U.S. Customs and Border Protection

Slip Op. 11–152

FRENCH FEAST, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00131

[On challenge for refund of retaliatory import duties, after settlement in part, motion to dismiss remainder of action dismissed as time-barred.]

Dated: December 9, 2011

Peter S. Herrick, P.A. (*Peter S. Herrick*), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*), and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge:

This action pursuant to 28 U.S.C. § 1581(i) seeks refunds of retaliatory duties assessed on imports subject to *Implementation of WTO Recommendations Concerning EC-Measures Concerning Meat and Meat Products*, 64 Fed. Reg. 40638, 40639 (USTR July 27, 1999) ("*EC-Measures* "). French Feast, Inc. filed its summons and complaint against U.S. Customs and Border Protection ("Customs") on May 5, 2011, one hundred and fifty days after issuance of the appellate mandate on *Gilda Industries, Inc. v. United States*, 622 F.3d 1358 (Fed. Cir. 2010) affirming that the existing retaliatory action terminated by operation of law on July 29, 2007.

Thereafter, pursuant to 19 U.S.C. § 1520(a)(1), the parties stipulated to entry of judgment for refunds of retaliatory duties on entries of merchandise made after July 29, 2007 and liquidated (or remaining unliquidated) after May 4, 2009.

The government now moves to dismiss for lack of jurisdiction over the entries that remain herein, *i.e.*, those liquidated prior to May 5, 2009 ("remaining entries"), arguing that they are time-barred.

French Feast avers it was unaware it could challenge the retaliatory duty payments until it was so advised by its customs brokers and

argues its claim did not "finally" accrue until the mandate in *Gilda*. Pl.'s Resp. at 3–4 (referencing *United States v. Commodities Export Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992 (noting that a cause of action accrues only when "all events" necessary to state the claim or fix the alleged liability of the government have occurred). Collection of retaliatory duties is merely ministerial, contends French Feast, and therefore there is no basis for denying the remaining retaliatory duty refunds.

In other words, French Feast essentially argues the dates of liquidation are irrelevant for purposes of this claim. The dates of liquidation, however, are not irrelevant.

French Feast invokes jurisdiction pursuant to 28 U.S.C. § 1581(i),[1] and "[a] civilaction of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(i). Further, "[t]he basic rule is that the clock of a statute of limitations begins to run from the date the plaintiff's cause of action 'accrues' . . . [and] stops on the date that the plaintiff files his complaint in a court of proper jurisdiction." *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003) (citation omitted). For purposes of 28 U.S.C. § 1581(i) and U.S.C. § 2636(i), thus, a cause of action begins to accrue when a claimant has, or should have had, notice of the final agency act or decision being challenged. *See*, *e.g., Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 32 CIT __, 547 F. Supp. 2d 1352 (2008).

Given that French Feast is challenging pursuant to 28 U.S.C. § 1581(i) the authority of Customs to assess retaliatory duties in accordance with the then-current annex to *EC-Measures*, the event that triggered the accrual of French Feast's claim was not issuance of the mandate in *Gilda* but Customs' liquidation. *See* 19 U.S.C. § 1514; 19 C.F.R. § 159.1 (liquidation means "the final computation or ascertainment of the duties (not including vessel repair duties) or drawback accruing on an entry"). *Cf.*, *e.g.*, *Volkswagen of America, Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008) (liquidation as "a final challengeable event in Customs' appraisal process"); *Juice Farms, Inc. v. United States*, 18 CIT 1037, 1040 (1994) (importers bear burden of checking for posted notices of liquidation and protesting in timely manner). Even prior to final assessment of retaliatory duties,

[1] Judicial review pursuant section 15881(i) is governed by 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e). "Agency action" under section 706 review will be "h[e]ld unlawful and set aside" if the findings and conclusions are found to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

French Feast was on notice that those duties were being imposed; yet French Feast did not challenge such imposition or seek injunction to prevent the entries' liquidations.

Further, French Feast provides no support for the argument that judicial review of another party's challenge somehow "tolls" or "suspends" the accrual of its own cause of action, and it did not file this action within two years of the relevant date(s) of liquidation of the remaining entries in accordance with 28 U.S.C. § 1581(i). *Gilda*, as the controlling legal precedent, may effect the outcome as to particular entries of this case, but the accrual of French Feast's cause of action did not depend upon issuance of *Gilda* 's mandate because the accrual of a claim is not affected by a judicial interpretation of a statute. *See*, *e.g.*, *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) ("it is fundamental jurisprudence that the statute's *objective* meaning and effect were fixed when the statute was adopted[; a]ny later judicial pronouncements simply explain, but do not create, the operative effect") (italics in original).

French Feast argues that Customs is acting in a merely ministerial role in the collection of retaliatory duties. But, if French Feast is not challenging Customs' liquidation of its entries, the only other agency determination possibly at issue would be the decision of the Office of the United States Trade Representative to impose retaliatory duties. That decision occurred before final liquidation in this case, so even under such a conception of the nature of French Feast's claim, jurisdiction is still lacking as to the remaining entries in dispute. The only plausible agency action or decision French Feast contests, thus, is Customs' liquidation of its entries that included the retaliatory duties. At liquidation, Customs decided the imposition of those duties was "final," and at that point French Feast's cause of action (to challenge that agency action and/or decision) accrued. French Feast has not presented any valid basis for the relief it is essentially requesting, which is to "undo" liquidation or order reliquidation.

Accordingly, because French Feast did not file its complaint within two years of the date of accrual of its cause of action as required by 28 U.S.C. § 2636(i), the Court cannot grant French Feast's prayer for relief with respect to the remaining entries. These were all apparently liquidated prior May 5, 2009.

On the other hand, the government's position has been that the statute of limitations operates as a jurisdictional bar to French Feast's claims beyond the two-year window. Such a stance must be rejected as conflicting with the plain language of 28 U.S.C. 2636(i), *i.e.*, "[a] civil action of which the Court of International Trade has

jurisdiction under section 1581[.]" *See Parkdale Intern., Ltd. v. United States*, 31 CIT 1229, 1238 n.6, 508 F. Supp. 2d 1338, 1349 n.6 (2007). The government's motion to dismiss will therefore be granted pursuant to USCIT Rule 12(b)(5).

Judgment will enter accordingly.

Dated: December 9, 2011
New York, New York

R. Kenton Musgrave,
SENIOR JUDGE

Slip Op. 11–153

PTIMUS, INC., d/b/a MARKYS CAVIAR, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00152

[On challenge for refund of retaliatory import duties, after settlement in part, motion to dismiss remainder of action construed as partial and granted as to time-barred entries.]

Dated: December 9, 2011

Peter S. Herrick, P.A. (*Peter S. Herrick*), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*), and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge:

This action pursuant to 28 U.S.C. § 1581(i) seeks refunds of retaliatory duties assessed on imports subject to *Implementation of WTO Recommendations Concerning EC-Measures Concerning Meat and Meat Products*, 64 Fed. Reg. 40638, 40639 (USTR July 27, 1999) ("*EC-Measures*"). Optimus, Inc. filed its summons and complaint against U.S. Customs and Border Protection ("Customs") on May 17, 2011, one hundred and sixty-two days after issuance of the appellate mandate on *Gilda Industries, Inc. v. United States*, 622 F.3d 1358 (Fed. Cir. 2010) affirming that the existing retaliatory action terminated by operation of law on July 29, 2007.

Thereafter, pursuant to 19 U.S.C. § 1520(a)(1), the parties stipulated to entry of judgment for refunds of retaliatory duties on entries

of merchandise made after July 29, 2007 and liquidated (or remaining unliquidated) after May 20, 2009 (a Wednesday).

The government now moves to dismiss for lack of jurisdiction over the entries that remain herein, *i.e.*, those liquidated prior to May 20, 2009 ("remaining entries"),[1] arguing that they are time-barred.

Optimus avers it was unaware it could challenge the retaliatory duty payments until it was so advised by its customs brokers and argues its claim did not "finally" accrue until the mandate in *Gilda*. Pl.'s Resp. at 3–4 (referencing *United States v. Commodities Export Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992 (noting that a cause of action accrues only when "all events" necessary to state the claim or fix the alleged liability of the government have occurred). Collection of retaliatory duties is merely ministerial, contends Optimus, and therefore there is no basis for denying the remaining retaliatory duty refunds.

In other words, Optimus essentially argues the dates of liquidation are irrelevant for purposes of this claim. The dates of liquidation, however, are relevant to this matter.

Optimus invokes jurisdiction pursuant to 28 U.S.C. § 1581(i),[2] and "[a] civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(i). Further, "[t]he basic rule is that the clock of a statute of limitations begins to run from the date the plaintiff's cause of action 'accrues' . . . [and] stops on the date that the plaintiff files his complaint in a court of proper jurisdiction." *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003) (citation omitted). For purposes of 28 U.S.C. § 1581(i) and U.S.C. § 2636(i), thus, a cause of action begins to accrue when a claimant has, or should have had, notice of the final agency act or decision being challenged. *See*, *e.g., Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 32 CIT __, 547 F. Supp. 2d 1352 (2008).

