Next, the Court considers the argument of Plaintiff-Intervenor with respect to the attractiveness of the U.S. market. Ultimately, the Commission has credited the testimony and data provided by ArcelorMittal regarding its corporate policies to source hot-rolled steel locally and to provide the domestic subsidiary veto power over imports. Because the Court has already found that the Commission's acceptance of ArcelorMittal's stated corporate policies is supported by substantial evidence and otherwise in accordance with law, the Court is satisfied with the agency's explanation of the attractiveness of the U.S. market. *See* Discussion IV.1.C., *supra*.

On the issue of China's shift from net-importer to net-exporter status, this Court's previous instructions to the Commission consisted essentially of a requirement to address, and at a minimum, to explain why China is irrelevant with respect to the Mittal Countries. The Court finds that in the Commission's Remand Determination, it has thoroughly considered the evidence about the shift in China's import/export patterns. *See* Remand Determination at 29–30. The Court agrees that the arguments of the Plaintiff-Intervenor on this issue amount to nothing more than a desire to re-weigh the evidence. While it is true that comparable percentages of exports are directed to Asian markets other than China from the Mittal Countries, on one hand, and from China, on the other, the Court does not *see* reason to disturb the Commission's volume determination on that basis. For the foregoing reasons then, the Court finds that the Commission's determination regarding excess capacity, export orientation, the attractiveness of the U.S. market and China's shift from net-importer to net-exporter status to be supported by substantial evidence in the record and otherwise supported by law.

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[16] The Court also notes that export orientation is not considered in isolation, and that the percentages discussed above are meaningless apart from considering absolute volumes. While Kazakhstan, Romania and South Africa may have larger percentages of exports to total shipments than the other six countries, in 2006, total export volumes of the three countries was[[ ]] short tons, while the export volume of the other six countries was [[ ]] short tons. *See* Final Staff Report at Table IV–31, IV–35, and IV–40 (CR 376); *see also* Views of the Commission at 50 (CR 427).

5. *Potential Price Effects*

A. The Commission's Determination on Remand

The Court predicated its remand instructions on the potential price effects of the subject imports on the correlative effects of the Commission's faulty volume analysis. Because the relationship between the imports' potential price effects and their volume is obvious, it logically follows that likely volume findings deemed unsupported by substantial evidence would impact the agency's conclusions with regard to price effects. As a result, the ITC was ordered on remand to reassess its potential price effects analysis in accordance with the agency's revised volume determination.

Consistent with its decision in the *Final Determination*, the ITC concluded that upon revocation of the antidumping and countervailing duty orders, the likely volume of subject imports will be small, and in light of ArcelorMittal's efforts to price these imports in a manner so as not to disrupt the U.S. market for hot-rolled steel, there will not likely be significant underselling of hot-rolled steel from the subject countries. *See* Remand Determination at 32; *see also Final Determination* at 46.

B. Parties' Arguments

Both Nucor and U.S. Steel advance arguments that are grounded on the assumption that the Commission's likely volume finding cannot be sustained. As such, Plaintiffs aver, that finding cannot support the agency's likely price effects analysis. *See* U.S. Steel Comments at 36; Nucor Comments at 23. Nucor further alleges that the ITC disregarded significant pricing evidence, and cites to data from the *Final Determination* demonstrating that the average unit values[17] ("AUVs") of the subject countries' home markets and third country exports were [[ ]] than the AUV of U.S. commercial shipments during the period of review. *See* Nucor Comments at 23–24 n.9. Thus, Nucor maintains, the potential for significant underselling of hot-rolled steel in the U.S. market combined with the Commission's recognition that even moderate levels of undersold merchandise will have a significant price suppressing or depressing effect, undermines the ITC's analysis. *See id.* at 24.

The Commission bases its price effects determination primarily on the reaffirmation of its likely volume analysis. That is to say, while ArcelorMittal may import modest levels of hot-rolled steel into the

[17] Average unit values are computed by multiplying, the price of each product times the quantity sold, adding these figures, and then dividing by the total number of products sold. *See United States Steel Group*, 96 F.3d at 1364.

U.S. from its overseas affiliates, the volume of such imports would not be significant. Moreover, Defendant claims, the stated policy of ArcelorMittal is to ensure that when the company did import products from its affiliates [[

]] Remand Determination at 32.

C. Analysis

Having already found that the Commission's likely volume determination is supported by substantial evidence and otherwise in accordance with law, the Court rejects Plaintiffs' arguments regarding the sufficiency of the agency's price effects analysis. In addition, Plaintiffs' complaint about the ITC's assessment of the pricing evidence is clearly in error. Far from being dismissive of the pricing data, the Commission cited to this information in the explanation of its price effects determination. *See* Remand Determination at 31–32. In fact, the ITC specifically discussed the underselling data from both the original period of investigation and the five-year review. *See id.* While acknowledging the instances of underselling which form the basis of Nucor's claim, the ITC concluded that this evidence was not dispositive when examined against the backdrop of ArcelorMittal's practices regarding imports from affiliated firms. To be sure, this evaluation of the evidence is more than mere conjecture, and the agency's decision is reasonably discernible to the Court. *See NSK Corp. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1311, 1318 (2009) (*citing NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009)). Therefore, the Court finds that the Commission sufficiently explained its price effects findings in the context of its likely volume determination as mandated by the Court. As a result, the Commission's determination is supported by substantial evidence and otherwise in accordance with law.

6. *Likely Impact*

A. The Commission's Determination on Remand

The Court instructed the Commission on remand to reconsider its likely impact determination in light of its revised volume and price effects determinations. *Nucor*, 33 CIT ___, 605 F. Supp 2d 1361, 1383. The Commission was also required to "account for and explain the poor performance of the domestic industry in the latter portion of the POR." *Id.* Because the ITC did not reach a different conclusion on either the volume issue or the price effects issue, it similarly concluded that the subject imports were not likely to have a significant impact on the domestic industry. Remand Determination at 33. The

Commission also attributed the domestic industry's poor performance in the latter portion of the POR to "flat or declining prices after 2006." *Id.* However, "[a]ll Commissioners who are joining this opinion concluded that the industry was not in a vulnerable condition, notwithstanding substantial performance declines in interim 2007, in light of its overall profitability since 2004." *Id.*

B. Parties' Arguments

Plaintiff Nucor responds to the Commission's likely impact determination simply by invoking its objections to the Commission's volume and price effects determinations, without raising any new objection. Nucor Comments at 24–25. Plaintiff-Intervenor U.S. Steel contends that in reaching an affirmative determination in the original sunset review on *certain* countries (not involved in this litigation), the Commission determined that imports from *those* countries would have a negative impact on the domestic industry. U.S. Steel Comments at 37. The Commission responds to Nucor's comments by pointing out that Plaintiff does not raise any new arguments on the likely impact analysis, and urges that the ITC should be affirmed. ITC Rebuttal Comments at 32–33.

C. Analysis

As the Court has already sustained the Commission's volume and price effects analyses, and upon hearing no compelling argument from Plaintiff or Plaintiff-Intervenor as to why the ITC's likely impact analysis is flawed, the Court finds that the likely impact analysis is supported by substantial evidence and is otherwise in accordance with law.

Conclusion

For all the reasons set forth above, the Commission's negative injury determination, reached on remand, is sustained in its entirety. Judgment shall be entered accordingly.

Dated: January 27, 2010
New York, New York

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

Slip Op. 10–11

UNITED STATES, PLAINTIFF, v. UPS CUSTOMHOUSE BROKERAGE, INC., Defendant.

BEFORE: JUDGE GREGORY W. CARMAN
Court No. 04–00650

[Held: At trial, Plaintiff failed to prove entitlement to recover monetary penalties imposed on Defendant customs broker. Having failed to show grounds for a rehearing, Plaintiff's request for an additional evidentiary proceeding is denied. Because the Court is designated by statute to decide the issues here, remand to Customs is not required. Discretionary remand would inappropriately allow Plaintiff to create a factual basis for recovery after trial, rendering Plaintiff's burden of proof meaningless. Judgment will issue in favor of Defendant.]

Dated: January 28, 2010

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jessica R. Toplin*); *Edward Greenwald*, of counsel, U.S. Customsand Border Protection, Department of Homeland Security, for Plaintiff.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Terence J. Lynam, Lars-Erik A. Hjelm, Natalya Daria Dobrowolsky, Lisa-Marie W. Ross, Thomas James McCarthy*), for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

This case comes before the Court on remand from the Court of Appeals for the Federal Circuit ("Court of Appeals"). The United States ("Plaintiff" or "government") brought this action pursuant to 28 U.S.C. § 1582(1) against Defendant, UPS Customhouse Brokerage, Inc. ("UPS"), seeking to recover monetary penalties of $75,000 imposed by the Bureau of Customs and Border Protection ("Customs") due to UPS's alleged failure to exercise responsible supervision and control over its customs brokerage business in violation of section 641(b)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(b)(4) (2000).

This Court has issued four prior decisions regarding the instant litigation, and the Court of Appeals has issued two. First, the Court denied Defendant's motion for partial summary judgment and Plaintiff's motion to strike. United States v. UPS Custom house Brokerage, Inc., 30 CIT 808, 442 F. Supp. 2d 1290 (2006) ("UPS I"). The Court certified an interlocutory appeal by Defendant, but the Court of Appeals denied permission to appeal. *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT 1612,464 F. Supp. 2d 1364 ("UPS II"),

appeal denied, 213 F. App'x 985, 986, 2006 WL 3913545, at *1 (Fed. Cir. 2006). Plaintiff subsequently filed a motion for summary judgment, which the Court denied. *United States v. UPS Customhouse Brokerage, Inc.*, 31 CIT 1023, 2007 WL 1894211 (2007) ("UPS III"). The Court thereafter conducted a bench trial, at the conclusion of which the Court found UPS liable for failure to exercise responsible supervision and control of its customs business, and entered judgment for the United States and against UPS. *United States v. UPS Customhouse Brokerage, Inc.*, 32 CIT ____, 558 F. Supp. 2d 1331 (2008) ("UPS IV"). UPS successfully appealed, and the Court of Appeals issued an opinion affirming in part, vacating in part, and remanding in part. *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376 (Fed. Cir. 2009) ("UPS V"). The Court of Appeals held that Customs was required to consider each of the ten factors specifically listed in 19 U.S.C. § 111.1 when determining that Defendant failed to exercise responsible supervision and control of its customs business as required by 19 U.S.C. § 1641(b)(4).[1] UPS V, 575 F.3d at 1382.

Because the Court of Appeals affirmed in part, vacated in part, and remanded in part this Court's post-trial opinion and judgment, the Court must now determine the appropriate action to be taken on remand. On November 5, 2009, the Court held a conference with counsel for the parties to discuss this question, and counsel submitted briefs to the Court on November 20, 2009.

In partially reversing this Court's judgment as to liability, the Court of Appeals stated: "Because Customs did not consider all ten factors listed in 19 C.F.R. § 111.1, its determination that UPS violated 19 U.S.C. § 1641 was improper." *Id*. at 1383. The decision of the Court of Appeals makes plain that "[a]n agency must follow its own regulations," and "Customs failed to do so." *Id.* at 1382–83. This Court, in turn, "erred in upholding [Customs]'s determination that UPS did not exercise responsible supervision and control in violation of 19 U.S.C. § 1641[.]" *Id.* at 1378. The Court "up[held Customs]'s determination" by entering a judgment permitting Plaintiff to recover a civil penalty under 28 U.S.C. § 1582(1), despite Plaintiff's improper underlying determination.

[1] The factors of responsible supervision and control listed in 19 C.F.R. § 111.1 are referred to in this opinion variously as the "ten factors," "§ 111.1 factors," or simply "factors." "Broker statute" refers generally to 19 U.S.C. § 1641, which sets forth requirements and procedures applicable to customs brokers, including the "responsible supervision and control" mandate at § 1641(b)(4) and a procedure to impose monetary penalties at § 1641(d)(2)(A). "Broker regulation" will refer generally to 19 C.F.R. Part 111, which *inter alia* defines "responsible supervision and control" and elaborates how Customs will implement the penalty procedure of § 1641(d)(2)(A).

As discussed fully below, Plaintiff did not establish at trial that Customs properly considered all ten § 111.1 factors. While the Court of Appeals' opinion made clear that Customs is required to consider the ten factors when imposing a monetary penalty upon a broker for lack of responsible supervision and control, the opinion did not identify which Customs official bears this responsibility. The Court concludes that the statute authorizing Customs to impose a monetary penalty for a § 1641(b)(4) violation requires that "the appropriate . . . customs officer shall" perform the consideration of the ten factors. *See* § 1641(d)(2)(A). Customs regulations indicate that the "appropriate customs officer" is usually the Fines, Penalties, and Forfeitures Officer ("FP&F Officer") for the relevant port. *See* 19 C.F.R. §§ 111.94, 171.31.[2] The trial record establishes that the FP&F Officer required to consider the ten factors in imposing the penalties at issue was Mr. Bert Webster. *See infra*, Analysis § II.C. Plaintiff, despite ample opportunity, did not present any evidence that Mr. Webster considered the ten § 111.1 factors. Nor did Plaintiff adduce evidence upon which the Court could have independently considered the ten factors. Therefore, Plaintiff failed to prove at trial that Customs complied with 19 C.F.R. § 111.1 when imposing the penalties at issue, and it is not entitled to recovery.

Plaintiff has not shown grounds for the granting of a further evidentiary hearing. Moreover, the evidence it has offered to present at such a proceeding could not, in any event, demonstrate proper consideration of the ten factors. For these reasons, Plaintiff's request to enter further evidence is denied. Contrary to Defendant's position, remand to Customs for further administrative proceedings is not required, because the Court is designated by statute to decide the issues in this case. Additionally, discretionary remand under 28 U.S.C. § 2643 would inappropriately permit Plaintiff to create—*after* the conclusion of the trial—a factual basis for recovery, rendering Plaintiff's burden of proof meaningless. The Court therefore denies the request for remand. Judgment will issue for Defendant.

[2] As discussed further below, the Commissioner of Customs is the appropriate officer in rare circumstances that the evidence indicates were not present here. *See* 19 C.F.R. § 171.31.

Background

I. *Post-Trial Opinion and Court of Appeals Opinion*

A. Relevant Issues in the Court's Post-trial Opinion and Judgment

Following trial de novo, the Court issued an opinion finding that Plaintiff had proven by a preponderance of the evidence that UPS misclassified 42 specific entries of merchandise under subheading 8473.30.9000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). UPS IV, 558 F. Supp. 2d at 1349. The Court further found that, under the circumstances proven at trial, the misclassifications constituted a failure by UPS to comply with 19 U.S.C. § 1641(b)(4). *See* UPS IV, 558 F. Supp. 2d at 1352–54. Section 1641(b)(4) states in full that "[a] customs broker shall exercise responsible supervision and control over the customs business that it conducts." 19 U.S.C. § 1641(b)(4) (2000).

Core to this holding was this Court's interpretation of 19 C.F.R. § 111.1, the Customs regulation which defines the term "responsible supervision and control" as it appears in § 1641(b)(4). The operative definition is given as follows:

> "Responsible supervision and control" means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide.

19 C.F.R. § 111.1 (2000). Describing how that definition will be employed by Customs, the regulation states that "the determination . . . will vary depending upon the circumstances in each instance," and "factors which Customs will consider include, but are not limited to" a list of ten factors specifically set forth:

> [1.] The training required of employees of the broker; [2.] the issuance of written instructions and guidelines to employees of the broker; [3.] the volume and type of business of the broker; [4.] the reject rate for the various customs transactions; [5.] the maintenance of current editions of the Customs Regulations, the Harmonized Tariff Schedule of the United States, and Customs issuances; [6.] the availability of an individually licensed broker for necessary consultation with employees of the broker; [7.] the frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident

> individually licensed broker; [8.] the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker; [9.] the extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage; and [10.] any circumstance which indicates that an individually licensed broker has a real interest in the operations of a broker.

Id.

The trial Court held that the language of § 111.1 stating that Customs "will consider" the ten factors did not mandate that Customs weigh each and every one of the ten factors in every case, but rather permitted Customs to "consider the listed factors in section 111.1 or look beyond the factors and consider the totality of the circumstances, on a case-by-case basis as it did in this matter." UPS IV, 558 F. Supp. 2d at 1353. In accordance with this interpretation of the broker regulation, the Court found UPS liable for failure to exercise responsible supervision and control of its customs business without discussing the proof regarding Customs' consideration of the ten factors, focusing instead on the operative definition of responsible supervision and control given by § 111.1. Id. at 1352–54. The Court then upheld the amount of fines sought by Plaintiff, entering judgment for Plaintiff and against Defendant in the amount of $75,000. *Id.* at 1356.

B. Appeal

UPS appealed and the Court of Appeals affirmed in part, vacated in part, and remanded in part. The Court of Appeals affirmed the Court's holding that UPS had misclassified the entries at issue. UPS V, 575 F.3d at 1381. However, the Court of Appeals held that the term "will" in the phrase "will consider" of 19 C.F.R. § 111.1 "is a mandatory term," and thus "any interpretation of § 111.1 that does not require consideration of the listed factors is clearly inconsistent with the plain language of the regulation." *Id.* at 1382. As a result, the Court of Appeals stated that Customs has an "obligation under the regulation to consider *at the least* the ten listed factors." *Id.* (emphasis in original). Reviewing the record, the Court of Appeals stated: "[W]e do not *see* where all ten factors were even mentioned in the testimony. Additionally, where specific factors are discussed in the testimony, it is difficult to determine if those factors were actually considered by Customs." Id. at 1383. The Court of Appeals then stated that "[b]ecause Customs did not consider all ten factors listed in 19 C.F.R. § 111.1, its determination that UPS violated 19 U.S.C. § 1641 was

improper." Id. For these reasons, the Court of Appeals stated, "we vacate that portion of the Court of International Trade's judgment and remand for further proceedings." *Id.* Finally, the Court of Appeals declined to reach the parties' appellate contentions about whether there were multiple violations of the broker statute and whether Customs could impose penalties of more than $30,000 in the aggregate, and vacated "those portions of the Court of International Trade's judgment addressing these issues[.]" *Id.*

II. *Meaning and Effect of Court of Appeals' Opinion*

A. Question on Remand

The Court of Appeals' holding that vacated the judgment in part was stated as follows:

> Because the Court of International Trade erred in upholding [Customs'] determination that UPS did not exercise responsible supervision and control in violation of 19 U.S.C. § 1641, we vacate that portion of the court's judgment and remand for further proceedings.

Id. at 1378. More specifically, the Court of Appeals explained:

> Because Customs did not consider all ten factors listed in 19 C.F.R. § 111.1, its determination that UPS violated 19 U.S.C. § 1641 was improper. Accordingly, we vacate that portion of the Court of International Trade's judgment and remand for further proceedings.

Id. at 1383.[3] The Court of Appeals thus made plain that two errors occurred below. Customs' error was failing to consider all ten factors when determining that UPS failed to exercise responsible supervision and control; this Court's error was in upholding Customs' determination despite Plaintiff's failure to prove that Customs had considered the ten factors. *See id.*

When the Court of Appeals identifies an error and remands for further proceedings, the lower court must determine "what the appellate court's mandate left for the district court to do." Exxon Chemical Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1482 (Fed. Cir. 1998). Since the Court's error consisted of upholding Customs' determination despite Customs' flawed consideration of 19 C.F.R. § 111.1 in

[3] Section 111.1 of Title 19, Code of Federal Regulations ("the broker regulation") defines the term "responsible supervision and control" found at 19 U.S.C. § 1641(b)(4), and lists ten specific factors that Customs "will consider" in deciding whether a broker has exercised responsible supervision and control. The broker regulation and its ten listed factors are discussed in detail *infra.*

making that determination, the specific question here is: what impact does Customs' failure to follow 19 C.F.R. § 111.1 have on Plaintiff's action to recover monetary penalties against UPS under 28 U.S.C. § 1582(1)? Put another way, can Customs correct its error and demonstrate that it should be permitted to recover the penalty under § 1582(1)? To answer this question, the Court considers the nature of Plaintiff's cause of action, locates the flaw noted by the Court of Appeals in Customs' penalty procedure, and examines the effect of that error on the case.

B. Plaintiff's Cause of Action and the Court's Jurisdiction

Section 1582 of Title 28, United States Code, defines Plaintiff's cause of action and the jurisdiction of the Court:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—
>
> (1) to recover a civil penalty under section 592, 593A, 641(b)(6), *641(d)(2)(A)*, 704(i)(2), or 734(i)(2) of the Tariff Act of 1930[.]

28 U.S.C. § 1582 (2000) (emphasis added). In such a case, Plaintiff must create an evidentiary record at trial before the Court, which decides the facts and issues of law *de novo* on the basis of that record. [4] 28 U.S.C. § 2640(a)(6) (2000). The evidence must be relevant to the Court's inquiry, which is whether or not the United States should be entitled to recover the imposed penalty. *See* Fed. R. Evid. 402. Plaintiff bears the burden of proving the case by a preponderance of the evidence. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993) (holding that civil plaintiffs bear a preponderance of the evidence burden when no statute specifies otherwise). On the most basic level, therefore, the outcome of a § 1582(1) case involving the broker statute hinges on whether the United States has proven, upon the basis of the record it has assembled before the Court, that it is entitled to recover a monetary penalty properly imposed pursuant to the procedure of § 1641(d)(2)(A).

To demonstrate that a penalty has been properly imposed under § 1641(d)(2)(A), Plaintiff must establish both that the broker commit-

[4] *See* Analysis, § III.1, infra, for a discussion of the appropriate standard of review for this action.

ted a violation of Customs law as the predicate for the penalty,[5] and that all formal requirements of the procedure for imposing the penalty were properly followed by Customs. *See* § 2640(a)(6); *see also* § 1641(d)(2)(A). The Court has no direct jurisdiction to independently impose a penalty for violation of the predicate statute—here, the responsible supervision and control statute at § 1641(b)(4). The Court's statutory role is not to *impose* penalties on customs brokers, but rather to decide whether to *permit recovery* of penalties the government has already imposed. *See* 28 U.S.C. § 1582(1). Therefore, the Court's determination regarding the predicate infraction does not in and of itself suffice to permit Plaintiff to recover the penalty. The Court decides whether Defendant violated the predicate statute only insofar as violation of the statute is a crucial component of the penalty procedure of § 1641(d)(2)(A). Plaintiff must still demonstrate that all other formal requirements of the procedure were properly followed, where they are in dispute.

C. Customs' Error

Customs' error—its failure to consider all ten § 111.1 factors when determining whether to impose the monetary penalties—occurred during the § 1641(d)(2)(A) penalty process. To properly determine whether the Court may permit recovery of the monetary penalties at issue, the Court must first examine the penalty process, ascertain where Customs deviated from the process, and determine whether Customs can correct its error.

Although the Court presumes that the parties are fully familiar with the § 1641(d)(2)(A) process, this appears to be the first recovery action for monetary penalties issued under § 1641(d)(2)(A) that has gone to trial,[6] and a discussion of the underlying procedure will thus be useful and help to frame the analysis that follows.

1. *The Penalty Procedure Statute and Regulations*

Section 1641(d)(2)(A) states, in relevant part:

> [T]he appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should

[5] Customs is only statutorily authorized to initiate a § 1641(d)(2)(A) penalty proceeding where the broker, in relevant part, "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C).

[6] To the Court's knowledge, the only other suit by the government seeking to recover a monetary penalty issued under § 1641(d)(2)(A) was decided on summary judgment. *See United States v. Ricci*, 21 CIT 1145, 985 F. Supp. 125 (1997). In *Lee v. United States*, Plaintiff challenged a revocation action that was initially linked to a monetary penalty recovery action, but the government voluntarily dismissed the recovery component of the action before judgment. *See* 26 CIT 384, 387 n.4; 196 F. Supp. 2d 1351, 1356 n.4 (2002).

> not be subject to a monetary penalty . . . . The notice shall advise the customs broker of the allegations or complaints against him and shall explain that the broker has a right to respond . . . . Before imposing a monetary penalty, *the customs officer shall consider the allegations or complaints and any timely response made by the customs broker and issue a written decision*. A customs broker against whom a monetary penalty has been issued under this section shall have a reasonable opportunity under [19 U.S.C. § 1618] to make representations seeking remission or mitigation of the monetary penalty. [After any § 1618 proceeding], the appropriate customs officer shall provide to the customs broker a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

19 U.S.C. § 1614(d)(2)(A) (emphasis added). This process is further defined in Customs' broker regulations at 19 C.F.R. Part 111, and in the fines, penalties, and forfeitures regulations at 19 C.F.R. Part 171.

2. *Allegations or Complaints and Predicate Offense*

The penalty process begins with "allegations or complaints" against a broker. § 1641(d)(2)(A). Customs is authorized to initiate penalty actions when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." § 1641(d)(1)(C); *see also* 19 C.F.R. §§ 111.53(c) (setting forth grounds for suspension or revocation of a broker's license), 111.91(a) (permitting monetary penalty where no license suspension or revocation is sought). Violations of the responsible supervision and control requirement in § 1641(b)(4) (a law enforced by Customs) can therefore serve as the predicate for a penalty action.

3. *Prepenalty Notice and Broker Response*

The "appropriate customs officer" then issues to the broker a "prepenalty notice" that must include two things: notice to the broker of the allegations or complaints, and notice to the broker of its opportunity to respond to the allegations or complaints. 19 U.S.C. § 1641(d)(2)(A); 19 C.F.R. §§ 111.92 (providing for pre-penalty notice and time to respond), 111.93 (providing for broker response in form of petition for relief under 19 C.F.R. Chapter 171). The broker's response must be filed with the Fines, Penalties, and Forfeitures Officer ("FP&F Officer") for the relevant port. 19 C.F.R. § 111.94 (setting

forth how Customs will decide whether to impose a penalty and notify broker of results); § 171.12(a) (indicating petition to be filed with relevant FP&F Officer).

The contents of the prepenalty notice being only allegations or complaints, the customs broker plainly has not yet been subjected to imposition of a monetary penalty upon receiving the prepenalty notice. § 1641(d)(2)(A); 19 C.F.R. § 111.94.

4. *Consideration of Allegations and Response*

Upon expiration of the deadline for the broker's response, "the customs officer shall consider the allegations or complaints and any timely response made by the customs broker" before issuing a decision. § 1641(d)(2)(A). Customs regulations mandate that, "[i]f it is definitely determined that the act or omission forming the basis of a penalty . . . did not in fact occur, the claim shall be canceled by the Fines, Penalties, and Forfeitures Officer." 19 C.F.R. § 171.31. *See also* 19 C.F.R. § 111.94 (indicating that the FP&F Officer will ultimately issue the written decision in a § 1641(d)(2)(A) case).

This is the step of the penalty procedure at which Customs committed the error noted in the Court of Appeals' opinion. In penalty cases like the one underlying this suit, initiated by allegations or complaints that a broker violated the responsible supervision and control requirement of § 1641(b)(4), Customs necessarily must "consider" whether or not the broker exercised responsible supervision and control. *See* § 1641(d)(2)(A), 19 C.F.R. §§ 111.1, 111.94, UPS V, 575 F.3d at 1383. It can therefore be deduced that the decision maker responsible for considering the allegations and the broker response—the FP&F Officer—is bound by any applicable Customs regulations, including the operative definition of responsible supervision and control, as well as the ten mandatory factors which 19 C.F.R. § 111.1 indicates that Customs "will consider."[7] Because the Court of Appeals based its decision on the failure of Customs to consider all ten factors in reaching its determination, Customs' error was committed by the FP&F when that officer considered the allegations against UPS, along with UPS's responses, without considering each of the ten factors of § 111.1.