Given that Optimus is challenging pursuant to 28 U.S.C. § 1581(i) the authority of Customs to assess retaliatory duties in accordance with the then-current annex to *EC-Measures*, the event that triggered the accrual of Optimus's claim was not issuance of the mandate in

[1] The correct date should have been May 17, 2009, but the court is informed no liquidations are affected by the partial settlement agreement oversight. Judgment is therefore on the papers presented.

[2] Judicial review pursuant section 15881(i) is governed by 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e). "Agency action" under section 706 review will be "h[e]ld unlawful and set aside" if the findings and conclusions are found to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

Gilda but Customs' liquidation. *See* 19 U.S.C. § 1514; 19 C.F.R. § 159.1 (liquidation means "the final computation or ascertainment of the duties (not including vessel repair duties) or drawback accruing on an entry"). *Cf., e.g.*, *Volkswagen of America, Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008) (liquidation as "a final challengeable event in Customs' appraisal process"); *Juice Farms, Inc. v. United States*, 18 CIT 1037, 1040 (1994) (importers bear burden of checking for posted notices of liquidation and protesting in timely manner). Even prior to final assessment of retaliatory duties, Optimus was on notice that those duties were being imposed; yet Optimus did not challenge such imposition or seek injunction to prevent the entries' liquidations.

Further, Optimus provides no support for the argument that judicial review of another party's challenge somehow "tolls" or "suspends" the accrual of its own cause of action, and it did not file this action within two years of the relevant date(s) of liquidation of the remaining entries in accordance with 28 U.S.C. § 1581(i). *Gilda*, as the controlling legal precedent, may effect the outcome as to particular entries of this case, but the accrual of Optimus's cause of action did not depend upon issuance of *Gilda* 's mandate because the accrual of a claim is not affected by a judicial interpretation of a statute. *See*, *e.g.*, *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) ("it is fundamental jurisprudence that the statute's *objective* meaning and effect were fixed when the statute was adopted[; a]ny later judicial pronouncements simply explain, but do not create, the operative effect") (italics in original).

Optimus argues that Customs is acting in a merely ministerial role in the collection of retaliatory duties. But, if Optimus is not challenging Customs' liquidation of its entries, the only other agency determination possibly at issue would be the decision of the Office of the United States Trade Representative to impose retaliatory duties. That decision occurred before final liquidation in this case, so even under such a conception of the nature of Optimus's claim, jurisdiction is still lacking as to the remaining entries in dispute. The only plausible agency action or decision Optimus contests, thus, is Customs' liquidation of its entries that included the retaliatory duties. At liquidation, Customs decided the imposition of those duties was "final," and at that point Optimus's cause of action (to challenge that agency action and/or decision) accrued. Optimus has not presented any valid basis for the relief it is essentially requesting, which is to "undo" liquidation or order reliquidation.

Accordingly, because Optimus did not file its complaint within two years of the date of accrual of its cause of action as required by 28

U.S.C. § 2636(i), the Court cannot grant Optimus's prayer for relief with respect to the remaining entries. These were all apparently liquidated prior May 17, 2009.

On the other hand, the government's position has been that the statute of limitations operates as a jurisdictional bar to Optimus's claims beyond the two-year window. Such a stance must be rejected as conflicting with the plain language of 28 U.S.C. 2636(i), *i.e.*, "[a] civil action of which the Court of International Trade has jurisdiction under section 1581[.]" *See Parkdale Intern., Ltd. v. United States*, 31 CIT 1229, 1238 n.6, 508 F. Supp. 2d 1338, 1349 n.6 (2007). The government's motion to dismiss will therefore be granted pursuant to USCIT Rule 12(b)(5).

Judgment will enter accordingly.

Dated: December 9, 2011
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 11–154

APPLIKON BIOTECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 07–00364

[On cross motions for summary judgment of classification of bioreactor systems, judgment for the plaintiff.]

Dated: December 12, 2011

Law Offices of George R. Tuttle, A.P.C. (*Carl D. Cammarata*), for the plaintiff.

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 (*Beverly A. Farrell* and *Justin R. Miller*), Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge:

Plaintiff Applikon Biotechnology, Inc. ("Applikon") challenges U.S. Customs and Border Protection's ("Customs") classification of "BioBundle Cell Culture Bioreactor Systems" and "ez-Control Cell Culture BioBundle Bioreactor Systems" imported from the Netherlands (both referred hereafter as the Bioreactor Systems). Proper administrative protest procedure having been undertaken and all

liquidated duties, taxes and fees having been paid,[1] *see* 19 U.S.C. §§ 1514, 1515, jurisdiction is proper pursuant to 28 U.S.C. § 1581(a).

I. *Description of the Merchandise*

A "bioreactor" is "a device or apparatus in which living organisms and esp[ecially] bacteria synthesize useful substances (as interferon) or break down harmful ones (as in sewage)." *Merriam Webster Collegiate Dictionary* (10th ed. 1996). As their names imply, Applikon's Bioreactor Systems maintain an aseptic and homogenous environment in which to culture cells. *See* Def. Ex. F (Autoclavable BioBundle 3L Manual) at 3–4. The homogeneous environment is accomplished by continuous mixing or stirring of the cell culture, and mixing is routinely utilized when operating the Bioreactor System.[2] The principal function of the Bioreactor is to grow cells in an aseptic, homogeneous environment, and that homogeneous environment is maintained by the mixing function. Pl's Stmt. of Facts ¶¶ 16–17.

The cells are grown in the Bioreactor System for various applications in research or process development, such as for use in biopharmaceuticals, antibodies, enzymes, vaccines, antibiotics, vitamins, food additives, alcoholic beverages, biofuels, for commercial or organic waste treatment, or plant cell technology, all of which are referred to as the "cell culture process." A typical use is in the development of biopharmaceuticals where the bench-size Bioreactor Systems serve as smaller research and test environments before upscaling for production in larger bioreactors used in production. Pl's Stmt. of Facts ¶ 31.

In their imported condition, both of the Bioreactor Systems consist of three major components. They are the Bioreactor, the Controller,

[1] The protests are numbered 2809–07–100575, dated August 31, 2007, denied September 21, 2007, and 2809–08–100604, dated November 5, 2008, denied March 30, 2009.

[2] Plaintiff's Concise Statement of Facts ("Pl's Stmt. of Facts") ¶ 32. The facts cited in this opinion and averred in Pl's Stmt. of Facts are either admitted by the government or deemed admitted because the government's objections thereto were inapposite and unpersuasive. Mere "conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996) (citation omitted). As our appellate court stated recently:

> The trial court found that Processed failed to allege facts sufficient to support a conclusion that the primary use of the backpacks and beach bag is as a toy (*i.e.*, for play). We discern no error in that finding. As noted by the trial court, "It is well settled that a conclusory statement on the ultimate issue does not create a genuine issue of fact." *Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998) (internal quotations and citation omitted). Also, as noted by the trial court, the nonmovant "must point to an evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail." *Barmag Barmer Maschinenfabrik AG. v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

Processed Plastic Co. v. United States, 473 F.3d 1164, 1170 (Fed. Cir. 2006).

and the Actuator. In the BioBundle System the Controller and Actuator are housed in separate cabinets, and in the ez-Control System they are both housed in one cabinet. In both Bioreactor Systems the principal component, in which the cell culture process occurs, is the bioreactor vessel. This consists of a dish-bottomed glass vessel configured with a stirring mechanism that is integral to sealing the vessel in set-up and the maintenance of the aseptic environment necessary for the cell culture process. The bioreactor stirrer motor and stirrer assembly rest on the bioreactor headplate so that the stirrer assembly shaft and impeller extend into the bioreactor vessel to continuously mix the liquid cell culture at a set rate of agitation to both prevent the cells from settling on the bottom of the bioreactor vessel and to uniformly expose them to the desired environment. Pl's Stmt. of Facts ¶ 18. "[O]nce the vessel is sterilized, the vessel is sealed to maintain the sterile environment, and the stirrer assembly is a critical part of that sealing function." Pl's Reply to Def's Resp. to Pl's Statement of Material Facts Not in Genuine Dispute ("Pl's Fact Reply") at 46.

In addition to the bioreactor (consisting of the bioreactor vessel and the mechanical bioreactor mixing equipment), both Bioreactor Systems include equipment used to control mixing and optional functions, such as control of pH, dissolved oxygen, level/anti-foam and temperature. Pl's Stmt. of Facts ¶ 15. These functions are configurable using a combination of eight digital and five analogue outputs, and twelve actuators incorporating various devices (pumps, valves, solenoid valves, motor speed controller, thermal mass flow controllers, rotameters, *et cetera*) which maintain the selected parameter set-points. The controller measures the process variables and calculates corresponding controller outputs in order to keep process conditions on set point. The controller's functions are integrated into and complete the Bioreactor System. They are operated by adjusting the controller's setpoints for the desired parameters, switching on the "thermocirculator," stirrer motor, acid and/or base pumps and gas flow, and when the parameters reach their desired setpoints, the bioreactor is ready for inoculation. *See* Def. Ex. B (Autoclavable Bioreactor User Manual) at 3–2.