[7] Of course, this applies equally to the customs officer who formulates the allegations or complaints that initiate the monetary penalty process; however, because that officer's actions only initiate the penalty process and do not determine its outcome, the legally operative and therefore relevant consideration of the ten factors is that carried out by the penalty procedure decision maker. *See* 19 U.S.C. § 1641(d)(2)(A), 19 C.F.R. §§ 111.94, 171.31.

5. *Written Decision*

The broker statute requires that Customs, after considering the allegations and the broker's response, issue a "written decision" to the broker. § 1641(d)(2)(A). Customs regulations add a requirement that "the petitioner will be provided with a written statement setting forth the decisions on the matter and the findings of fact and conclusions of law upon which the decision is based." 19 C.F.R. § 171.31a; accord 19C.F.R. § 111.94. The written decision is issued by the FP&F Officer. 19 C.F.R. § 111.94. The Court of Appeals' decision in UPS V strongly implies that Customs must describe in its written decision the consideration given to each of the ten § 111.1 factors. *See* 575F.3d at 1382 (stating that, where one factor is irrelevant, "Customs can simply explain that a particular factor does not apply and move on from there."). This requirement is also arguably contained in 19 C.F.R. § 171.31a, since consideration of the ten factors requires Customs to analyze facts and conclude whether those facts constitute a violation of the law.

6. *Broker's Opportunity to Request Remission or Mitigation*

Finally, the broker must be given an opportunity to seek discretionary relief from Customs in the form of remission or mitigation of the penalty. § 1641(d)(2)(A). Pursuant to the broker statute, the remission or mitigation process is governed by 19 U.S.C. § 1618 and its implementing regulations at 19 C.F.R. Part 171.[8] *Id.* ; 19 C.F.R. § 111.95. After consideration of the broker's petition, the FP&F Officer issues a final written decision containing the findings of fact and conclusions of law upon which the decision is based. 19 C.F.R. § 111.95; 19 C.F.R. 171.31a.

7. *Appeal and Recovery in Court*

The broker statute provides the broker with no direct route to judicial review of an imposed fine. *Compare* § 1641(d)(2)(A) (making no provisions for direct judicial appeal of imposition of a monetary penalty) *with* § 1641(d)(2)(B) (detailing penalty procedures including development of a formal record before an administrative law judge and the right to cross-examination) and § 1641(e) (permitting limited judicial review upon appeal when Customs denies, suspends, or re-

[8] The Customs regulations in Part 171 set forth a single petition procedure that governs both (a) a prepenalty response, and Customs' decision as to whether to impose a penalty, as well as (b) a request for discretionary remission or mitigation of a penalty already imposed, and Customs' decision of that petition.

vokes a broker's license, or imposes a monetary penalty in lieu thereof, but not when Customs imposes a monetary penalty under § 1641(d)(2)(A)).

On the other hand, the broker regulation provides that, when a monetary penalty is not timely paid by the broker, "Customs will refer the matter to the Department of Justice for institution of appropriate judicial proceedings." 19 C.F.R. § 111.94. Although not specified, the reference to "appropriate judicial proceedings" in the regulations apparently anticipates the filing of a recovery action under 28 U.S.C. § 1582(1), such as the case at bar.

D. This Court's Error

The error that the Court of Appeals noted on the part of the trial Court was that the trial Court "up[held Customs'] determination" and permitted recovery of a civil penalty under § 1582(1) despite a flaw in the § 1641(d)(2)(A) procedure used to impose that penalty. UPS V, 575 F.3d at 1378.

This Court wrongly resolved a dispute between the parties regarding the elements Plaintiff was required to prove to establish entitlement to recover its penalties. Defendant insisted that one required element of Plaintiff's case was a demonstration that Customs had considered all ten factors of responsible supervision and control set-out at 19 C.F.R. § 111.1, while Plaintiff maintained that it did not have to prove consideration of the ten factors. (Dkt. No. 95: Response to Court's Request/Order Dated 11/7/07 ("Pretrial Letter Response"), A-1–A-2, B-2–B-3.) If Defendant's position had prevailed, Plaintiff would have been required to prove that it had considered all ten factors in or to establish that Customs, through the appropriate decision maker, the FP&F Officer, had fully complied with the monetary penalty procedure in § 1641(d)(2)(A) and was entitled to recovery. When UPS raised this issue in the context of a § 1582(1) case, the effect was to assert not only that UPS had in fact exercised responsible supervision and control, but also to challenge whether Plaintiff had complied with all of the steps of the penalty procedure. Specifically, Defendant's position constituted a claim that Customs did not properly conduct the "consideration" required by the broker statute and regulations. § 1641(d)(2)(A); 19 C.F.R. §§ 111.94, 171.31.

This Court erroneously rejected UPS's position and held that Plaintiff did not have to prove consideration of all ten factors to demonstrate entitlement to recover the imposed penalty. *See* UPS IV, 558 F. Supp. 2d at 1353. This Court's ruling thus expressed the view that the "consideration" step of the § 1641(d)(2)(A) process did not mandate consideration of all ten § 111.1 factors, and that, as a result, there was

no defect in Customs' penalty process as alleged by Defendant. *Id.* This Court therefore focused its attention on whether, to the satisfaction of the Court on the basis of the record assembled before it, Defendant had actually committed the predicate violation underlying the penalty procedure, rather than whether Customs had rendered its decision on the allegations in the proper manner. *Id.*

The Court of Appeals, in determining that Customs *was* required to consider all ten factors, accepted Defendant's interpretation of the broker regulation, which this Court had rejected. UPS V, 575 F.3d at 1383. In the procedural context of a § 1582(1) case, the Court of Appeals' holding indicated that Plaintiff did not prove it had properly complied with the "consideration" step (and possibly the "written decision" step) of the penalty procedure. *See* § II.C.4–5, *supra*. Thus the Court of Appeals' holding did not disturb the Court's substantive finding that UPS committed the predicate violation upon which the penalty procedure was based; instead, the Court of Appeals held that the Court erred in rejecting Defendant's challenge to the procedure by which the penalty was imposed. By analogy, the defect noted by the Court of Appeals was comparable to the defect that would exist if Customs failed to provide the broker an opportunity to respond to the prepenalty notice, or if Customs failed to make the mitigation procedure available to Defendant. In the presence of such procedural defects, the Court could not permit Plaintiff to recover the imposed penalties regardless of whether the broker had committed the underlying violation of Customs law. *See*, *e.g.*, *United States v. Chow*, 17 C.I.T. 1372, 1376–77, 841 F. Supp. 1286, 1289–90 (1993) (dismissing government suit to recover a monetary penalty imposed under analogous statute 19 U.S.C. § 1592, where Customs provided importer only seven days for response but regulation required 30 days); *see also United States v. Gold Mountain Coffee, Ltd.*, 8 C.I.T. 247, 251–52, 597 F. Supp. 510, 516 (1984) (noting that Court will not uphold seizure of merchandise as security for payment of monetary penalty issued under § 1592 where government cannot show certain conditions of § 1592(c)(5) were "satisfied during the process of obtaining the arrest warrant").

Analysis

Having determined that the Court of Appeals' opinion noted a defect in Customs' compliance with the penalty procedure of § 1641(d)(2)(A), the Court now arrives at the central issue on remand: whether Plaintiff can correct the defect and prove its entitlement to recover the penalties at issue.

At a conference held on November 5, 2009, the Court heard the positions of the parties on what steps to take in response to the Court of Appeals' decision, and asked the parties to brief the following questions: (1) whether the Court should dismiss the case in light of the Court of Appeals' vacatur of the liability and penalty findings as a simple case in which Plaintiff failed to meet the burden of proof; (2) whether the Court should remand the case to Customs and, if so, what issues Customs should be instructed to address; and (3) whether the Court should grant the government's request, made during the November 5, 2009 conference, to reopen proceedings and allow the government to present additional testimony from Ms. Lydia Goldsmith.[9] (Dkt. No. 121: Joint Letter of the Parties of November 9, 2009.) The Parties set forth their positions in briefs filed on November 20, 2009. (*See* Dkt. No. 123: Def.'s Post-Remand Brief; Dkt. No. 124: Pl.'s Post-Remand Brief.)

After considering the positions of the parties and applicable law, the Court finds that Plaintiff failed to prove that the relevant Customs FP&F Officer properly considered the ten factors of § 111.1 when imposing the penalties at issue on UPS. Plaintiff has not established grounds for a rehearing and thus will not be given another opportunity to prove what it failed to prove at trial—consideration of the § 111.1 factors. Moreover, Plaintiff has not offered to present additional evidence that could establish that the FP&F Officer considered the ten factors. As to remand, the Court is authorized by 28 U.S.C. § 2640(a)(6) to decide the issues in this case at a trial *de novo*, so remand is not required. Discretionary remand under 28 U.S.C. § 2643 is inappropriate since the Court is tasked with deciding the case upon the record established before it. Furthermore, discretionary remand to Plaintiff would also permit the party bearing the burden of proof to create, after the conclusion of the trial, the factual prerequisites for recovery. This would improperly render Plaintiff's burden of proof meaningless. Plaintiff having failed to prove entitlement to recover the penalties at issue by a preponderance of the evidence at trial, judgment will be entered for Defendant.

I. *Plaintiff Did Not Establish at Trial That the Appropriate Customs Officer Considered the Ten Factors*

As already discussed, the "appropriate customs officer" to consider the ten factors is the FP&F Officer of the relevant port. The record here establishes that Mr. Bert Webster was that officer. According to Ms. Goldsmith, "I determined that there should be penalties, but I

[9] Ms. Goldsmith, Supervisory Import Specialist and Trade Enforcement Coordinator at the Customs Area Port of Cleveland, Ohio, was the government's principal witness at trial on the issue of responsible supervision and control.

don't make the final decision," because Mr. Webster had to agree with her. (Tr. 928.) FP&F Officer Webster was "the one that has discretion, and he is the one that decides to issue" the prepenalty notices. (Tr. 982–83.) Mr. Webster's discretion extended to deciding whether to bundle numerous misclassified entries together into a single penalty notice, so Ms. Goldsmith "didn't know how many pre- penalty notices would end up being issued." (Tr. 1018.) Mr. Webster or his deputy also issued the written decisions, penalty statements, and penalty notices imposing monetary penalties upon UPS. *See* Tr. Ex. 66, 68, 70, 72, and 74. From this record, the Court finds by a preponderance of the evidence that Mr. Webster was the appropriate Customs officer responsible for conducting the consideration required by § 1641(d)(2)(A) and § 111.1.

Plaintiff introduced no evidence whatsoever at trial to establish whether the FP&F Officer considered the ten § 111.1 factors. Plaintiff did not call Mr. Webster to testify. Although Mr. Webster's written decisions, penalty statements, and penalty notices in the penalty cases against UPS were introduced as trial exhibits,[10] the ten § 111.1 factors are not discussed anywhere in those exhibits.[11] There is no other relevant evidence in the trial record. Consequently, the Court finds that Plaintiff did not establish at trial that the appropriate Customs officer considered the § 111.1 factors when deciding whether to impose penalties upon UPS.

II. *Further Evidentiary Proceedings Are Inappropriate and Not Mandated by the Court of Appeals' Opinion*

Having found that Plaintiff did not prove consideration of the § 111.1 factors, the Court now examines whether Plaintiff can correct this defect. First, the Court considers whether Plaintiff should be permitted to supplement the record with additional evidence to establish that Customs considered all ten of the factors. The United States Code permits the Court to retry or rehear a case in certain circumstances:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any

[10] Tr. Ex. 66 (written decision, penalty statement, and penalty notice in case 2000–4196–300221); Tr. Ex. 68 (written decision, penalty statement, and penalty notice in case 2000–4196–300222); Tr. Ex. 70 (penalty statement and penalty notice in case 2000–4196- 300223) (Plaintiff does not appear to have entered into evidence the written decision in this penalty case); Tr. Ex. 72 (written decision, penalty statement, and penalty notice in case 2000–4196–300319); and Tr. Ex. 74 (written decision, penalty statement, and penalty notice in case 2000–4196–300320).

[11] As mentioned previously, such a discussion is probably required by the Court of Appeals' decision and the regulatory mandate that the written decision state the findings of fact and conclusions of law upon which it is based. *See* 575 F.3d at 1382; 19 C.F.R. § 171.31a.

> civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

28 U.S.C. § 2643(b). Retrial or rehearing may be appropriate where

> there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

Oak Laminates Div. of Oak Materials Group v. United States, 8 CIT 300, 302, 601 F. Supp. 1031, 1033 (1984) (*quoting W.J. Byrnes & Co. v. United States*, 68 Cust. Ct. 358,358 (1972)). "The purpose of a rehearing is not to relitigate." *Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554, 1560 (Fed. Cir. 1992) (*citing Belfont Sales Corp. v. United States*, 12 CIT 916, 917, 698 F. Supp. 916, 918 (1988), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989)). When a party moves for rehearing, that motion is "addressed to the sound discretion of the trial court." *Id.* (citation omitted); *see also Oak Materials Group*, 8 CIT at 302, 601 F. Supp at 1033.

A. Positions of the Parties

1. *Plaintiff's Position*

Plaintiff supports its argument that the Court should hold further evidentiary proceedings on two grounds.

First, Plaintiff asserts that "dismissal would violate the [Court of Appeals]'s express mandate and improperly grant [UPS] the appellate relief that the [Court of Appeals] denied it." (Pl.'s Post-Remand Brief at 1.) In Plaintiff's view, "the mandate requires this Court to conduct further proceedings on liability in light of the new interpretation of section 111.1 announced by the [Court of Appeals] for the first time." (*Id.* at 3.) Plaintiff stresses that the Court of Appeals "affirmed" the post-trial judgment in part and declined to reach the damages issues "now" because doing so would be "premature." (*Id.* at 2 (*citing* 575 F.3d at 1381, 1383).) The government theorizes that, in characterizing the damages issues as "premature" instead of "permanently foreclosed by an alleged failure of proof," and declining to

decide those issues "now," instead of declining to decide them "forever," the Court of Appeals required the introduction of further evidence to reestablish liability. (*Id.*) The Court of Appeals "would have reversed the judgment with instructions to dismiss" if UPS had fully prevailed on appeal. (*Id.* at 2–3 (citing *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998).) Refusing to take further evidence would therefore require the Court to:

> (1) interpret as wholly inoperative . . . the Federal's Circuit's decision affirming this Court's judgment regarding classification . . . (2) substitute the [Court of Appeals]'s use of the word "vacated" in its decision with "reversed"; (3) delete the words "additional proceedings" from the [Court of Appeals]'s mandate; and (4) ignore the [Court of Appeals]'s explicit ruling that all damages issues are premature and hold instead that they are permanently foreclosed in this case due to a supposed failure of proof.

(*Id.* at 4.)

Second, Plaintiff urges the Court to reopen trial because "the [Court of Appeals]'s decision represents a[] . . . change in . . . the proper interpretation of 19 C.F.R. § 111.1," *id.* at 6, and the government "should be provided an opportunity to establish that UPS violated 19 U.S.C. § 1641 under the correct legal standard announced by the [Court of Appeals]," *id.* at 8. Plaintiff seeks to "demonstrate to this Court that [Customs] considered each factor in its penalty determination" and "establish that Customs did comply with its regulation, even though we did not include this demonstration in our case-in-chief at trial." (*Id.* at 8, 10.) Consideration of all ten factors would be established by presenting "additional testimony from Ms. Goldsmith that would expand and explicate her earlier trial testimony" and "establish that [Customs] actually did consider each factor in section 111.1[.]" (*Id.* at 9–10.) Plaintiff claims it "did not perceive, at the time [of trial], a need to establish that [Customs] had considered all ten factors as part of our case in chief," id. at 8, and that "[h]ad we been apprised of the correct interpretation of section 111.1 before August 2009, we would have made this showing at trial," *id.* at 12.

2. *Defendant's Position*

Defendant opposes further evidentiary proceedings, arguing that the Court is barred from taking further testimony by the standard of review in 5 U.S.C. § 706. (Id. at 7–8.) UPS interprets the Court of Appeals' opinion to foreclose the government from presenting the

Court with evidence that Customs did, in fact, consider all ten of the § 111.1 factors, because "the court of appeals unequivocally held that 'Customs *did not* consider all ten factors listed in 19 C.F.R. § 111.1.'" (*Id.* at 11 (*quoting* UPS V, 575 F.3d at 1383) (emphasis added by Defendant).) According to UPS, permitting the government to introduce new evidence before the Court would give Plaintiff the ability to justify its imposition of a monetary penalty in circumvention of UPS's right to be heard at the agency level under a correct application of the law. (*Id.* at 11–14.)

B. Plaintiff Has Not Shown Grounds to Reopen the Trial

Here, a rehearing would not serve to correct "a significant flaw in the conduct of the original proceeding" arising from some "irregularity in the trial"; a "serious evidentiary flaw"; the "discovery of important new evidence which was not available, even to the diligent party, at the time of trial"; or an "accident," "unpredictable surprise," or "unavoidable mistake" that "severely impaired a party's ability to adequately present its case." *See Oak Laminates Division.*, 601 F. Supp. at 1033. For example, this Court's erroneous interpretation of § 111.1 did not lead the Court to preclude Plaintiff from entering evidence needed to establish that Customs considered all ten factors; Plaintiff was free to offer that evidence, but never did so.

Plaintiff makes no claim that Ms. Goldsmith's proposed additional testimony was unavailable at the time of trial, or could not be presented due to some accident, surprise, or unavoidable mistake. Even if Plaintiff was surprised by what Ms. Goldsmith said on cross-examination and realized it had made some mistake in examining her, Plaintiff still had sufficient opportunity to expand and explicate her testimony on redirect examination, or to request an opportunity to call another witness to testify regarding consideration of the ten factors.

Plaintiff makes none of these claims, instead claiming only that it did not introduce the relevant evidence because it did not believe doing so was necessary. This indicates that a new hearing would improperly allow Plaintiff a chance to relitigate its case to correct what could perhaps best be characterized as a tactical mistake, apparently stemming from Plaintiff's belief that the open § 111.1 issue would be decided in its favor.

The Court of Appeals' announcement of a "new" interpretation of § 111.1 on appeal does not bring the error into the category of a surprise, accident, or mistake deserving a rehearing. The Court of Appeals' interpretation of § 111.1 was "new" only in the sense that the issue had never been addressed by that court before. Despite the

novelty of the issue—or, more precisely, because of the novelty of the issue—Plaintiff had ample notice before trial that the Court's ruling on this crucial issue was not a foregone conclusion. This is not a case in which Plaintiff could rely upon a long-established interpretation of the law in planning its trial strategy, but rather a case in which Plaintiff knew well in advance of trial that the success of its case could depend upon establishing evidence to satisfy either of the two potential outcomes on the applicability of the § 111.1 factors. No flaw in the trial prevented Plaintiff from doing then what it seeks to do now: putting on a witness to testify regarding the consideration given to the ten factors of § 111.1.

The record also reveals that Plaintiff knew, long before trial, that the Court might base its decision of the case in part on a determination that Plaintiff's burden of proof included establishing that Customs had considered all ten § 111.1 factors.[12] The Court therefore rejects Plaintiff's contention that it did not present at trial evidence relevant to this question—evidence which Plaintiff now says it possessed all along—due to a lack of notice that it might be required to do so. The Court also rejects Plaintiff's contention that the Court of Appeals' opinion constituted a change in the law regarding 19 C.F.R. § 111.1 and should excuse Plaintiff's failure to prove its case at trial.

More than 15 months before trial, Defendant argued in its memorandum opposing Plaintiff's motion for summary judgment that Plaintiff needed to prove that it had considered all ten § 111.1 factors. (*See* Def. SJ Opp. at 4 (Dkt. No. 66).) UPS contended that the Court should deny the motion because Plaintiff bore the burden of establishing not only that UPS misclassified certain import entries, but also "how these alleged misclassifications, taking into account each factor listed in 19 C.F.R. § 111.1, demonstrates [sic] the failure to exercise responsible supervision and control in violation of 19 U.S.C. § 1641(b)(4)." (*Id.* (internal quotations omitted).) Plaintiff responded to this argument in detail, indicating that the government understood UPS to be arguing that the ten factors of § 111.1 were mandatory, and contending that the factors were inapplicable to this action. (Pl.'s SJ Reply at 6–12 (Dkt. No. 70).) The Court denied summary judgment on different grounds, but stated that the "Court acknowledges Defendant's other challenges to Plaintiff's case" and would allow those challenges to "be taken up at trial," UPS III, 31 CIT at 1028, thus informing Plaintiff that the issue remained open.

[12] As mentioned earlier, this case appears to be the first case to go to trial in which the United States has sought to recover a monetary penalty for failure to exercise responsible supervision and control. The question of what elements Plaintiff had to prove to make out its case was therefore a question of first impression.

Defendant also argued in the Pretrial Letter Response that it viewed the ten factors to be an element of Plaintiff's case, serving to notify Plaintiff that it might be required to present evidence regarding the ten factors at trial. Pretrial Letter Response at B-1–B-3. UPS characterized § 111.1 as setting forth a "fact-intensive inquiry that requires Customs, and now the Court, to consider a wide range of factors," including the ten factors. *Id.* Although Defendant believed Plaintiff would have to present evidence on the substance of the ten factors for the *Court* itself to directly consider, it also maintained that Customs was required to consider the ten elements as well.[13] *Id.* Plaintiff was thus notified that it might not only have to prove that it considered the ten factors in the deciding the outcome of the penalty proceeding, but also to present evidence regarding the ten factors from which the Court could determine that Defendant failed to exercise responsible supervision and control.

The issue was next addressed in the final Pretrial Order, in which Defendant asserted that Plaintiff's penalty claim "does not satisfy the regulatory factors set forth in the Customs regulations." Pretrial Order, Schedule D-2 ¶ 5. Defendant also included in its list of triable issues the question of "[w]hether . . . misclassification of the entries underlying Plaintiff's Complaint, if proven, amounts to a failure by Defendant to exercise responsible supervision and control in light of the extensive compliance measures taken by Defendant, the volume of its business, the particular HTSUS classification at issue, and the other factors required to be considered in determining whether a broker has exercised responsible supervision and control under 19 U.S.C. § 1641(b)(4). *See* 19 C.F.R. § 111.1 and 19 C.F.R. Part 171 App. C. § XI." (Pretrial Order, Schedule F-2 ¶ 3 (emphasis added).)

Finally, Defendant argued in its opening statement at trial that Plaintiff was required to introduce evidence about all of the § 111.1 factors. (Tr. 73–74.) Plaintiff did not object or make any argument of its own regarding this assertion. (*See* Tr. 60–63; 73–74.)

From this record, the Court finds that Plaintiff was well aware before trial and at trial that the Court could rule against it on the issue of whether consideration of all ten factors was an element of its cause of action. The Court further finds that Plaintiff had reason to

[13] The Court does not interpret § 111.1 as requiring the Court to independently consider each of the ten factors of § 111.1 in a case of this type. The Court takes this view because § 111.1 specifically states that the ten factors are factors which *Customs* "will consider," and that language cannot mandate how the Court will make its own determination. 19 C.F.R. § 111.1. The Court's determination of whether a predicate offense actually occurred to justify the initiation of a § 1641(d)(2)(A) proceeding is distinct, however, from the requirement that Customs prove that it complied with § 1641(d)(2)(A) by considering the ten factors when determining to impose the penalty it seeks to recover. *See* Background, § II.D, *supra*.

know that if the Court issued a ruling adverse to Plaintiff on this question, Plaintiff would be required to prove consideration of the ten factors in order to establish Defendant's liability. The United States therefore cannot be excused for failing to put forward in its case-in-chief *any* evidence that the § 111.1 factors had been considered. This is especially true when Plaintiff now claims that it had evidence all along that Customs actually did consider all ten factors (an argument that Plaintiff, notably, failed to assert at or before trial). The Court finds puzzling Plaintiff's failure to enter evidence purportedly in its possession which was relevant to an issue which it knew could be central to the outcome of the case. Nonetheless, it would be contrary to the purpose of trial and basic principles of finality for the Court to extend Plaintiff an opportunity to do correctly now that which it failed to do before. *See Belfont*, 698 F. Supp. at 918 (indicating that the purpose of a rehearing is to correct a flaw in the proceeding, not to give a party a chance to "relitigate").

C. Plaintiff Cannot Cure the Defect with Testimony from Ms. Goldsmith

From Plaintiff's proposal that Ms. Goldsmith give additional evidence, it appears that Plaintiff fails to apprehend the nature of the defect in its proof. Further testimony by Ms. Goldsmith is irrelevant because Mr. Webster, not Ms. Goldsmith, was the Customs officer required to consider the ten factors. *See* 19 U.S.C. § 1641(d)(2)(A); 19 C.F.R. §§ 111.94, 171.31; *see also* Analysis, § I, *supra.*

This is revealed in Ms. Goldsmith's testimony. According to Ms. Goldsmith, her role in the formal penalty proceeding was limited to identifying UPS's misclassified entries, drafting prepenalty notices, and forwarding the draft notices to Mr. Webster. Ms. Goldsmith stated, "I determined that there should be penalties, but I don't make the final decision," because Mr. Webster had to agree with her. (Tr. 928.) Issuing the prepenalty notices "is left up to the Fine & Penalties Office," and Ms. Goldsmith did not know if the FP&F Office actually issued the notices that she forwarded. (Tr. 930.) "[T]he responsibility of the Fines & Penalties Office" also included obtaining any necessary higher-level clearances, and Ms. Goldsmith did not know if that was done. (Tr. 934, 936–37.) Ms. Goldsmith summarized her role in the process as follows: "The pre-penalty statement is written by the team. They forwarded it to me to review so I did make changes to the actual pre-penalty statement that they first wrote, and then the statement with the attachment of the entries is forwarded to FP&F" (Tr. 962–63.) Mr. Webster was "the one that has discretion, and he is the one that decides to issue" the prepenalty notices. (Tr. 982–83.) Mr. Webster's discretion extended to deciding whether to bundle numer-

ous misclassified entries together into a single penalty notice, so Ms. Goldsmith "didn't know how many pre-penalty notices would end up being issued." (Tr. 1018.) From this record, the Court finds that Ms. Goldsmith merely formulated allegations against UPS and forwarded them to Mr. Webster, the relevant FP&F Officer, who was responsible for considering the allegations and UPS's response. Therefore, further testimony from Ms. Goldsmith, who did not decide the penalty actions, could not reveal whether Mr. Webster considered the ten factors in deciding to impose the penalties at issue.

Even assuming, for the sake of argument, that Ms. Goldsmith's consideration of all ten factors could satisfy Plaintiff's burden of proof, the Court finds that additional testimony that she considered all ten factors would conflict with her prior testimony. Ms. Goldsmith's only testimony regarding the ten factors arose during her cross-examination. In that testimony, Ms. Goldsmith expressed unfamiliarity with the contents of the broker regulation, not realizing at first that the 2000 version of the broker regulation (which was amended effective April 14, 2000) applied during the penalty proceedings, and testifying that she was using the prior version of the broker regulations when she met to discuss the penalty cases with Mr. Webster in February or March of 2000. (Tr. 971–80.) It appears that Ms. Goldsmith was also unaware that those prior regulations provided a definition of responsible supervision and control. (Tr. 976–77.)[14]

Defense counsel asked Ms. Goldsmith about seven of the ten factors in particular. (Tr. 984–92.) The Court finds, from Ms. Goldsmith's responses, that it is unclear whether she considered the § 111.1 factors of supervisory visit frequency ("I did not look at it, but we did consider it," Tr. 990); internal audit frequency ("[t]hat is a consideration, yes," but she "wasn't familiar with all of [UPS's audits] at the time" and did not look at UPS's audits at "that particular moment," Tr. 990–91); and the extent of involvement in operations by the broker qualifying the district permit ("Yes. I mean, that is a consideration. That is one of the items that are [sic] listed," but she did not find a deficiency there and "wasn't really looking at those areas," Tr. 991). Three other § 111.1 factors—employee training by the broker, issu-

[14] With regard to the definition of responsible supervision and control, the amendment of the broker regulation which went into effect on April 14, 2000 merely relocated a previously-existing similar definition from § 111.11(d) to § 111.1 and amended some of the specific factors to be considered by Customs. *See* 51 Fed. Reg. 30,336, 30,337–38 (Aug. 26, 1986) (publishing final rule containing initial definition of responsible supervision and control in § 111.11(d)); 64 Fed. Reg. 22,726, 22,728 (Apr. 27, 1999) (proposing rule change consisting of modification of § 111.11(d) and moving the modified subdivision to § 111.1); 65 Fed. Reg. 13,880, 13,891–92 (adopting final rule with modified definition of responsible supervision and control at § 111.1, effective April 14, 2000).

ance of instructions and guidelines to employees by the broker, and the licensed broker's real interest in brokerage operations—were never mentioned during Ms. Goldsmith's testimony. The Court therefore finds that additional testimony by Ms. Goldsmith that she actually considered all ten factors would be inconsistent with her prior testimony.