Utilization of the functions for control of pH, dissolved oxygen, or temperature, is optional and dependant on the type of cell culture being grown. However, when utilizing any of these optional functions, the mixing function must still be used in order to effectively control the optional functions. Pl's Stmt. of Facts ¶ 33. Cells will die without mixing operations. Pl's Stmt. of Facts ¶ 35. The continuous mixing or stirring of the liquid cell culture ensures that all cells will have equal

access to the contents of the medium in which they are suspended. The mixing of the medium provides the cells with proper exposure to dissolved culture medium components, dilutes harmful cell waste products, and is necessary to effectively control other parameters, such as the pH, dissolved oxygen, or temperature. Pl's Stmt. of Facts ¶ 34.

Mammalian cell culture, for which the Bioreactor Systems are mainly sold, requires a temperature of approximately 37 degrees Celsius (*i.e.*, human body temperature), which is normally well above ambient room temperature. Pl's Stmt. of Facts ¶ 37, and Def. Response thereto. The merchandise as imported includes temperature control features but does not include the electric heating blanket, which is procured separately in the U.S. by Applikon and packaged with the devices after importation. Pl's Stmt. of Facts ¶ 26. The electric heating blanket is plugged into the actuator, and is not a permanent part of the Bioreactor System. Def's Resp. to Pl's Stmt. of Facts ¶ 38. The heating blanket function is triggered when the medium's temperature drops by as little as 0.1 degree Celsius. Def. Ex. A at 4. The BioBundle literature describes the heating blanket "as an alternative for a thermocirculator" to maintain a desired temperature when wrapped around the bioreactor vessel containing the medium.

"For an optimum performance [*sic*] of any biological system, it is necessary to keep the environment of the micro-organisms at optimal conditions. Apart from temperature and medium composition, the two most important factors that effect [*sic*] this environment are the degree of mixing and aeration[,]" according to Applikon's literature. *See* Def. Ex. B at 2–1. Optimal temperature can be maintained by placement of the bioreactor vessel in a temperature-controlled room or an external temperature-controlled medium (such as hot water).

It is not the customary practice (although it can be done) for the user to add cold medium to the bioreactor vessel and then use the heating blanket and temperature control to raise the temperature of the medium to the desired set point; the medium is almost always pre-warmed in a water bath or warm room overnight before starting the experiment in the bioreactor and the combination of pre-warmed medium and cells are then added to the bioreactor. Pl.'s Fact Reply ¶ 39. The Bioreactor Systems are not apparatus that only or principally function to control temperature automatically. Def's Resp. To Pl's Stmt. of Facts ¶ 41. A Bioreactor System is normally only used when the mixing function is required and utilized. Pl's Stmt. of Facts ¶ 46.

II. *Applicable Legal Standards*

Proper tariff classification is determined by the General Rules of Interpretation ("GRIs") of the Harmonized Tariff System of the U.S. ("HTSUS") and the Additional U.S. Rules of Interpretation. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs are applied in numerical order. *BASF Corp. v. United States*, 482 F.3d 1324, 1326 (Fed. Cir. 2007). It is a question of law requiring ascertainment of proper meaning in relevant tariff provisions and determining whether the merchandise comes within the description of such terms. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999).

Interpretation of the HTSUS begins with the language of the tariff headings and subheadings of the HTSUS and their section and chapter notes, and may also be aided by the Explanatory Notes published by the World Customs Organization. *Trumpf*, *supra*, 34 CIT at __, 753 F. Supp. 2d at 1305 & 1306 n.20. The chapter and section notes are not optional interpretive rules but statutory law. *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999).

Both parties move for judgment pursuant to USCIT Rule 56, which is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant bears that burden, *see*, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and a fact is "material" only if it would affect the outcome of the action. *See Trumpf Med. Sys., Inc. v. United States*, 34 CIT ___, ____, 753 F. Supp. 2d 1297, 1305 (2010) ("*Trumpf* ").

The court will grant a motion for summary judgment "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Accordingly, summary judgment in a classification case is appropriate only if the material facts of what the merchandise is and what it does are not at issue. *Diachem Indus. Ltd. v. United States*, 22 CIT 889, 893 (1998) (citation omitted). The court may not resolve or try factual issues on a motion for summary judgment. *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048 (1988) (citation omitted).

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As

> we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' "

Scott v. Harris, 550 U.S. 372, 380 (2007), quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 586–587 (1986).

III. *Competing Tariff Provisions*

The parties agree the merchandise is properly classifiable in Chapter 84, HTSUS and the court's review has not uncovered a more apt classification elsewhere in the tariff. *See Jarvis Clark v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand") (emphasis in original); *see, e.g.*, Pl's Br. at VI-3. The government classified the Bioreactor Systems under heading 8419, HTSUS, as follows (italics added):

8419:	Machinery, plant or laboratory equipment, whether or not electrically heated . . . , *for the treatment of materials by a process involving a change of temperature* such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric; parts thereof:	
	* * *	
	Other machinery, plant or equipment:	
	* * *	
8419.89:	Other:	
	* * *	
8419.89.95:	Other	4.2% *ad valorem*

Applikon contends the merchandise is classifiable under subheading 8479.82.00, HTSUS (italics added):

8479:	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	* * *
	Other machines and mechanical appliances:
	* * *
8479.82.00:	*Mixing*, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or *stirring* machines . . . . . Free

IV. *Analysis*

Applikon's motion for summary judgment is solely directed to its first cause of action, although its complaint claims alternative classification under HTSUS subheadings 9032.89.60, 8479.89.98, or 8543.89.97. Defendant cross-moves for summary judgment in favor of the classification as entered, under subheading 8419.89.95. Considering the parties' motions, the court is of the opinion that no material facts remain in dispute, that a hearing on the motions is unnecessary, and that the matter may be resolved summarily. The court finds that the imported merchandise is properly classified in heading 8479, for the reasons set forth below.

A

Under GRI 1, classification is determined according to "the terms of the headings and any relative section or chapter notes[.]" In this case, the terms of the headings and the applicable notes are dispositive. The government contends the Bioreactor Systems are classifiable in heading 8419, which provides in pertinent part:

> Machinery, plant or laboratory equipment, whether or not electrically heated . . . , for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes . . . .

Application of this heading to the merchandise at issue requires resolution of a series of questions. As will be explained *infra*, the imported merchandise constitutes a type of machine, and is also laboratory equipment. However, the distinction between the two for

purposes of the initial analysis is immaterial. Likewise, the parties do not dispute that the machine's function includes a "treatment of materials" as that phrase is used in heading 8419. *See Fujitsu America, Inc. v. United States*, 28 CIT 1261, 1272–74, 342 F. Supp. 2d 1326, 1336–37 (2004), *aff'd*, 422 F.3d 1364 (Fed. Cir. 2005). Again, however, that is not dispositive.

The parties disagree as to whether the imported merchandise is "for the treatment of materials by a process involving a change of temperature." Plaintiff contends that the machines are not intended to "change the cells by a change in temperature" such as through the cooking or roasting examples from heading 8419. Pl's Fact Reply at 55. Defendant argues that the "[t]he bioreactor systems treat a medium containing cells by a process that involves a change of temperature." Def's Reply Memorandum at 4.

The facts before the court demonstrate that while the Bioreactor Systems can control the temperature of the cell medium, that function is subsidiary to the overall function of the device. The Bioreactor Systems can operate without the heating blanket, and do not include the electric heating blanket upon importation. The heating blanket is not permanently attached to the Bioreactor System, it is plugged in when necessary. The merchandise's temperature control capability is not used by every process to which the machine is suitable. The Bioreactor System can grow cells without the blanket, using a heated chamber or vessel in which the bioreactor is placed. Finally, the Bioreactor System, even when equipped with the blanket, is not designed to change the temperature at which the cell culturing is performed (*e.g.*, by cooking or roasting), rather it is designed to keep the temperature constant. Any temperature change is therefore minor, on the order of 0.1 degrees Celsius. The automatic maintenance of temperature at a set point by the heating blanket, although used in some applications and necessary for those applications, is subsidiary to the primary function of the Bioreactor Systems, which is to maintain an aseptic and homogeneous environment for the growth of cells. The court finds that after reviewing the applicable law and the material facts not in dispute, the Bioreactor Systems are not for the "treatment of materials by a process involving a change of temperature[.]" Plaintiff prevails on this key point.

Defendant's citations to *Applied Biosystems v. United States*, 34 CIT ___, 715 F. Supp. 2d 1327 (2010) and *Fujitsu America, supra*, 28 CIT 1261, 342 F. Supp. 2d 1326, *aff'd*, 422 F.3d 1364, are inapposite due to the methods by which the machines involved therein used temperature to achieve their functions, and especially to the central-

ity of temperature control to their function. In *Applied Biosystems*, the machine at issue heated and cooled DNA strands to perform its function. Clearly, the process involved treatment of materials by a change in temperature, akin to heading 8419's examples of "cooking, roasting, distilling, rectifying, [*etc*.]."

> The task, operation, or activity performed by a thermal cycler is "the treatment of materials by a process involving a change of temperature," HTSUS Heading 8419 (2000–2002). The PCR method of amplification described by Plaintiff necessarily involves temperature change. More specifically, denaturation of the DNA involves heating, annealing of the primers to their complementary DNA segments involves cooling, and synthesis of the new strands may involve reheating. . . . A thermal cycler effects these precise temperature changes. It does nothing more.

Applied Biosystems, 34 CIT at ___, 715 F. Supp. 2d at 1333 (citations omitted).

In this case, the merchandise can regulate the temperature of the material placed in it, but that is not its primary function. Its primary function, undisputedly, is to grow cells. The heat control function (putting aside the fact that the merchandise is not imported with the heat blankets) is not essential to achievement of this purpose in the same manner that the mixing function is always used when the Bioreactor System is in operation.

The same analysis applies to the holding in *Fujitsu America*. In that case, the merchandise involved was a coolant distribution unit, or CDU. Its function was to circulate water through plates attached to the CPU of a mainframe computer system. The water absorbed heat from the CPU and cooled it by running it through a radiator. *See Fujitsu America*, 422 F.3d at 1365. Though plaintiff argued that the CDU operated to keep the CPU's temperature constant, the court found that the operation of the CDU was to warm and then cool water. *See id.* at 1367. It is clear that the function of the *Fujitsu* CDU was primarily to "effect a change in temperature," whereas the function of the Bioreactor System herein is to grow cells, a process that may be aided by using a heat blanket. If in this case the court were classifying the heating blanket, the question might be answered differently, but that is not the issue before the court.

B

The conclusion that the heating function of the Bioreactor System is subsidiary to its primary function of promoting cell growth means

that Note 2(e) to Chapter 84 excludes the Bioreactors from classification in heading 8419. That Note provides:

> Subject to the operation of Note 3 to Section XVI . . . , a machine or appliance which answers to a description in one or more of the headings 8401 to 8424, or heading 8486 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group or under heading 8486, as the case may be, and not the latter group.
>
> Heading 8419 does not, however, cover:
> * * *
>
> (e) Machinery or plant, designed for mechanical operation, in which a change of temperature, even if necessary, is subsidiary.

HTSUS Chapter 84, Note 2(e) (2007).

The parties disagree on the proper construction and operation of Chapter 84 Note 2(e). Plaintiff asserts, at p. VI-16 of its Memorandum in Support of its Motion for Summary Judgment on the First Cause of Action ("Pl's Memo in Support"), that "[t]he subject Bioreactor Systems are machines designed for the mechanical operation of mixing the cell culture in the vessel to provide a homogenous environment [for cell growth] and are not designed to change temperature." The government contends that the exclusion from heading 8419 is limited to machinery or plant, not laboratory equipment. Def's Cross-Motion for Summary Judgment at 18–19.

It is clear, however, from the agreed facts that the Bioreactor Systems constitute "machines" as that term is understood in common meaning. "A 'machine' is, *inter alia*, 'an assemblage of parts that are usu[ally] solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion and energy to one another in some predetermined manner and to some desired end.'" *Applied Biosystems*, 34 CIT at ___, 715 F. Supp. 2d at 1333, quoting *Webster's Third International Dictionary* (2002) (and holding that the thermal cyclers at issue therein qualified as both machinery and laboratory equipment). Because it cannot be disputed that the Bioreactor Systems constitute "machines," the government's argument that they are exempt from Note 2(e)'s exclusion, because they are also laboratory equipment, is to no avail. The temperature control function is subsidiary to the overall operation of the Bioreactor System. Chapter 84 Note 2(e) excludes the Bioreactor System from classification in heading 8419.

A review of the Explanatory Notes is helpful in this instance. The Explanatory Note to heading 8419 provides in part:

> [T]he heading covers machinery and plant designed to submit materials (solid, liquid, or gaseous) to a heating or cooling process in order to cause a simple change of temperature or to cause a transformation of the materials resulting principally from the temperature change (*e.g.*, heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling processes). But the heading **excludes** machinery and plant in which the heating or cooling, even if essential, is merely a secondary function designed to facilitate the main mechanical function of the machine or plant, e.g., machines for coating biscuits, *etc*., with chocolate, and conches (**heading 84.38**), washing machines (**heading 84.50** or **84.51**), machines for spreading and tamping bituminous road-surfacing materials (**heading 84.79**).

Explanatory Note to Heading 84.19, World Customs Organization (2010) (emphasis in original). The heating blanket is subsidiary to the cell growth function of the Bioreactor in the same manner that the water heating circuit in a washing machine is subsidiary to its function of cleaning clothes. Therefore, Note 2(e) to Chapter 84 excludes the Bioreactor Systems from classification in heading 8419.

C

The parties also disagreed over the correct application of Notes 3 and 4 to Section XVI, HTSUS to the classification issues at hand. Because the Bioreactor System is excluded from heading 8419 by Chapter 84 Note 2(e), the court need not reach the issue of whether mixing or temperature control constitute the "principal function" of the Bioreactor System or rest its decision on a torturous interpretation of whether mixing or heating more clearly "define" the function of the Bioreactor System. *Cf.*, *e.g.*, *Fuji America Corp. v. United States*, 30 CIT 1058 (2006), *aff'd*, 519 F.3d 1355 (Fed. Cir. 2008) (argument that chip placer's principal function is "lifting and storing" does not take into account its "entire function" of the process to which it is actually purposed). The facts clearly show that cell growth is the primary, clearly defined function of these machines, but that function is not described in any heading of the HTSUS, and therefore fitting the Bioreactor Systems within the ambit of Notes 3 or 4 is inordinate.[3]

[3] As noted in note 4, *infra*, the Bioreactor System does not qualify as a composite machine for purposes of Note 3 to Section XVI in any event.

D

Applikon argues that the Bioreactor Systems are "not specified elsewhere" in Chapter 84 and are properly classified in heading 8479 because even if the parties agree that the "principal function" or "principal purpose" of the bioreactor systems is "to provide an aseptic homogenous environment to facilitate the growth of cells suspended in a liquid culture or medium," the mixing function is essential to the operation of the Bioreactor System.

Plaintiff's argument is buttressed by Note 7 to Chapter 84. That note provides in pertinent part:

> A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose. * * * Subject to note 2 to this chapter and note 3 to section XVI,[4] a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 8479.

Chapter 84, Note 7, HTSUS (2007) (footnote added). Because it is undisputed that the principal purpose of the Bioreactor System is to grow cells, a purpose which is not described in any heading in Chapter 84, the Bioreactor System falls to be classified in Heading 8479 by operation of Note 7 to Chapter 84.

VI. *Conclusion*

Upon consideration of the foregoing, Applikon's Bioreactor Systems are correctly classified under subheading 8479.82.00, HTSUS. Judgment will therefore enter in favor of the plaintiff.

Dated: December 12, 2011
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

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[4] Note 3 to Section XVI is inapplicable because the Bioreactor Systems are not composite machines. The Explanatory Notes to Note 3 to Section XVI explain that composite machines are:

> taken to be fitted together to form a whole when incorporated one in the other or mounted one on the other, or mounted on a common base or frame or in a common housing. * * * Assemblies of machines should not be taken to be fitted together to form a whole unless the machines are designed to be permanently attached either to each other or to a common base, frame, housing, *etc*.

The Bioreactor Systems are made up of separate machines connected by cables, *etc*., and are not designed to be permanently mounted to each other, and thus do not fall within the term "composite machine" as it is used in Note 3 to Section XVI.

Slip Op. 11–155

AMANDA FOODS (VIETNAM) LTD., et al. Plaintiffs, UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE AND THE DOMESTIC PROCESSORS, Defendant-Intervenors.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 09–00431

[Remanding Department of Commerce's final results of administrative review of antidumping duty order]

Dated: December 14, 2011

Matthew J. McConkey and *Jeffrey C. Lowe*, Mayer Brown LLP, of Washington, DC, for Plaintiff Amanda Foods (Vietnam) Ltd.

John J. Kenkel and *James K. Horgan*, DeKieffer & Horgan, of Washington, DC, for Consolidated Plaintiff Viet Hai Seafood Co., Ltd.

Matthew R. Nicely and *David S. Christy*, Thompson Hine LLP, of Washington, DC, for Consolidated Plaintiffs Bac Lieu Fisheries Joint Stock Co.; Ca Mau Seafood Joint Stock Co.; Cadovimex Seafood Import-Export and Processing Joint-Stock Co.; Cafatex Fishery Joint Stock Corp.; Coastal Fisheries Development Corp.; Cuulong Seaproducts Co.; Danang Seaproducts Import Export Corp.; Investment Commerce Fisheries Corp.; Minh Hai Export Frozen Seafood Processing Joint-Stock Co.; Minh Hai Joint-Stock Seafoods Processing Co.; Ngoc Sinh Private Enter.; Nha Trang Fisheries Joint Stock Co.; Nha Trang Seaproduct Co.; Phu Cuong Seafood Processing & Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Co.; Soc Trang Seafood Joint Stock Co.; Thuan Phuoc Seafoods and Trading Corp.; UTXI Aquatic Products Processing Corp.; Viet Foods Co., Ltd.; Vinh Loi Import Export Co.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for Consolidated Plaintiff Cam Ranh Seafoods Processing Enter. Co.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With him on the briefs were *Tony West*, Assistant Attorney General, Jeanne E. Davidson, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was Jonathan M. Zielinski, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Andrew W. Kentz, *Jordan C. Kahn*, and *Nathaniel M. Rickard*, Pickard, Kentz & Rowe, LLP, of Washington, DC, for Defendant- Intervenor Ad Hoc Shrimp Trade Action Committee

Elizabeth J. Drake, *Geert M. De Prest*, and *Wesley K. Caine*, Stewart and Stewart, of Washington, DC, and *Edward T. Hayes*, Leake & Anderson, LLP, of New Orleans, LA, for Defendant-Intervenor The Domestic Processors.