D. The Court of Appeals Did Not Mandate Evidentiary Proceedings

Contrary to Plaintiff's interpretation, the mandate of the Court of Appeals requires only that this Court conduct "further proceedings" and nowhere specifies the form or content required of such proceedings. Plaintiff argues that the Court of Appeals meant to require "further proceedings on liability in light of the new interpretation of section 111.1 announced by the [Court of Appeals] for the first time," Pl.'s Post-Remand Brief at 1–2, but does not cite any authority for that interpretation of the Court of Appeals' plain statement that "we . . . remand for further proceedings," UPS V, 575 F.3d at 1383.

The general rule is that "[f]ollowing appellate disposition, a district court is free to take any action that is consistent with the appellate mandate, as informed by both the formal judgment issued by the [appeals] court and the [appeals] court's written opinion." *Exxon Chem. Patents, Inc.*, 137 F.3d at 1484. Contrary to Plaintiff's insistence that the Court of Appeals would have ordered dismissal if it found Plaintiff's case fatally flawed, there are "many circumstances" in which it would be error for an appeals court to order dismissal or direct entry of a final judgment for defendant below when plaintiff's verdict is set aside on appeal. *See id.*, 137 F.3d at 1480 (*citing Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 326 (1967). The lower court is not to assume that the appeals court has ordered a particular outcome unless the appeals court states that order explicitly. *See id.* at 1481. When an appellate judgment issues, that judgment always vests jurisdiction in the district court to conduct "further proceedings," which "may be purely ministerial, as when a judgment for the plaintiff is reversed and the only matters that remain for the district court are to dismiss the complaint and enter the judgment in the docket," but may also be "more significant." *Id.* at 1483.

Exxon indicates that the nature of the "further proceedings" mandated by the Court of Appeals here can be any proceedings consistent with the formal judgment of the Court of Appeals (affirmed in part, vacated in part, remanded in part) and the contents of its opinion. In accordance with Exxon, the Court here has conducted a conference with the parties and allowed them to brief their positions regarding the correct course to take. As already explained in detail above, the

Court has determined that Plaintiff cannot correct the defect in its case through a hearing to take new evidence. This determination stems directly from the nature of the proof required in a § 1582(1) case and the impact of the Court of Appeals' opinion in the context of this particular type of proceeding. The Court therefore finds that the mandate of the Court of Appeals does not require further evidentiary proceedings here.

III. *Remand to Customs for Further Proceedings*

Defendant asserts that the Court must remand this case to Customs for further administrative proceedings, to be conducted in accordance with the Court of Appeals' opinion. The Court determines that the issues to be decided do not require remand to Customs, and that it would be inappropriate to exercise the Court's discretionary remand power in view of the *de novo* nature of the action and Plaintiff's burden of proof.

A. Positions of the Parties

Defendant states that "[a]lthough UPS had initially suggested that this Court dismiss the action . . . UPS has determined that the proper course is to remand to the agency for further proceedings." (Def.'s Post-Remand Brief at 3.) UPS urges the Court to remand to Customs because "the Supreme Court and [Court of Appeals] have unequivocally and repeatedly held that, if any agency makes an error of law, the court must remand to the agency so that it can correct its error and apply the proper legal standard." *Id.* at 3–7 (citing numerous cases in which the Supreme Court and courts of appeals have mandated remand to the agency under the "settled principle of administrative law that '[w]hen an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'") (quoting *Int'l Light Metals v. United States*, 279 F.3d 999, 1003 (Fed. Cir. 2002), which in turn quotes from *NLRB v. Enter. Ass'n of Steam*, 429 U.S. 507, 522 n.9 (1977), and citing numerous other cases[15]). According to Defendant, this Court

[15] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Nat'l Ass'n of Greeting Card Publrs. v. USPS*, 462 U.S. 810 (1983); *Reilly v. OPM*, 571 F.3d 1372 (Fed. Cir 2009); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372 (Fed. Cir. 2008); *In re Reuning*, 276 F. App'x 983 (Fed. Cir. 2008); *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350 (Fed. Cir. 2005); *Whittington v. Merit Sys. Prot. Bd.*, 80 F.3d 471 (Fed. Cir. 1996); *Waldau v. Merit Sys. Prot. Bd.*, 19 F.3d 1395 (Fed. Cir. 1994); *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807 (Fed. Cir. 1992); *Kline v. Dep't of Transp., Fed. Aviation Admin.*, 808 F.2d 43 (Fed. Cir. 1986); *Casteneda- Castillo v. Gonzales*, 488 F.3d 17 (1st Cir.

would commit reversible error by failing to remand the case to Customs for a correct application of § 111.1 in the first instance. *Id.* at 7 (*citing Gonzalez v. Thomas*, 547 U.S. 183 (2006) (per curiam) and *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (per curiam)).

Plaintiff does not oppose a remand to Customs for further proceedings, but states that:

> [a]lthough we are fully prepared to present evidence that [Customs] in fact considered each of the factors . . . we have concluded that an appropriate course of action would be for this Court to remand the entire case to [Customs] and then conduct, following [Customs]'s remand determination, limited judicial proceedings to permit compliance with the [Court of Appeals]'s mandate.

(Pl.'s Post-Remand Brief at 8–9.)

B. Remand is Neither Required Nor Appropriate

Whether a remand is required or appropriate in a given lawsuit depends on the nature of the suit and the issues to be decided—e.g., the statutorily-mandated standard of review, the relationship of the parties to each other, whether the United States or one of its agencies is a party to the action, and the statutory authority of an agency party. The Court interprets the standard of review statute at 28 U.S.C. § 2640 as setting forth a *de novo* standard of review for this case. Remand is not mandatory here because the Court is authorized by statute to determine *de novo* whether Plaintiff is entitled to recovery. As a consequence of the *de novo* nature of this suit and Plaintiff's burden of proof, the Court concludes that discretionary remand of this case to Customs would be inappropriate.

1. *The Applicable Standard of Review*

The Court's standard of review in this case is set forth at 28 U.S.C. § 2640,[16] entitled "Scope and standard of review," which states in full:

2007); *Soltane v. DOJ*, 381 F.3d 143 (3d Cir. 2004); *Coal. for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435 (6th Cir. 2004) (*citing South Prairie Constr. Co. v. Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998); *PPG Indus., Inc. v. United States*, 52 F.3d 363 (D.C. Cir. 1995); *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466 (8th Cir. 1995); *Tomas v. Rubin*, 935 F.2d 1555 (9th Cir. 1991); *Pollgreen v. Morris*, 770 F.2d 1536 (11th Cir. 1985); *Ommaya v. Nat'l Insts. of Health*, 726 F.2d 827 (D.C. Cir. 1984); and *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979).

[16] The Court previously addressed the standard of review statute in UPS IV, 558 F. Supp. 2d at 1336 (stating that "[t]he Court reviews a case brought under 19 U.S.C. § 1641(d)(2)(A) *de novo* as to the facts, the law, and the amount of the penalty" in its post-trial determination) and in UPS I, 30 CIT at 823–25, 442 F. Supp. 2d at 1304–06 (concluding, after

(a) The Court of International Trade *shall make its determinations* upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under [19 U.S.C. § 1515].

(2) Civil actions commenced under [19 U.S.C. § 1516].

(3) Civil actions commenced to review a final determination made under [19 U.S.C. § 2515(b)(1)].

(4) Civil actions commenced under [19 U.S.C. § 1677f(c)(2)].

(5) Civil actions commenced to review any decision of the Secretary of the Treasury under [19 U.S.C. § 1641], with the exception of decisions under [19 U.S.C. § 1641(d)(2)(B)], which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

(b) In any civil action commenced in the Court of International Trade under [19 U.S.C. § 1516a] the court *shall review the matter* as specified in subsection (b) of such section.

(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under [19 U.S.C. § 2273] or any final determination of the Secretary of Commerce under [19 U.S.C. § 2341] or [former 19 U.S.C. § 2371], the court *shall review the matter* as specified in [19 U.S.C. § 2395].

(d) In any civil action commenced to review any order or decision of the Customs Service under [19 U.S.C. § 1499(b)], the court *shall review the action* on the basis of the record before the Customs Service at the time of issuing such decision or order.

(e) In any civil action not specified in this section, the Court of International Trade *shall review the matter* as provided in section 706 of title 5.

28 U.S.C. § 2640 (2000) (emphasis added).

At first glance, two subdivisions possibly apply to this action: § 2640(a)(5) and § 2640(a)(6). Subdivision (a)(5) appears to apply because it specifies "[c]ivil actions commenced to review any decision of the Secretary of Treasury under [§ 1641], with the exception of deci-

review of the statute, that the standards of review at 5 U.S.C. §§ 706(2)(A) and 706(2)(C) were "relevant in this matter" at summary judgment.) The Court's prior articulation that the APA was "relevant in this matter" was incorrect. As discussed below, the Court continues to hold that the appropriate standard of review is *de novo*.

sions under [§ 1641(d)(2)(B)]," and this case arises to recover a monetary penalty imposed pursuant to § 1641(d)(2)(A). Subdivision (a)(6) of § 2640 also appears to apply, because it specifies "[c]ivil actions commenced under [28 U.S.C. § 1582]," and Plaintiff commenced this case under § 1582(1). After due consideration, the Court is convinced that only § 2640(a)(6) applies to a monetary penalty recovery suit commenced under § 1582(1), for the reasons that follow.

First, the Court notes that § 2640(a)(5) applies to an "action commenced to review" the agency's decision, which implies a challenge to the agency action by an aggrieved party. This language does not describe the case at bar because the government commenced this case to *uphold* Customs' action, not to review or challenge it. The present case is more accurately described by the plain language of § 2640(a)(6) than that of § 2640(a)(5), because the essential question for the Court is whether to permit recovery of penalties under § 1582(1), not whether a broker violated has § 1641 in the first place. Subdivision (a)(6) describes the present case more specifically, because the broker statute is only before the Court indirectly, as a basis underlying a § 1582(1) suit. Furthermore, § 1582 provides specifically for suits to recover a fine levied by the United States against a private entity,[17] but the causes of action covered by the other subdivisions of § 2640(a) provide for exactly the opposite—suits by private entities against the United States.[18] This distinction adds force to the differences between the plain language of §§ 2640(a)(5) and (a)(6), suggesting that Congress intended to group suits by the government to recover § 1641(d)(2)(A) monetary penalties together with similar cases under § 2640(a)(6), while placing under § 2640(a)(5) cases initiated by private parties challenging government action under the broker statute. Moreover, the Court notes that Plaintiff accepts that

[17] 28 U.S.C. 1582 (applying only to a "civil action which arises out of an import transaction and *which is commenced by the United States* [.]") (emphasis added). Each of the statutes referenced in § 1582(1) provides a procedure by which the government may impose a fine. *See* 19 U.S.C. § 1592 (penalties for fraud, gross negligence, and negligence by importers); 19 U.S.C. 1593a (penalties for false drawback claims); 19 U.S.C. § 1641(b)(6) (penalties for transacting customs business without a license); 19 U.S.C. § 1641(d)(2)(A) (as discussed throughout this opinion); 19 U.S.C. § 1671c(i)(2)

[18] *See* §§ 2640(a)(1) (providing for challenges to the government's denial of a protest under 19 U.S.C. § 1515); (a)(2) (providing for challenges to the government's valuation, classification, or duty decision under 19 U.S.C. § 1516); (a)(3) (providing for challenges to the government's final country of origin rulings under 19 U.S.C. § 2515(b)(1)); (a)(4) (providing for challenges when the government denies access to proprietary materials); and (a)(5) (providing for "actions commenced to review any decision" of the government under § 1641 apart from license revocation or suspension decisions). *Compare* (a)(6) (providing for recovery actions "commenced *by* the United States" to recover civil penalties, recover upon a bond, or recover duties) (emphasis added).

the Court's review of this case is governed by the *de novo* standard of § 2640(a)(6). (Pl.'s Post-Remand Brief at 9,12.) For these reasons, the Court holds that § 2640(a)(6) applies to monetary penalty recovery suits, rather than § 2640(a)(5).

Drawing this distinction is not merely an academic exercise. It is true that subdivisions (a)(5) and (a)(6) both share the operative language of § 2640(a), requiring the court to "make its determinations upon the basis of the record made before the court," but, remarkably, that shared language has been construed as requiring something different depending on which subdivision of § 2640(a) applies in a particular case. *Compare ITT Corp. v. United States*, 24 F.3d 1384, 1389 (Fed. Cir. 1994) (construing § 2640(a)(1) as requiring "trial *de novo*") *with Bell v. United States*, 17 C.I.T. 1220, 1224–25, 839 F. Supp. 874, 878 (1993) (construing § 2640(a)(5) as mandating something more deferential than *de novo* review by virtue of its interaction with 19 U.S.C. § 1641(e)) *and United States v. Ricci*, 21 CIT 1145, 985 F. Supp. 125, 126 (1997) (construing § 2640(a)(5) as failing to provide a standard of review altogether).