OPINION AND ORDER

Pogue, Chief Judge:

In this action, the Plaintiffs seek review of two determinations by the United States Department of Commerce ("Commerce" or "the Department") in the final results of the third administrative review of

the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam").[1]

First, Plaintiff Amanda Foods (Vietnam) Ltd. ("Amanda Foods"), challenges the Department's calculation of separate rates for cooperative, non-individually investigated respondents. This issue will be voluntarily remanded to Commerce for review in light of the Court's decision in *Amanda Foods (Vietnam) Ltd. v. United States*, CIT , 774 F. Supp. 2d 1286 (2011). Order, Aug. 9, 2011, ECF No. 56.[2]

Second, Plaintiff Viet Hai Seafood Co., Ltd. a/k/a Vietnam Fish One Co., Ltd. ("Fish One") challenges the Department's determination not to revoke the antidumping duty order with regard to Fish One under the Department's statutory authority provided by Section 751(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(d) (2006).[3] This second issue is the focus of this opinion.

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c).

As explained below, the court concludes that (I) Commerce's interpretation of the revocation statute is a reasonable interpretation of an ambiguous provision and consistent with Commerce's reasonable interpretation of its own regulations and policies regarding revocation for non-mandatory respondents; (II) because Fish One failed to exhaust its administrative remedies, it may not now challenge the mandatory respondent selection process; and (III) Fish One is not entitled to revocation based on three years of *de minimis* dumping margins.

BACKGROUND

Fish One is among the companies subject to Commerce's February 1, 2005, antidumping duty order covering certain frozen warmwater

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[1] *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 74 Fed. Reg. 47,191 (Dep't Commerce Sept. 15, 2009) (final results and final partial rescission of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 07–08 (Sept. 8, 2009), Admin. R. Pub. Doc. 303 ("*I & D Mem.*") (adopted in *Final Results*, 74 Fed. Reg. at 47,191–92).

[2] Execution of this remand order was stayed pending resolution of the second issue raised in this case.

[3] In relevant part, the statute states:

> [Commerce] may revoke, in whole or in part, . . . an antidumping duty order or finding . . . after review under subsection (a) or (b) of this section.
>
> 19 U.S.C. § 1675(d)(1).

All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

shrimp from Vietnam.[4] Fish One requested a review of its sales covered by the order for the 2007–2008 period (the third administrative review) and also requested revocation of the antidumping duty order pursuant to 19 U.S.C. § 1675(d) and 19 C.F.R. § 351.222(b)(2)(2011).[5] Letter from DeKieffer & Horgan to Secretary, U.S. Department of Commerce 1 (Feb. 29, 2008), Admin. R. Pub. Doc. 9.

As required by the statute, Commerce initiated the third administrative review,[6] and, in due course, issued its preliminary results of the review.[7] In the *Preliminary Results*, Commerce determined, "not to revoke the Order with respect to Fish One." *Preliminary Results*, 74 Fed. Reg. at 10,011.

Commerce found Fish One ineligible for revocation because it was not chosen as a mandatory respondent.[8] *Id.* According to Commerce,

> [t]he Department does not interpret the regulation as requiring it to conduct an individual examination of Fish One, or a verification of Fish One's data, where, as here, the Department determined to limit its examination to a reasonable number of

[4] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152, 5,154 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order)(the "order" or "ADD order").

[5] All subsequent citations to the Code of Federal Regulations are to the 2011 edition, unless otherwise noted.

[6] *Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 73 Fed. Reg. 18,739 (Dep't Commerce Apr. 7, 2008) (notice of initiation of administrative reviews of antidumping duty orders)("*Notice of Initiation*").
Commerce did not publish with the *Notice of Initiation* a "Request for Revocation of Order (in part)" in response to Fish One's request for revocation. Mem. of Pl. Supp. Mot. J. Agency R. 5, ECF No. 59–2 ("Pl.'s Br."); *see* 19 C.F.R. § 351.222(f)(2)(i) ("[Commerce] will publish with the notice of initiation under § 351.221(b)(1), notice of "Request for Revocation of Order (in part) . . . .").

[7] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 74 Fed. Reg. 10,009 (Dep't Commerce Mar. 9, 2009) (preliminary results, preliminary partial rescission and request for revocation, in part, of the third administrative review) ("*Preliminary Results*").
Commerce did not acknowledge Fish One's request for revocation until Commerce issued the *Preliminary Results*. In the *Preliminary Results*, Commerce stated that it had "inadvertently omitted Fish One's request for revocation within the Initiation Notice." *Id.* at 10,011.

[8] In response to the *Notice of Initiation*, Commerce received 110 requests for review, of which twenty-eight companies requested a separate rate. *Preliminary Results*, 74 Fed. Reg. at 10,009–10. Due to the large number of respondents, Commerce chose to limit the number of companies individually reviewed according to 19 U.S.C. § 1677f-1(c)(2)(B), choosing three companies — Camimex, Min Phu Group, and Phuong Nam Co., Ltd. — as mandatory respondents. *Id.* at 10,010. Neither Fish One, nor any other respondent, challenged Commerce's determination that the number of respondents was large, necessitating the invocation of § 1677f-1(c)(2).

> exporters in accordance with [19 U.S.C. § 1677f-1(c)(2)(B)[9]], and Fish One was not one of those companies selected under this provision.

Id. Commerce neither altered its determination or its basic rationale in the *Final Results*.[10] *See Final Results*, 74 Fed. Reg. at 47,193; *I & D Mem.* Cmt. 16 at 57–63.

STANDARD OF REVIEW

When reviewing the Department's decisions made in administrative reviews of antidumping duty orders, 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." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Fish One makes three principle arguments before the court. Fish One first contends that the Department's determination not to individually review its sales for the purpose of revocation is not in accordance with law because it is (A) contrary to Congressional intent, (B) an unreasonable interpretation of the statute, (C) counter to the Department's regulations, and (D) inconsistent with the Department's precedent and policy. Second, Fish One contends that Commerce employed a flawed process for selecting mandatory respondents. Third, Fish One contends that the zero percent dumping margin assigned to it in the *Final Results* entitles it to revocation. Each of these arguments are considered separately.

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[9] 19 U.S.C. § 1677f-1(c) provides:

> (1) General rule
>
> In determining weighted average dumping margins under . . . 1675(a) of this title, [Commerce] 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, [Commerce] 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 [Commerce] 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.

[10] Fish One did qualify for separate rate status and received a zero margin. *Final Results*, 74 Fed. Reg. 47,195–96. Thus, Fish One was a non-selected, separate rate respondent in this review.

I. The Department's determination not to individually review Fish One for the purpose of revocation is based on a reasonable interpretation of the statute, regulations, and agency policies

The heart of the parties' dispute is their disagreement over the existence and nature of a "revocation review" under 19 U.S.C. § 1675(d). Specifically, Fish One asks the court to conclude that § 1675(d) requires Commerce to conduct an individual review upon receipt of a request for revocation.

Commerce contends that § 1675(d) permits the revocation of an anti-dumping duty order after a § 1675(a) review, also referred to as an administrative review, but does not create a separate revocation review process.[11] Def's Resp. to Pl.'s Mot. J. Admin. R. 8–10, ECF No. 67 ("Def.'s Resp. Br."). Fish One argues, in contrast, that § 1675(d) mandates a separate and parallel revocation review that is to be conducted simultaneously with a § 1675(a) administrative review. Pl.'s Br. 11–14.

Resolving these differing interpretations requires consideration of the interplay of three statutory provisions (19 U.S.C. §§ 1675(a), 1675(d), and 1677f-1(c)(2)), all relating to administrative review of antidumping duty orders.

According to Commerce's view, the § 1677f-1(c)(2) provision for limiting the number of respondents in an administrative review also limits the number of respondents eligible for revocation. To Commerce, because an administrative review is a prerequisite for revocation, if a respondent is excluded from review under § 1677f-1(c)(2), they are also excluded from revocation. Thus, in its *Final Results*, Commerce reasoned that "pursuant to [19 U.S.C. § 1677f-1(c)(2)(B)], . . . it could reasonably examine the three largest exporters by volume" and because "Fish One was not included among the top three, the Department was under no obligation to select Fish One for individual examination." *I & D Mem.* Cmt. 16 at 61.

Fish One contests Commerce's interpretation, arguing that because the text of § 1677f-1(c)(2) does not make mention of § 1675(d), the former cannot be applied as an exception to the latter. To Fish One, § 1677f-1(c)(2) applies only to administrative reviews under § 1675(a), and because revocation reviews under § 1675(d) are separate and parallel, they are outside the purview of § 1677f-1(c)(2). Therefore, in Fish One's opinion, "[n]owhere in the statute is there any limitation on the review of revocation requests." Pl.'s Br. 12. Accordingly, Fish One claims that "Congress has spoken and Commerce has no leeway.

[11] Revocation is also available following a § 1675(b) review for changed circumstances; however, the facts of this case concern a § 1675(a) review, therefore the discussion will be limited to revocation following a § 1675(a) review.

. . . Commerce must strictly follow the revocation provision of the statute." Id. Fish One further contends that Commerce has acknowledged the parallel review process by making revocation reviews mandatory under its regulations. *Id.* at 14–16.

Because Fish One challenges Commerce's interpretation of the statute, this question is reviewed using the familiar two step framework required by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).[12]

A. The statute is ambiguous regarding individual review following a request for revocation

The plain meaning of 19 U.S.C. § 1675(d) is little help in resolving the question at issue. As noted above, the provision states in relevant part:

> [Commerce] may revoke, in whole or in part, . . . an antidumping duty order or finding . . . after review

under subsection (a) or (b) of this section. 19 U.S.C. § 1675(d). This language provides no indication of whether a revocation request mandates an individual review. Rather, the "language provides minimal guidance other than providing that the revocation should be carried out 'after review under subsection (a) [a periodic administrative re-

[12] Under *Chevron*, first the court must determine if "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter . . . ."). When determining whether Congress has spoken to the precise question at issue, the court makes recourse to the traditional tools of statutory construction. *Id.* at 843 n.9. The primary tool for discerning Congressional intent is the plain meaning of the statute's text, but if the plain meaning does not resolve the issue, then the court will turn to the statute's structure, canons of statutory construction, and may also consider legislative history. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998).

If, after employing the tools of statutory construction under step one, the court determines that "the statute is silent or ambiguous with respect to the specific issue," then the court must determine whether the agency's interpretation of the statute is reasonable. Chevron, 467 U.S. at 843; *see also* Windmill Int'l *Pte. v. United States*, 26 CIT 221, 223, 193 F. Supp. 2d 1303, 1306 (2002). An agency's interpretation will be upheld, so long as it is a reasonable interpretation. "[Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation. . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (ellipses in original)). When evaluating the reasonableness of Commerce's interpretation, the Court considers, *inter alia*, "the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Windmill Int'l Pte.*, 26 CIT at 223, 193 F. Supp. 2d at 1306.

view] or (b) [a changed circumstances review] . . . .'" *Sahaviriya Steel Indus. v. United States*, 649 F.3d 1371, 1376 (Fed. Cir. 2011) (quoting 19 U.S.C. § 1675(d)(1)).

The statute is clear that a respondent subject to an antidumping duty order must undergo a § 1675(a) administrative review or a § 1675(b) changed circumstances review before the order is revoked under § 1675(d). But whether and how that review is to be conducted is not addressed by § 1675(d). *See Sahaviriya Steel*, 649 F.3d at 1376 ("The language of the statute is silent as to the conditions that might warrant the revocation of an antidumping duty order or the particular circumstances that would trigger such action."). The statute's ambiguity on this point means that "Commerce was left by Congress to promulgate guidelines as to when revocations 'in whole or in part' are appropriate and to set forth proper procedures therefore." *Id.* (citing *Chevron*, 467 U.S. at 843).

Fish One argues that all statutory language must be given effect, which requires the separate provisions at §§ 1675(a) and (d) to be interpreted as independent review processes; therefore, "[s]ince it is 'possible' to implement both provisions of the statute, Commerce should have done so," Pl.'s Br. 12–13; *see Meeks v. West*, 216 F.3d 1363, 1366–67 (Fed. Cir. 2000).

It is not true, however, that giving each provision of the statute such full, *independent* effect is the only way to "fit . . . all parts [of the statute] into an harmonious whole." *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959). Rather, "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Whether Commerce's interpretation of the overall statutory scheme governing review is reasonable will be taken up below; for now it is sufficient to state that Plaintiff's argument that §§ 1675(a), 1675(d), and 1677f-1(c)(2) *cannot* be read together, but must be given independent effect, is inconsistent with established practices of statutory construction that seek to interpret the statutory scheme as a harmonious whole. Furthermore, though the statute is clear that revocation cannot occur absent review, the statute is ambiguous regarding the trigger and form of that review.

B. The Department's interpretation is reasonable

As noted above, Commerce has interpreted the exception to individual review of an antidumping duty order found at § 1677f-1(c)(2) to be applicable to revocation under § 1675(d). In short, Commerce

argues that because Fish One was not chosen for mandatory review under § 1677f-1(c)(2)(B), it had no subsequent right to an individual review for the purposes of revocation. *See Preliminary Results*, 74 Fed. Reg. at 10,011–12. Fish One argues in response that "the statute does not limit revocation review in any manner. Without such limitation, Commerce must conduct a revocation review if requested. A mere request by a respondent triggers the pertinent section of the Statute." Pl.'s Br. 14.

Fish One's argument finds no support in the language of the statute. Nowhere in the text of § 1675(d) is there mention of a "request for revocation" nor does § 1675(d) contain any language that compels the Department to do anything. As this Court has previously held, the statutory language of § 1675(d) places the discretionary authority to revoke with Commerce. *See Hyundai Elec. Co. v. United States*, 23 CIT 302, 308, 52 F. Supp. 2d 1334, 1340 (1999) (holding that "may revoke" language in statute conferred discretion on Commerce).[13] To conclude that Commerce is required to initiate a review based on a statutory provision that does no more than give Commerce the discretion to revoke an order is contrary to the plain language of the statute.

Nor does the Plaintiff's argument for the unreasonableness of the Department's interpretation find a basis in the objectives of these provisions or the antidumping scheme as a whole. *See Windmill Int'l Pte.*, 26 CIT at 223, 193 F. Supp. 2d at 1306. In this regard, the history of the relevant provisions is helpful.

Administrative review of antidumping duty orders was first provided for in the Trade Agreement Act of 1979, Pub. L. No. 96–39, § 751(a), 93 Stat. 144, 175 (1979) (codified at 19 U.S.C. § 1675(a)). In its first incarnation, § 1675(a) made annual, administrative reviews mandatory.[14] What is now § 1675(d) was also introduced in the Trade Agreement Act of 1979 using the same language that remains in force

[13] *Hyundai* also held that the "may revoke" language in the regulation conferred discretion on Commerce. *See Hyundai*, 23 CIT at 308, 53 F. Supp. 2d at 1340; 19 C.F.R. § 353.25(a)(2) (1997) ("[Commerce] may revoke an order in part if . . . ."). In 1999, Commerce changed the language of the regulation so that it read "If [Commerce] determines . . . that the antidumping duty order . . . is no longer warranted, [Commerce] will revoke the order . . . ."). 19 C.F.R. § 351.222(b)(1)(ii) (2000); *see also Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg. 51,236, 51,239 (Dep't Commerce Sept. 22, 1999). Whether Commerce's regulations impose upon it any obligation to revoke an order is discussed below.

[14] "At least once during each 12-month period . . . [Commerce], after publication of notice of such review in the Federal Register, shall review, and determine . . . the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B) (1982); § 751(a)(1)(B), 93 Stat. at 175.

today.[15] § 751(c), 93 Stat. at 176. In the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 611(a)(2), 98 Stat. 2948, 3031 (1984), Congress amended § 1675(a) by adding the language, "if a request for such a review has been received." The effect of this amendment was to cease mandatory annual review and place the burden for requesting review on the interested parties. Also in the Trade and Tariff Act of 1984, Congress added § 1677f-1, which permitted Commerce to use sampling and averaging when conducting § 1675 reviews. § 620(a), 98 Stat. at 3039. Finally, in the Uruguay Round Agreements Act, Congress amended § 1677f-1 by adding subsection (c) as it now reads, including the requirement for individual review when determining dumping margins and the exceptions to individual review. § 229(a), 108 Stat. at 4889. Throughout the various modifications noted here, the relevant language of § 1675(d) has remained consistent. *Compare* § 751(c), 93 Stat. at 176, *with* 19 U.S.C. § 1675(d) (2006).

This history points to two important considerations. First, in the original incarnation of § 1675, the revocation provision in § 1675(d) existed in the context of a mandatory, annual review as required by § 1675(a). Thus, each year an annual review would be conducted, *after* which Commerce could make § 1675(d) revocation decisions. Though the statutory scheme has changed over time, § 1675(d) has remained consistent, and "provisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had been originally enacted as one section." 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22.34, at 395–96 (7th ed. 2009).