In *Bell*, the plaintiff challenged the denial of his broker's license application, arguing that the *de novo* standard of § 2640(a)(5) applied and was in "fatal conflict" with 19 U.S.C. § 1641(e)(3) (a provision of the broker statute pertaining to certain judicial appeals and mandating that the court uphold Customs' findings of fact if supported by substantial evidence). 839 F. Supp. 874, 878. Noting that "it is preferable to harmonize apparently conflicting statutes," the *Bell* court stated that "[i]n license denial cases, 'record made before the court' refers not to the standard of review, but to the scope of information that the court shall ultimately review on appeal," and ruled that the "court will . . . uphold the Secretary's findings and conclusions . . . if they are supported by substantial evidence[.]" *Id.* at 878–79. In *China Diesel Imports v. United States*, the court analyzed *Bell* as limited to broker's license denial cases, where "peculiar competing statutory provisions [i.e., the judicial appeal provisions of the broker statute at § 1641(e)(3)] . . . weigh[] against ordinary *de novo* trial." 18 C.I.T. 515, 520, 855 F. Supp. 380, 385 (1994). The court in *China Diesel*, however, held that § 2640(a) directs trial *de novo* where "no . . . competing statutory provisions, nor indications of legislative intent, weigh[] against a trial *de novo* [.]" *Id.*

Furthermore, in what appears to be the only other court decision on a monetary penalty recovery case, the court applied § 2640(a)(5) rather than § 2640(a)(6). *See Ricci*, 985 F. Supp. at 126. The *Ricci* court stated that § 2640(a) provides only a *scope* of review that "is not accompanied by a standard of review," and consequently looked to 5

U.S.C. § 706 (the Administrative Procedure Act ("APA")) for a standard to govern § 1641(d)(2)(A) monetary penalty recovery suits. 985 F. Supp. at 126. Ultimately, the *Ricci* court applied a *de novo* standard of review pursuant to 5 U.S.C. § 706(2)(F). *Id.* Thus, the operative language of § 2640(a) has been construed differently in cases involving § 2640(a)(5) than in cases involving the other subdivisions of § 2640(a), despite the argument against such a result which arises from the fact that all of the subdivisions share the same operative language.[19]

This Court disagrees with *Ricci* 's statement that the operative language "upon the basis of the record made before the court" in § 2640(a) does not provide a standard of review. The statute's language, in the first place, directs how the Court "shall make its *determinations.* " 19 U.S.C. § 2640(a) (emphasis added). A "determination" is a "final decision by a court," Black's Law Dictionary (9th Ed. 2009), and to "determine" means to "settle or decide (a dispute, question, matter in debate), as a judge or arbiter," Oxford English Dictionary (2d Ed. 1989). In contrast, each of the other subdivisions of § 2640 directs how the Court "shall review" the matter. *See* § 2640(b)-(e) and Analysis, § III.B.1, *supra.* A "review" is a "[c]onsideration, inspection, or reexamination of a subject or thing," implying a case in which the Court takes a second look at a matter previously decided. Black's Law Dictionary (9th Ed. 2009). Since § 2640(a) describes the manner in which the Court "shall make its determinations"—or, in other words, "settle or decide" the case in the first instance—the statutory language "upon the basis of the record made before the court" appears to contemplate *de novo* review by the court and constitute a standard of review.

The language in § 2640(a), while suggestive, is insufficient to decide this question standing alone. Higher courts, however, have also interpreted the phrase "upon the basis of the record made before the court" in § 2640(a) to mandate a *de novo* standard of review. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999) (implying that the phrase "make its determinations upon the basis of the

[19] The Court's review of the relevant case law and statutes convinces the Court that the purported statutory conflict cited in *Bell* and *China Diesel* does not actually exist, and that license denials should also be governed by an ordinary *de novo* standard of review. The Court is convinced of this interpretation by the language of § 1641(e)(3) and (4), which references the hearing officer and findings of fact required in a revocation or suspension proceeding—which are not required when a license or permit is denied. *Compare* § 1641(d)(2)(B) (revocation or suspension procedure) and 19 C.F.R. §§ 111.67–69 (requirements regarding hearing officer and findings of fact) *with* § 1641(b) and (c) (denial grounds) and 19 C.F.R. §§ 111.13(e), 111.16–17, 111.19(e), (g) (requirements regarding denial of permit of license and administrative appeals therefrom).

record made before the court" in § 2640(a) gives the Court "authority . . . to make factual determinations, and to apply those determinations to the law, *de novo* "); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003) (stating that the Court "is required to decide, on a de novo basis, civil actions that contest the denial of a protest to a Customs classification ruling," and quoting the operative language of § 2640(a)); ITT, 24 F.3d at 1389 (referring to § 2640(a) as "establishing a statutory scheme for review of Customs' denial of a . . . reliquidation request in a trial *de novo* before the Court of International Trade").

Confirming this analysis, the standard and scope of review statute's operative language has been interpreted to provide a *de novo* standard of review in cases covered by the other subdivisions of § 2640(a). *See Park B. Smith*, 347 F.3d at 924 (*de novo* review of challenge to Customs classification, which falls under § 2640(a)(1)); *Amity Leather Co. v. United States*, 20 C.I.T. 1049, 939 F. Supp. 891, 892–93 (1996) (*de novo* review of challenge to denied 19 U.S.C. § 1516 petition, which falls under § 2640(a)(2)); *Daido Corp. v. United States*, 16 C.I.T. 987, 807 F. Supp. 1571, 1577 (1992) (*de novo* review of challenge to denied 19 U.S.C. § 1677f(c)(2) request for confidential information, which falls under § 2640(a)(4)); *Allied Tube & Conduit Corp. v. United States*, 13 C.I.T. 698, 721 F. Supp. 305, 309 (1989) (same); *United States v. Inn Foods, Inc.*, 31 C.I.T. 1474, 515 F. Supp. 2d 1347, 1357 (2007) (*de novo* review of action to enforce penalties imposed under 19 U.S.C. § 1592, which falls under § 2640(a)(6)).[20]

Finally, the legislative history of § 2640 corroborates that Congress intended cases falling under § 2640(a)—all of them—to be governed by a *de novo* standard ofreview. The report of the Judiciary Committee of the House of Representatives recommending adoption of § 2640 stated that § 2640(a)(6) "provides for a trial de novo in a civil penalty or collection action commenced pursuant to proposed section 1582" and that "[t]his *standard of review* is appropriate since the types of actions specified in section 1582 are presently commenced in federal district court, and a trial de novo is conducted in that court." H.R. REP. No. 1235, 96th Cong., 2d Sess. 59 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3771 (repeating similar language for § 2640(a)(1)-(a)(5)) (emphasis added).

[20] It appears that *Xerox Corp. v. United States*, pending before this Court under Court No. 07–00337, would be the first case to fall under § 2640(a)(3). Because no decision in that case has yet addressed the issue, the standard of review provided by § 2460(a)(3) remains an open question.

Based upon these considerations, the Court holds that the phrase "upon the basis of the record made before the court" in § 2640(a) provides a standard of review, not merely a scope of review, and establishes that the Court decides *de novo* monetary penalty recovery actions brought under § 1582(1).

2. *Impact of De Novo Standard on Remand Determination*

a. The Mandatory Remand Principle Is Inapplicable

Defendant cites a plethora of cases establishing beyond doubt that, *on judicial appeal of an administrative determination*, the Court *must* remand to the administrative agency upon locating a defect in the agency's application of the law. Regarding this mandatory remand principle, the Court of Appeals has stated:

> In determining whether and how that principle is to be applied, however, its purpose must always be kept in mind: it is designed to ensure that the reviewing court does not intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency's expertise and discretion. Whether the principle is to be applied necessarily turns upon the precise issues the reviewing court has decided and what questions remain for the agency to decide on remand.

Int'l Light Metals, 279 F.3d at 1003. The mandatory remand requirement applies where the law "entrusts the agency to make" the relevant determination. *Ventura*, 547 U.S. at 16. In such cases, a "judicial judgment cannot be made to do service for an administrative judgment" because the court "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and reach its own conclusions based on such an inquiry." Id. (internal quotations and citations omitted). For these reasons, "a court of appeals should remand a case to an agency for decision of *matters that statutes place primarily in agency hands. " Id.* (emphasis added).

The teaching of *Int'l Light Metals* (a *de novo* case) is that the Court of International Trade may remand where appropriate, but need not do so unless the Court would otherwise intrude on agency prerogatives. *See* 279 F.3d at 1003. The Court need not blindly exercise remand authority in the case at bar, but must instead examine whether failure to remand would intrude on Customs' authority.

Consideration of the mandatory remand principle shows that it is inapposite to the situation at bar. Each of the 25 cases cited by Defendant in this regard originated as an appeal for judicial review

by a party aggrieved by an adverse agency action.[21] In such cases, the district court "sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether [the agency's] decision was factually flawed." *PPG Indus.*, 52 F.3d at 365 (*quoting Marshall Co. Health Care Ass'n v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993)). This case is not before the Court on appeal; to the contrary, the Court sits here as a trial court and is "authorized to determine in a trial-type proceeding whether [the agency's] decision was factually flawed." *Id.* This conclusion follows from the standard of review statute, § 2640(a)(6), which authorizes the Court to conduct a trial *de novo*. *See* Analysis, § III.B.1, *supra*; *compare also* 19U.S.C. § 1641(d)(2)(A) (providing procedure for imposing monetary penalties but making no provision for direct judicial appeal) *with* 19 U.S.C. § 1641(d)(2)(B) (providing procedures for suspension or revocation of broker's license) and § 1641(e) (limiting inquiry of court upon judicial appeal of suspension or revocation of broker's license). Unlike the

[21] *Thomas*, 547 U.S. at 183–84 (asylum applicant challenging BIA denial); *Ventura*, 547 U.S. at 13–14 (same); *Florida Power & Light*, 470 U.S. at 731–33 (citizen APA suit challenging NRC decision);
Nat'l Ass'n of Greeting Card Publrs., 462 U.S. at 818–19 (business association challenging postal rate increase);
Enter. Ass'n of Steam, 429 U.S. at 513–14 (union challenging NLRB decision);
South Prairie Constr., 425 U.S. 801–02 (union challenging NLRB decision);
Reilly, 571 F.3d at 1376–77 (employee challenging MSPB decision);
Ad Hoc Shrimp Trade Action Comm., 515 F.3d at 1378–79, 1382 (industry coalition challenging Commerce antidumping scope determination);
In re Reuning, 276 F. App'x at 985 (applicant appealing adverse PTO decision);
Folio, 402 F.3d at 1352–53 (employee challenging MSPB decision);
Int'l Light Metals, 279 F.3d at 101–02 (manufacturer challenging Customs' denial of drawback claim);
Whittington, 80 F.3d at 472–73 (employee challenging MSPB decision);
Waldau v. Merit Sys. Protection Bd., 19 F.3d at 1396–97 (same);
Trent Tube, 975 F.2d at 809 (manufacturers challenging Commerce injury determination);
Kline, 808 F.2d at 44 (employee challenging MSPB decision);
Casteneda-Castillo v. Gonzales, 488 F.3d at 19–20 (asylum applicant challenging BIA denial);
Soltane, 381 F.3d at 145–46 (employer APA suit challenging INS visa denial);
Coal. for Gov't Procurement, 365 F.3d 442–43 (business coalition APA suit challenging FPI action);
Baystate Alternative Staffing, 163 F.3d at 670 (employer APA suit challenging Dep't of Labor decision);
PPG Indus., 52 F.3d at 364–65 (manufacturer APA suit challenging Dep't of Labor decision);
Coteau Props., 53 F.3d at 1471 (company APA suit challenging OSM action);
Tomas, 935 F.2d at 1555 (citizen challenging state agency actions);
Pollgreen, 770 F.2d at 1543 (boat owners challenging BIA fines for involvement in Mariel Boatlift);
Ommaya, 726 F.2d at 829 (employee challenging MSPB decision); and
Kamheangpatiyooth, 597 F.2d at 1255 (applicant for suspension of deportation challenging BIA denial).

situation in *Ventura* and the other cases cited by Defendant, this Court, not Customs, bears the authority to determine the central question of the suit: whether Plaintiff is entitled to recovery of a monetary penalty issued under § 1641(d)(2)(A). 28 U.S.C. § 1582(1); 19 C.F.R. § 111.94. For these reasons, the Court finds that the mandatory remand principle is inapplicable.

b. Discretionary Remand is Inappropriate

Even though the mandatory remand principle does not apply, the Court still must consider whether to remand to Customs pursuant to 28 U.S.C. § 2643. That statute states that the Court "may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision," § 2643(b), and, with exceptions not applicable here, "may . . . order any other form of relief that is appropriate in a civil action, including . . . orders of remand," § 2643(c)(1). Remand is thus within the Court's discretion, and should be exercised when doing so will assist the Court in reaching the correct result. 28 U.S.C. § 2643(b); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The Court can reach the correct result here only by resolving the fundamental issue of the trial: has Plaintiff proven by a preponderance of the evidence that the Court should permit recovery of the monetary penalties imposed upon UPS? Remand is not an appropriate means of answering that question.

Unlike the situation in *Int'l Light Metals*, Plaintiff here is not a private party seeking relief from adverse agency action, but is rather the government, seeking to enforce agency action. *See* 279 F.3d at 1002. The Court makes its determination *de novo* upon the basis of a record that the government must develop and in which the government bears the burden of proving entitlement to recovery, like any other plaintiff bringing a civil suit. 28 U.S.C. § 2640(a)(6); 19 U.S.C. § 1641(d)(2)(A). The Court of Appeals, in ruling that this Court erred "in upholding [Customs]'s determination that UPS did not exercise responsible supervision and control in violation of 19 U.S.C. § 1641," indicated that Plaintiff's burden of proof required showing at trial that it had complied with all of the prerequisites of the § 1641(d)(2)(A) penalty procedure, including proper consideration of the § 111.1 factors. This burden of proof would become meaningless if, after Plaintiff failed to prove entitlement to recovery at trial, the Court exercised its discretionary remand power so that Plaintiff could create the facts prerequisite to recovery, add those facts to the trial record, and receive a judgment in its favor. Certainly no other plaintiff would be allowed such an extraordinary remedy for a failure of proof at trial.

Furthermore, the parties have not identified, and the Court has not located, any case brought pursuant to 28 U.S.C. § 1582 which has been remanded to the agency. Therefore, after due consideration, the Court concludes that discretionary remand to Customs pursuant to 28 U.S.C. § 2643 would be inappropriate in this case. Remand being neither mandatory nor appropriate, the Court denies the request to remand this case to Customs.

Conclusion

The Court holds that (1) Plaintiff failed to establish at trial that the required Customs officer, here the FP&F Officer, considered all ten factors of responsible supervision and control set forth in 19 C.F.R. § 111.1 when imposing the monetary penalties at issue on UPS; (2) this failing was tantamount to a failure by Plaintiff to meet its burden of proof; (3) Plaintiff has not shown grounds for reopening the trial to introduce additional evidence; (4) it is neither necessary nor appropriate to remand this case to Customs; and (5) as a result of Plaintiff's failure to establish that the monetary penalties at issue were properly imposed in accordance with the broker statute and the regulations interpreting that statute, the Court will enter judgment for Defendant. Judgment will issue separately in accordance with this Opinion.

Dated: January 28, 2010
New York, New York

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

Slip Op. 10–12

ANDAMAN SEAFOOD CO., LTD., et al., Plaintiffs, – v – UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 09–00091

[Plaintiffs' motion for judgment on agency record denied; Commerce's final Section 129 determination affirmed]

Dated: February 2, 2010

White & Case LLP (*Walter J. Spak, Frank H. Morgan* and *Jay C. Campbell*) for the Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*), and, of counsel, *Jonathan Zielinski*, Office of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

OPINION

Pogue, Judge:

I.
Introduction

This action raises the question of whether the government may choose to give only prospective effect to its decision to bring its administration of domestic antidumping law into compliance with international commitments.

Plaintiffs are producers/exporters of frozen warmwater shrimp from Thailand. Plaintiffs seek review of the Department of Commerce's ("Commerce" or "the Department") response to the findings of a World Trade Organization ("WTO") panel regarding the antidumping duty investigation of certain frozen warmwater shrimp from Thailand.[1] Specifically, Plaintiffs challenge Commerce's partial, rather than total, revocation of the antidumping order at issue, and the Department's decision to apply only prospectively the revised antidumping margin contained in the *Final § 129 Determination*, *i.e.*, the decision to apply the recalculation of the Department's determinations of sales at less than fair value ("LTFV"), the revised antidumping margin, solely to subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of that *Final § 129 Determination*. Plaintiffs contend that in declining to apply the revocation of the antidumping order to unliquidated entries predating the effective date of implementation of the *Final § 129 Determination*, the Department acted contrary to law. (Compl. ¶ 16.)[2]

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[1] *See Implementation of the Findings of the WTO Panel in United States — Antidumping Measure on Shrimp from Thailand*, 74 Fed. Reg. 5,638 (Dep't Commerce Jan. 30, 2009) (notice of determination under Section 129 of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. § 3538 ("Section 129"), and partial revocation of the antidumping duty order on frozen warmwater shrimp from Thailand) ("*Final § 129 Determination*").

[2] In their complaint, Plaintiffs also claim that Commerce improperly failed to exclude from the antidumping duty order two additional companies, which were non-existent or inoperational at the time of the original investigation but were subsequently found by the Department to be collapsible into the Rubicon Group. (Compl. ¶¶ 17–18.) On October 13, 2009, Commerce excluded these two companies from the order, following a changed circumstances review. *Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed. Reg. 52,452 (Dep't Commerce Oct. 13, 2009) (final results of antidumping duty changed circumstances review and notice of revocation in part). Accordingly, this issue is now moot, and Plaintiffs are no longer pursuing their claim in this regard. (*See* Def.'s Mem. in Opp'n to [Pls.'] Rule 56.2 Mot. for J. Upon Agency R. 2 n.1; Pls.' Reply Br. ("Pls.' Reply") 1 n.1).

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c).[3] Because domestic law permits the agency's determination, the court concludes that the Department did not act contrary to law.

II.
Background

This action stems from Commerce's 2005 antidumping duty order covering certain frozen warmwater shrimp from Thailand that were entered or withdrawn from warehouse for consumption on or after August 4, 2004 (the "subject merchandise"). *See Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5,145 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order) ("*Final Determination & Order* "); *see also* Sections 731–36 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673–73e(a) (2006).[4] The subject merchandise included goods that Plaintiffs produced or exported.

In its *Final Determination & Order*, Commerce calculated Plaintiffs' dumping margins by using a "zeroing" methodology.[5] The Department's use of this methodology was challenged at the WTO, and, in response to this challenge, a WTO dispute settlement panel concluded that the United States — by employing zeroing to calculate dumping margins in the *Final Determination & Order* — acted inconsistently with Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement"). The WTO panel recommended that the United States bring its dumping determination into conformity with its obligations under the relevant WTO agreements. Panel Report, *United States — Measures Relating to Shrimp from Thailand*, ¶¶ 2.2, 8.2, 8.6, WT/DS343/R (Feb. 29, 2008) ("U.S. — Shrimp (Thailand) Panel Report"). (*See also* Compl. ¶ 7.)

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[3] 28 U.S.C. § 1581(c) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930."); Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(III) & (B)(vii) ("Within thirty days after [] the date of publication in the Federal Register of . . . notice of the implementation of [a determination under Section 129 of the URAA]. . ., an interested party . . . may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint . . ., contesting any factual findings or legal conclusions upon which the determination is based.").

[4] Further citation to the Tariff Act of 1930, as amended, is to Title 19 of the U.S. Code, 2006 edition.

[5] "Zeroing" is a methodology "whereby only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) were aggregated, and negative margins (*i.e.*, margins for sales of merchandise sold at nondumped prices) were given a value of zero." *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343,1345–46 (Fed. Cir. 2005). The effect of "zeroing" may be to increase the amount of the antidumping duty ordered.

The United States did not appeal the panel's conclusion in this respect,[6] and the panel's report was adopted by the WTO Dispute Settlement Body ("DSB") on August 1, 2008. Action by Dispute Settlement Body, *United States — Measures Relating to Shrimp from Thailand*, WT/DS343/14 (Aug. 7, 2008). (*See also* Compl. ¶ 7.)[7]

Following the DSB decision, the government entered into the statutory process to determine whether and how to respond. *See* 19 U.S.C. § 3538. Specifically, on November 14, 2008, Commerce "advised interested parties that it was initiating a proceeding under section 129 of the URAA . . . that would implement the findings of the WTO dispute settlement panel in [*U.S. — Shrimp (Thailand)* Panel Report]." *Final § 129 Determination*, 74 Fed. Reg. at 5,638. *See also* 19 U.S.C. § 3538(b).[8] The Department then issued its preliminary results, on November 21, 2008, and, after receiving comments and rebuttal comments from the interested parties, the Department issued its final results on January 12, 2009. In its final results, the Department recalculated the weighted-average dumping margins from the antidumping investigation without zeroing, i.e., by applying the calculation methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) (final modification). *Final § 129 Determination*, 74 Fed. Reg. at 5,638–39.

Continuing the statutory process, "the [United States Trade Representative ("USTR")] held consultations with the Department and the appropriate congressional committees with respect to this deter-

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[6] *See* Appellate Body Report, *United States — Measures Relating to Shrimp from Thailand*, ¶ 181, WT/DS343/AB/R (July 16,2008) (listing issues raised on appeal).

[7] Pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the disputing parties agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in this dispute would expire on April 1, 2009. Agreement under Article 21.3(b) of the DSU, *United States — Measures Relating to Shrimp from Thailand*, WT/DS343/16 (Nov. 4, 2008).

[8] "Congress has established two procedures by which a negative WTO decision may be implemented into domestic law. The first method, a Section 123 proceeding, is the mechanism to amend, rescind, or modify an agency regulation or practice in order to implement a decision by the WTO that such isinconsistent with U.S. treaty obligations. [. . .] The second method, a Section 129 proceeding, is [more] discrete[, *i.e.*,] Section 129 sets forth a procedure to implement a negative WTO decision with respect to a specific agency determination that the WTO found [insufficient to] support an unfair trade order." *Corus Staal BV v. United States*, __ CIT __, __, 593 F. Supp. 2d 1373,1377–78 n.11 (2008) (internal emphasis, alteration, quotation marks and citations omitted). *See also U.S. Steel Corp. v. United States*, __ CIT __, __, 637 F. Supp. 2d 1199, 1205–06 (2009); *Acciaierie Valbruna S.p.A. v. United States*, No. 08–00381, 2009 WL 2190188, at *2 n.5 (CIT July 23, 2009).

mination [as required by section 129(b)(3) of the URAA]," *id.* at 5,638, and, on January 16, 2009, "in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, the USTR directed the Department to implement in whole this determination." *Id. See also* 19 U.S.C. § 3538(b)(4).

Accordingly, on January 30, 2009, Commerce issued notice of its determination under Section 129, stating that the Department will apply the recalculated weighted-average dumping margins from the antidumping investigation of frozen warmwater shrimp from Thailand to subject merchandise entered or withdrawn from warehouse for consumption on or after January 16, 2009, the effective date of the determination. *Final § 129 Determination* at 5,639; *see* 19 U.S.C. § 3538(c)(1)(B) (determination under Section 129 shall apply to entries made on or after "the date on which the Trade Representative directs [Commerce] to implement that determination").

The re-calculated margins for Plaintiffs were *de minimis*, *Final § 129 Determination*, 74 Fed. Reg. at 5,639; *see* 19 U.S.C. § 1673b(b)(3) (defining *de minimis* as less than two percent). Based on this finding, the Department partially revoked the antidumping order with respect to Plaintiffs, effective for all entries of the subject merchandise entered on or after January 16, 2009, the effective date of the recalculation. *Final § 129 Determination*, 74 Fed. Reg. at 5,639; *Partial Revocation of Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Thailand Produced and Exported by the Rubicon Group Co's*, A–549–822 (CBP Feb. 23, 2009), Admin. R. Pub. Doc. 44; *see also* 19 U.S.C. 1673d(a)(4) (Commerce shall disregard *de minimis* dumping margins).

Plaintiffs now challenge the *Final § 129 Determination*, arguing that, first, the United States retains no legal authority to assess antidumping duties on Plaintiffs' prior unliquidated entries (*i.e.*, unliquidated entries made prior to January 16, 2009 — the effective date of the Section 129 recalculation and partial revocation of the dumping order) because "the effect of the Section 129 Determination was to invalidate the original LTFV determination with respect to the [Plaintiffs]" (Mem. of P. & A. in Supp. of Pls.' USCIT R. 56.2 Mot. for J. on Agency R. ("Pls.' Mem.") 8), and "[t]he U.S. antidumping law mandates that antidumping duties can only be assessed when there is a valid determination of dumping" (*id.* at 11 (citing 19 U.S.C. § 1673)).

Plaintiffs rely on *Laclede Steel Co. v. United States*, 20 CIT 712, 928 F. Supp. 1182 (1996); *Jilin Henghe Pharm. Co. v. United States*, 28 CIT 969, 342 F. Supp. 2d 1301 (2004), *vacated as moot*, 123 F. App'x 402 (Fed. Cir. 2005); and *Tembec, Inc. v. United States*, 30 CIT 1519,

461 F. Supp. 2d 1355 (2006), *judgment vacated*, 31 CIT 241, 475 F. Supp. 2d 1393 (2007) (hereinafter collectively referred to as the "*Laclede* line" of cases), for the proposition that "[o]nce Commerce's final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties." (*Id.* at 12 (quoting *Jilin*, 28 CIT at 978, 342 F. Supp. 2d at 1309–10); *see generally id.* at 11–14.)

Second, Plaintiffs argue that Commerce's decision not to apply the Section 129 recalculation and partial revocation of the dumping order to those of Plaintiffs' unliquidated entries that were entered prior to the Section 129 determination is not consistent with the United States's international obligations under the WTO agreements, and therefore contrary to law, pursuant to *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."). (Compl. ¶ 16.)

Plaintiffs rely on two other WTO Appellate Body Reports, *United States — Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW (Aug. 18, 2009), and *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW (May 14, 2009) (Pls.' Mem. 16–18) for the proposition that "the WTO Agreements establish that prospective compliance means applying a measure that is WTO-consistent after the compliance period ends — irrespective of when the entries occurred." (*Id.* at 17–18.) Invoking *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 173, 358 F. Supp. 2d 1334, 1348 (2005) ("[Where] Congress has not statutorily created an unavoidable conflict with the WTO, there exists no reason not to look to the WTO for assistance in interpreting U.S. law" (citations omitted)) (relying on *Charming Betsy*, 6 U.S. (2 Crach) at 118; *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995)), Plaintiffs argue that, consistent with the cited Appellate Body reports, Section 129 should be interpreted to apply to all entries of subject merchandise which remain unliquidated at the time that the *Final § 129 Determination* is implemented. (*See* Pls.' Mem. 16–19.)

As explained below, the court rejects both of Plaintiffs' arguments.

III.
Standard Of Review

In an action brought, as here, under Section 516A of the Tariff Act of 1930, the court shall "hold unlawful any [agency] determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19

U.S.C. § 1516a(b)(1)(B)(i). *See also, e.g., PAM S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009). In considering legal issues, if a statutory provision directly addresses the question at issue, its plain meaning controls. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380 (Fed. Cir. 2003) ("'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984))); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) ("Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter.").

IV.
Discussion

1. *The Section 129 Determination Did Not Invalidate the Antidumping Order.*

The *Laclede* line of cases stand for the established principle that an invalid antidumping determination cannot serve as a legal basis for the imposition of antidumping duties. Thus, under the *Laclede* line, once an agency determination is ruled to have been invalid, all affected unliquidated entries must be liquidated in accordance with that ruling, regardless of their date of entry.