Second, in amending the statutory scheme, Congress has sought to achieve a balance of fairness and efficiency. On the one hand, § 1675(d)(1) provided an opportunity for revocation indispensable to the fair administration of the antidumping duty regime. However, Congress has also evidenced a concern with the efficient administration of the regime and, in particular, with moderating the administrative burden placed on Commerce. *See IPSCO, Inc. v. United States*, 12 CIT 676, 678, 692 F. Supp. 1368, 1370–71 (1988) (reviewing the legislative history of amendments to 19 U.S.C. § 1675 and noting Congress's emphasis on lessening the burden on Commerce as well as petitioners and respondents). Both the removal of the mandatory annual review under § 1675(a) and the introduction of § 1677f-1(c)(2) indicate a Congressional intent to strike a balance between fairness

[15] What is now 19 U.S.C. § 1675(d) was originally designated as 19 U.S.C. § 1675(c), § 751(c), 93 Stat. at 176; 19 U.S.C. § 1675(c) (1982), and later re-designated § 1675(d) when a new provision was added regarding five year review, Uruguay Round Agreements Act, Pub. L. No. 103–465, § 220(a), 108 Stat. 4809, 4861–64 (1994).

and efficiency in the administration of the antidumping duty regime, particularly in the process of review.

Both the statutory structure and Congress's intent to balance fairness and efficiency suggest that the Department's interpretation is reasonable. Commerce's decision to subordinate revocation decisions under § 1675(d) to the review process, including § 1677f-1(c)(2), tracks the structure of the statute and maintains the balance between fairness and efficiency. Moreover, as will be discussed below, Commerce's interpretation does not eliminate Fish One's opportunity for selection as a voluntary respondent and therefore does not foreclose Fish One's opportunity for review and revocation. In addition, Defendant Intervenor's point out that recognition of Commerce's resource constraints is not a factor that limits only the opportunity for respondents to obtain review. Rather, it also limits the opportunity for domestic producers to obtain review of additional respondents. Accordingly, because the statutory language is ambiguous and the Department's interpretation is reasonable, the court defers to Commerce's interpretation of the statute. *See Chevron*, 467 U.S. at 842–45.

C. Commerce's interpretation of its regulations is reasonable and consistent with its interpretation of the statute

Fish One next argues that Commerce has failed to abide by its own regulations, once again resting this argument on the notion that an administrative review and a revocation review are separate and independent procedures. Pl.'s Br. 14–16. Fish One claims that the Department's regulations require the initiation of a revocation review upon request by a party and that Commerce violated its regulations on revocation when it did not conduct a revocation review upon Fish One's request. *Id.* Under this theory, Fish One points to language in 19 C.F.R. § 351.222(f)(2), which it argues compels Commerce to take specific, enumerated actions with regard to a request for revocation.[16] Plaintiff makes much of the fact that the "regulatory language is mandatory, stating that Commerce will perform certain functions as part of the revocation review," *Id.* at 3., and in particular that "[19

[16] The relevant actions include: (1) publishing notice of a "Request for Revocation of Order (in part)"; (2) conducting a verification of the requesting party; (3) including a preliminary decision on revocation in the preliminary results of review; (4) publishing an "Intent to Revoke Order (in part)" with the preliminary results if warranted; (5) including a final decision on revocation with the publication of the final results of review; and (6) publishing a "Revocation of Order (in part)" with the notice of final results if warranted. 19 C.F.R. § 351.222(f)(2).

C.F.R.] § 351.222 states that Commerce 'will' initiate a partial revocation review, if requested," *Id.* at 15–16.[17]

Commerce argues in response that Fish One's distinction between administrative and revocation reviews is, again, illusory. Def.'s Resp. Br. 10–11. According to Commerce, "[a] review under the regulation means an administrative review under 19 U.S.C. § 1675(a)," *id.* at 10; therefore, the regulatory provisions under 19 C.F.R. § 351.222 are only applicable *when* a respondent is selected for review under 19 U.S.C. § 1677f-1(c)(2). As Commerce stated in the *Preliminary Results*, "[n]othing in the regulation requires the Department to conduct an individual examination and verification when the Department has limited its review, under [19 U.S.C. § 1677f-1(c)(2)]." *Preliminary Results*, 74 Fed. Reg. at 10,012; *see also I & D Mem.* Cmt. 16 at 61.[18]

An agency is, of course, bound by its regulations. *See United States v. Nixon*, 418 U.S. 683, 696 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it . . . ."); *Vitarelli v. Seaton*, 359 U.S. 535, 539–40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957). However, the court defers to the agency's error-free interpretation of its own regulations. *Carpenter Tech. Corp. v. United States*, 31 CIT 181, 184, 474 F. Supp. 2d 1347, 1350 (2007) (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998)). "[The court's] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson*

[17] *See* 19 C.F.R. § 351.222(f)(1) ("Upon receipt of a timely request for revocation or termination under paragraph (e) of this section, [Commerce] will consider the request as including a request for an administrative review and will initiate and conduct a review under § 351.213.").

[18] In making its case before Commerce Fish One also relied on 19 C.F.R. § 351.222(b)(2), which provides that

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

19 C.F.R. § 351.222(b)(2)(i). To Fish One this language must be read to require a revocation review. Commerce, however, reasonably construes this "will consider" language to apply after the administrative review has been completed, noting that because Fish One was not a mandatory respondent, the record did not support the conclusion that the conditions of § 351.222(b)(2)(i) were met.

Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Furthermore, the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

Because Commerce's interpretation is neither plainly erroneous nor inconsistent with the regulation, the court defers to that interpretation. *See Thomas Jefferson Univ.*, 512 U.S. at 512. According to 19 C.F.R. § 351.222(f)(2) certain actions must be taken by Commerce; however, it is a reasonable interpretation to conclude that these provisions do not require an individual review so much as they define the procedures of a review when it has been initiated.[19] While § 351.222(f)(1) states that "[Commerce] will initiate and conduct a review," it has already been established above, *see supra* Section I.B, that a review under 19 U.S.C. § 1675(a) is not synonymous with a revocation. The Department's understanding that its regulations under 19 C.F.R. § 351.222(f) initiate an administrative review under 19 U.S.C. § 1675(a), and therefore are subject to the exception to individual review found at 19 U.S.C. § 1677f-1(c)(2), is entirely consistent with its statutory interpretation, held reasonable above. Thus, it is reasonable for the Department to conclude that 19 C.F.R. § 351.222 only requires Commerce to initiate an administrative review under 19 U.S.C. § 1675(a) and requires further action only when a respondent is chosen for individual review consistent with 19 U.S.C. § 1677f-1(c)(2).

D. Commerce's decision not to individually review Fish One is consistent with its prior policy

Fish One next contends that Commerce should have applied a policy that Fish One claims was created in *Certain Fresh Cut Flowers from Colombia* ("*Flowers*").[20] Fish One argues that *Flowers* is an established precedent to which Commerce must hew. Pl.'s Br. 17.

[19] The Court recognizes that § 351.222(f)(2)(i) does establish a mandatory action by Commerce — publishing the "Request for Revocation of Order (in part)" along with the notice of initiation — whenever a request for revocation is filed. 19 C.F.R. § 351.222(f)(2)(i). Commerce acknowledged this obligation when it noted in the *Preliminary Results* that it had inadvertently failed to take this action. *Preliminary Results*, 74 Fed. Reg. at 10,011. However, because Commerce acknowledged the revocation request and the revocation was denied on other grounds, this mistake amounts to harmless error. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) (holding the Customs Service's failure to include requisite language in an extension notice harmless error where plaintiff suffered no prejudice).

[20] *Certain Fresh Cut Flowers from Colombia*, 62 Fed. Reg. 53,287, 53,290–91 (Dep't Commerce Oct. 14, 1997) (final results and partial rescission of antidumping duty administrative review) ("*Flowers Final Results*").

Commerce responds that it does not consider *Flowers* to be binding precedent because the "procedure was never implemented in practice and was limited to the *Flowers* proceeding." *I & D Mem.* Cmt. 16 at 62. Commerce further argues that even if *Flowers* is considered agency precedent, it has offered a reasonable explanation for its departure from this policy. Def.'s Resp. Br. 12–13.

An agency is not prohibited from changing its policies or adopting a position contrary to prior practice. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal."). When an agency changes its position suddenly and without explanation or "does not take account of legitimate reliance on prior interpretation," the agency's action may be "arbitrary, capricious [or] an abuse of discretion." *Id.* (internal citations omitted). "[I]f these pitfalls are avoided, change is not invalidating . . . ."[21] *Id.* Furthermore, the binding power of an agency policy is increased by the agency's own adherence, over time to such policy. As the Supreme Court has noted,

> [t]hough the agency's discretion is unfettered at the outset, if it announces and follows — by rule or settled course of adjudication — a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious, [or] an abuse of discretion."

INS v. Yang, 519 U.S. 26, 32 (1996)(internal citations omitted).

The policy at issue here was developed in the ninth administrative review of certain fresh cut flowers from Colombia. In that review, Commerce, for the first time, reviewed only the largest subject exporters pursuant to 19 U.S.C. § 1677f-1(c)(2). *Certain Fresh Cut Flowers from Colombia*, 62 Fed. Reg. 16,772, 16,773 (Dep't Commerce Apr. 8, 1997) (preliminary results and partial rescission of antidumping duty administrative review) ("*Flowers Prelim. Results*"). In light of Commerce's decision to limit the number of respondents, several non-selected respondents requested an alternative process by which

[21] Furthermore, the court does not substitute its judgment for that of the agency. Rather, it requires of the agency only that it support its decision with some sound reasoning.

> [T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc., 556 U.S. 502, , 129 S. Ct. 1800, 1811 (2009).

they could preserve their revocation eligibility. *Id.* at 16,774. In response, the Department, put forth three proposals "to allow for the possibility of future partial revocations in this order, while taking into account the Department's limited resources and the requirement that a company be verified in order to be revoked." *Id.* After taking comments, Commerce adopted a policy whereby a non-selected respondent that met certain criteria[22] would be individually reviewed under 19 U.S.C. § 1675(a) and also have data for the two prior years reviewed for the purposes of revocation. *Flowers Final Results*, 62 Fed. Reg at 53,291. A non-selected respondent that met the criteria, requested revocation, and was determined by Commerce not to have sold merchandise at less than normal value in each of the three years examined, would receive a revocation of the antidumping duty order. *Id.*

Nonetheless, the court cannot construe the *Flowers* policy to be a continuing limitation upon Commerce's discretion, *Yang*, 519 U.S. at 32, which would constrain the agency's future decision making. Rather, the agency's case-by-case decision-making places insufficient reliance upon *Flowers* to give it the sort of precedential weight that would bind Commerce. All that stands in favor of such a finding is the announcement of the procedure through publication in the Federal Register. However, even in the case for which it was created, the procedure was never implemented[23]; nor has Commerce subsequently implemented the procedure in any case outside of *Flowers*.

[22] The necessary criteria were:

> (1) a review was requested for the company in each of the two years immediately preceding the period of review in which revocation is requested, but the company was not selected for examination in either of those two preceding reviews; and (2) with the request for revocation the company (a) certifies that it sold subject merchandise at not less than normal value during the period described in 19 C.F.R. § 351.213(e)(1) and for two consecutive years immediately preceding that period; (b) provides the certifications required under 19 C.F.R. § 351.222(e)(ii) and (iii); and (c) submits a statement acknowledging that its entries are subject to assessment of AD duties at the non-selected respondent rate in one or both of the two preceding review periods.

Flowers Final Results, 62 Fed. Reg at 53,291.

[23] Because all requests for review had been withdrawn during the eighth review of the *Flowers* order, no respondent could be eligible for revocation until the eleventh review, at which point it would be possible to show three consecutive years of not less than normal value sales. *Flowers Prelim. Results*, 62 Fed. Reg. at 16,774. Thus, the procedure laid out in *Flowers Final Results*, would first be available "in the review of the period March 1, 1997 to February 28, 1998 (the eleventh review period)." *Flowers Final Results*, 62 Fed. Reg. at 53,291. However, the eleventh and subsequent reviews were terminated when the Department revoked the order in whole on July 20, 1999. *Certain Fresh Cut Flowers from Colombia*, 64 Fed. Reg. 38,887, 38,888 (Dep't Commerce July 20, 1999) (final results of changed circumstances antidumping duty administrative review; revocation of order) ("As the result of the revocation, the Department is terminating the administrative review[] covering the following period[]: March 1, 1997, through February 28, 1998 . . . .").

Not only has Commerce not consistently relied upon *Flowers*, *see Yang*, 519 U.S. at 32, it has never relied upon *Flowers*, *cf. Smiley*, 517 U.S. at 742–43.

Commerce has also bypassed the opportunity to implement the procedure outlined in *Flowers*. In *Certain Lined Paper from the People's Republic of China* ("*Lined Paper*"),[24] Commerce selected only one mandatory respondent, Shanghai Lian Li Paper Products Co., Ltd. ("Lian Li"). *Lined Paper I & D Mem.* Cmt. 7 at 43. Non selected respondents Watanabe Paper Products (Shanghai) Co., Ltd.; Watanabe Paper Products (Linging) Co., Ltd.; and Hotrock Stationary (Sennzhen) Co., Ltd. (collectively "Watanabe") challenged the selection, arguing, *inter alia*, that by choosing only one respondent Commerce was denying Watanabe the opportunity to seek revocation in the future. *Id.* Though the facts of *Lined Paper* are very similar to *Flowers*, Commerce chose not to invoke the *Flowers* procedure in *Lined Paper*. Instead, Commerce found that with, regard to revocation, "the Department has the discretion, pursuant to [19 U.S.C. § 1677f-1(c)(2)], to limit the number of entities that it reviews if it is not practicable to examine each individual exporter or producer." *Id.* at 47.

Rather, in *Lined Paper*, Commerce "extended the opportunity for non-mandatory respondents to seek voluntary status . . . ." *Id.* at 43. Voluntary respondent status will be discussed further below, but for now the court notes that such an opportunity exists for a non-selected respondent to seek individual review. *See* 19 U.S.C. § 1677m(a). Though Commerce developed an alternative policy in *Flowers* for maintaining the revocation eligibility of non-selected respondents, the court finds it reasonable for Commerce to now require non-selected respondents to instead go through the voluntary respondent process.

Accordingly, because Commerce has failed to implement or rely upon *Flowers* and has, in practice, changed its policy to rely instead on the voluntary review process in order to achieve the objectives stated in *Flowers*, the court finds that the procedure announced in *Flowers* is not binding upon Commerce in this or subsequent reviews.

II. Fish One cannot challenge the mandatory selection process because it failed to exhaust its administrative remedies

[24] *Certain Lined Paper Products from the People's Republic of China*, 74 Fed. Reg. 17,160 (Dep't Commerce Apr. 14, 2009) (notice of final results of the antidumping duty administrative review) ("*Lined Paper Final Results*"), and accompanying Issues and Decision Memorandum, A-570–901, ARP 06–07 (Apr. 6, 2009) ("*Lined Paper I & D Mem.*").

Fish One next argues that the Department used an improper methodology for choosing its mandatory respondents when it took into consideration its workload in other antidumping duty proceedings. Pl.'s Br. 18–19. Fish One further argues that it was unreasonable for the Department to limit its review to three mandatory respondents, when it could have included Fish One as a fourth. *Id.* Fish One relies on this Court's recent opinion in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, CIT , 637 F. Supp. 2d 1260 (2009) to support both of these contentions. Pl.'s Br. 18–19.

The court will not reach the merits of these claims because Fish One failed to exhaust its administrative remedies on this issue. Having failed to object to the mandatory respondent selection process at the administrative level, Fish One cannot raise the issue here. Furthermore, Fish One could have sought individual review through the voluntary respondent process, and, failing to do so, it is not in a position to challenge the mandatory respondent selection.

It is a general rule of administrative law that a plaintiff must exhaust available administrative remedies before seeking relief in the courts. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *McKart v. United States*, 395 U.S. 185, 193 (1969) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)). Similarly, this Court is required by statute to, "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *see also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) ("In the Court of International Trade, a plaintiff must also show that it exhausted its administrative remedies . . . .").

Fish One never raised its current objections to the mandatory selection process with Commerce. Following the selection of mandatory respondents, Fish One sent two letters to Commerce requesting that Commerce abide by Fish One's interpretation of the statutes and regulations by conducting an individual review of Fish One for the purpose of revocation. *See* Letter from DeKieffer & Horgan to Secretary, U.S. Department of Commerce (Oct. 8, 2008), Admin. R. Pub. Doc. 123 ("First Review Request Letter from Fish One to Commerce"); Letter from DeKieffer & Horgan to Secretary, U.S. Department of

Commerce (Jan. 2, 2009), Admin. R. Pub. Doc. 184 ("Second Review Request Letter from Fish One to Commerce"). However, in neither of these letters did Fish One raise its concern with how the mandatory selection process was conducted.[25] Nor did Fish One raise these concerns in its case brief to the agency. *See* Case Br., Apr. 13, 2009, Admin. R. Pub. Doc. 270. Because Fish One did not raise these concerns during the administrative process, Commerce had no opportunity to consider them in making its determinations. The court will not decide a question the agency had no opportunity to consider. *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

This result is especially appropriate here because Fish One also failed to exhaust its available remedies by not seeking a voluntary individual review. Where, as here, the number of respondents in an administrative review has been limited under 19 U.S.C. § 1677f-1(c)(2), Congress has provided an alternative process for a respondent to seek an individual review. This process is provided for at 19 U.S.C. § 1677m(a), which reads in relevant part:

> In . . . a review under section 1675(a) of this title in which [Commerce] has under section 1677f-1(c)(2) of this title . . . limited the number of exporters or producers examined . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to [Commerce] the information requested from exporters or producers selected for examination . . . ."

19 U.S.C. § 1677m(a).[26]

[25] In the first letter, Fish One did argue that respondents were being treated "unevenly in their quest for revocation" and requested that it be made a mandatory respondent, but its argument was premised on what it perceived to be different treatment of respondents requesting revocation; it did not raise the arguments it now makes about the number of mandatory respondents selected and the factors Commerce took into consideration. First Review Request Letter from Fish One to Commerce 6–7.

[26] The statute does permit Commerce to decline to review voluntary respondents when the number of voluntary respondents is so large as to