Nevertheless, Plaintiffs cannot successfully invoke the *Laclede* line's principle here, because the underlying antidumping order in this case has not been invalidated. Rather, on its face, the *Final § 129 Determination* is a "partial" and prospective revocation of the underlying order. As a matter of law, the statutory provisions under which the *Final § 129 Determination* is issued explicitly provides for such a determination. By the statute's plain terms, a determination implemented pursuant to Section 129 "shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs [Commerce] . . . to implement that determination." 19 U.S.C. § 3538(c)(1). The statute does not specify that a Section 129 determination must be implemented retroactively. Accordingly, regardless of whether the agency may reasonably interpret the statute to apply to *all* unliquidated entries of subject merchandise (a question the court need not and does not decide here), it is clear that, at the very least, the law explicitly contemplates the application of determinations made under its auspices solely to entries made on or after January 16, 2009, the date on

which the USTR directed its implementation — that is, the law explicitly permits the route adopted by Commerce in this case.

Moreover, the statute's plain language is buttressed by the Statement of Administrative Action:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by . . . Commerce are implemented under subsection[] . . . (b), such determinations have *prospective effect only*. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, *relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available*. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping [] duty order, entries made prior to the date of [the] Trade Representative's direction would remain subject to potential duty liability.

Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 1026 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4313 ("URAA SAA") (emphasis added).

It is clear, therefore, that Commerce's determination under Section 129 — in response to a DSB decision that the agency's action is not consistent with the WTO Antidumping Agreement — has a very different effect than a decision of a U.S. Court or a North American Free Trade Agreement ("NAFTA") Panel[9] that such an action was from the beginning inconsistent with U.S. antidumping law. The plain language of the statute provides that Commerce is to apply a determination under Section 129 prospectively, *i.e.*, to entries made on or after the date on which the USTR directs its implementation. There is nothing on the face of the law to suggest that its effect is to invalidate the original determination in so far as that original deter-

[9] *See* NAFTA Art. 1904.2 ("An involved Party may request that a panel review, based on the administrative record, a final antidumping [] determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping [] law *of the importing Party*. For this purpose, the antidumping [] law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping [] statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement." (emphasis added)).

mination applies to entries not explicitly covered by the terms of Section 129. To the contrary, the Department's use of zeroing in arriving at an affirmative LTFV determination — the basis of the challenge and consequent adverse decision in the WTO — has been consistently upheld by U.S. courts as a matter of U.S. law.[10]

Unlike the case at bar, in each of the *Laclede* line of cases, the relevant agency determination was held, by either a U.S. Court or a NAFTA Panel,[11] not to have been validly propagated *as a matter of U.S. law*.[12] That is, in each of these cases, the court held that, because the agency determination had been made contrary to the U.S. anti-

[10] *See Timken Co. v. United States*, 354 F.3d 1334, 1343 (Fed. Cir. 2004) ("According Commerce its proper deference, we hold that it reasonably interpreted [19 U.S.C.] § 1677(35)(A) to allow for zeroing."); *see also id.* at 1344 (refusing "to overturn the zeroing practice" based on a WTO Appellate Body decision); *Corus Staal BV v. United States*, 502 F.3d 1370, 1372 (Fed. Cir. 2007) ("[The Federal Circuit] has held that although the antidumping statutes do not require the use of zeroing in calculating dumping margins, Commerce's zeroing methodology is a permissible interpretation of the statutory provisions." (citations omitted)); *U.S. Steel*, __ CIT at __, 637 F. Supp. 2d at 1210 ("[T]he Federal Circuit has repeatedly found that the pertinent antidumping statutes do not unambiguously reveal Congress's position on the issue of zeroing . . . ." (citations omitted)); *id.* at 1212 ("In recognition of Commerce's expertise in the field of antidumping law, the court owes substantial deference to the agency when it interprets an ambiguous antidumping statute." (citation omitted)). In *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) (final modification), Commerce announced that it will no longer employ the zeroing methodology in investigations using average-to-average comparisons. *See Corus Staal*, 502 F.3d at 1373 n.1 (defining average-to-average valuation). However, "[i]t is clear that Commerce intends to apply its new policy on zeroing only prospectively." *Id.* at 1374.

[11] *See supra* note 9.

[12] With respect to *Laclede*, *see Laclede*, 20 CIT at 716,928 F. Supp. at 1187 (holding that Commerce must apply the rate affirmed by the court after remand to unliquidated entries made prior to the court's decision invalidating Commerce's initial assessment); *Laclede Steel Co. v. United States*, 18 CIT 965(1994) (invalidating Commerce's initial determination as a matter of U.S. law). With respect to *Jilin*, *see Jilin*, 28 CIT at 969–70, 342 F. Supp. 2d at 1303 ("Commerce's liquidation instructions seek to impose antidumping duties on Plaintiffs' entries pursuant to an antidumping order which was invalidated, with regard to Plaintiffs, by the Court's decision in *Rhodia, Inc. v. United States*, 26 CIT 1107, 240 F. Supp. 2d 1247 (2002)."); Rhodia, 26 CIT at 1108, 240 F. Supp. 2d at 1249 (noting that the court initially remanded the case back to Commerce because its determination was not supported by substantial evidence, in violation of U.S. law). With respect to *Tembec*, *see Tembec*, 30 CIT at 1524–32, 461 F. Supp. 2d at 1360–67 (holding that the revocation of an antidumping order as a result of its invalidation by a NAFTA panel applies to unliquidated entries made prior to *Timken* notice because it was "the intent of Congress that there be the same results with respect to refunds [of cash deposits] whether an appeal is taken to a NAFTA panel or this Court"); *Tembec, Inc. v. United States*, 30 CIT 958, 441 F.Supp. 2d 1302 (2006) (holding the antidumping order invalid as a matter of U.S. law because injury determination was invalidated by NAFTA panel); *id.* at 961, 1308 ("The NAFTA Panel issued its decision . . ., finding that the [International Trade Commission]'s injury determination was not supported by substantial evidence or in accordance with U.S. law.").

dumping statute, that determination was never validly made, and that therefore no outstanding entries may be liquidated on the basis of such agency action.

Here, on the other hand, the successful challenge to Commerce's initial antidumping order was made at the level of the WTO DSB, which concluded, on the basis of the WTO Antidumping Agreement, that regardless of its validity as a matter of U.S. antidumping law, this determination had been made contrary to international agreement. *See U.S. — Shrimp (Thailand)* Panel Report at ¶¶ 2.2, 8.2, 8.6. The question before the court, therefore, is whether the effect of a determination made pursuant to Section 129 — the statute used to implement the response of the United States, as a matter of domestic law, to the DSB's recommendations in *U.S. — Shrimp (Thailand)* Panel Report — is the same as a holding by a U.S. court that the initial challenged determination was issued in a manner that was contrary to law. The court concludes that it is not.

A Section 129 proceeding responds, *inter alia*, to a WTO DSB decision that a particular agency determination is not consistent with the United States' obligations as a Member of the WTO Antidumping Agreement. *See* 19 U.S.C. § 3538(b). As this Court explained in *Tembec*[13]:

> Unlike litigation before the court or a NAFTA panel, WTO Members are not required automatically to comply with the recommendations of a WTO panel or the [Appellate Body]. While compliance is encouraged, the DSU contemplates three different responses to an adverse WTO panel report. A Member may elect to bring its domestic practices in line with the WTO's recommendations. Alternatively, Members may substitute a compensatory trade agreement that lowers other barriers to trade while leaving an objectionable practice in place. Finally, a Member may choose not to comply with the WTO's recommendation.

Tembec, 30 CIT at 984–85, 441 F. Supp. 2d at 1328 (citing URAA SAA at 1008–09[14]). Accordingly, "Congress fashioned section 129 to allow

[13] Although the judgment in *Tembec* was vacated due to settlement, the decision itself was not withdrawn. *Tembec*, 31 CIT at 251, 475 F. Supp. 2d at 1402.

[14] URAA SAA at 1008–09 ("It is important to note that the []WTO dispute settlement system does not give panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences. The defending country may choose to make a change in its law. Or it may decide instead to offer trade 'compensation' — such as lower tariffs. The countries concerned could agree on compensation or on some other mutually satisfactory solution. Alternatively, the defending country

the United States to take full advantage of its remedial options before the WTO." *Id.* (footnote omitted).

In this case, Commerce, the USTR, and the pertinent Congressional committees deemed a prospective partial revocation and recalculation of dumping margins under Section 129 to be the appropriate response to the WTO panel decision in *U.S. — Shrimp (Thailand)*. *See Final § 129 Determination*. Consequently, in this case, the Department's recalculations pursuant to Section 129, which resulted in *de minimis* rates for Plaintiffs, are permissibly applicable solely to entries made on or after the date on which the USTR directed implementation of the Section 129 determination. 19 U.S.C. § 3538(c)(1)(B).[15] The resulting partial revocation of the antidumping order with respect to Plaintiffs, *see Final § 129 Determination*, is therefore similarly applicable to the same set of entries — those made on or after the effective date of implementation of the Section 129 determination.

Because the recalculation on which the partial revocation is based applies to entries made on or after its date of implementation, "[c]onsistent with the principle that GATT panel recommendations apply only prospectively," URAA SAA at 1026, and because the Department's initial calculations, leading to a determination of sales at LTFV using a zeroing methodology, have not been invalidated as a matter of U.S. law,[16] the LTFV determination and any antidumping duties assessed on its basis remain in effect with respect to entries not covered by the Section 129 recalculation — that is, with respect to all entries of subject merchandise made prior to the date of implementation of that determination. *Accord Corus Staal*, __ CIT at __, 593 F. Supp. 2d at 1386 (noting that Commerce's use of zeroing to calculate dumping margins is not unlawful as a matter of U.S. law, and concluding accordingly that "Commerce did not err when it instructed Customs to impose antidumping duties on Corus's entries of [the subject merchandise] given the valid determination of dumping and assumption of injury at the time these entries were made"). *See also Corus Staal*, 502 F.3d at 1373–75 (upholding Commerce's decision not to alter an administrative review determination "as a result of the post-POR prospective revocation of the order" pursuant to a Section 129 recalculation (quotation marks and citation omitted));

may decide to do nothing. In that case, the country that lodged the complaint may retaliate by suspending trade concessions equivalent to the trade benefits it has lost.").

[15] *See also Acciaierie Valbruna*, 2009 WL 2190188, at *1 n.1 ("The plain language of Section 129 of the URAA provides that a determination made under that provision has prospective effect, thereby applying only to entries made on or after the date the [USTR] directs [Commerce] to implement the decision." (citing 19 U.S.C. § 3538(c)(1)(B))).

[16] *See supra* note 10.

19 U.S.C. § 1675(d)(3) (determination to revoke order shall apply to unliquidated entries entered "on or after the dates determined by the administering authority"); *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 30 CIT 1537, 1542 n.8, 464 F. Supp. 2d 1350, 1355–56 n.8 (2006) ("Commerce's exclusive authority includes establishing the effective date of revocation." (citations omitted)).

Plaintiffs therefore improperly rely on *Laclede*, *Jilin*, and *Tembec*. Because the Department's original LTFV determination with respect to certain frozen warmwater shrimp from Thailand has not been held to have been invalidly made as a matter of U.S. law, its use as a basis for the assessment of duties on entries made prior to the effective date of the order's revocation is not contrary to the statute. *See* 19 U.S.C. §§ 1673e; 3538(c)(1).

2. *Application of the Charming Betsy Principle Does Not Alter the Effect of Section 129.*

Plaintiffs also argue that Section 129 should be interpreted so as to be consistent with WTO Appellate Body decisions, pursuant to the principle expressed by the Supreme Court in *Charming Betsy*, 6 U.S. (2 Cranch.) at 118 ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); *see also Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006) ("The rule of interpretation announced in [*Charming Betsy*] instructs that domestic law should be interpreted consistently with American international obligations to the degree possible."). Plaintiffs claim that WTO decisions require that, once the reasonable implementation period agreed upon by parties to a WTO dispute has expired (in this case, on April 1, 2009), any remaining unliquidated entries of subject merchandise must, in accordance with the DSU, be liquidated in a manner not inconsistent with the recommendations of the DSB.[17]

As already noted however, the clear intent of Congress in adopting Section 129 of the URAA was "to allow the United States to take full advantage of its remedial options before the WTO." *Tembec*, 30 CIT at 985, 441 F. Supp. 2d at 1328 (citing URAA SAA at 1008–09; 19 U.S.C. § 3538[]). The URAA was accordingly expressly designed so as to preserve the independence of U.S. law from adverse decisions of the DSB until such time as the political branches decide that, of the

[17] (Pls.' Mem. 16–19 (relying on Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW (Aug. 18, 2009); and Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW (May 14, 2009)).)

options available to the United States under the WTO Agreements, a change in U.S. law and/or policy or methodology is most appropriate. *See id.*

In this case, applying the Plaintiffs' interpretation of WTO precedent to compel Commerce to retroactively apply its partial revocation of the antidumping order to entries made prior to the effective date of that partial revocation would run counter to the clear and unambiguous meaning of current U.S. law. As explained above, the antidumping order in question was never invalidated as a matter of U.S. law. Accordingly, it remains in effect for all entries of subject merchandise entered on or after the effective date of the order until the effective date of its partial revocation. *See* 19 U.S.C. §§ 1673e; 1675(d)(3). To the extent that Plaintiffs are correct that the application of this statutory scheme to some subset of their unliquidated entries conflicts with U.S. obligations under the WTO Agreements (another question that the court need not, and does not decide here), that matter is for the WTO to decide, and, if appropriate, for further proceedings by the executive agencies in accordance with the statutory scheme.

V.
Conclusion

For all of the foregoing reasons, Plaintiffs' Motion for Judgment on the Agency Record is DENIED. Judgment will be entered for Defendant.

It is SO ORDERED.

Dated: February 2, 2010
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE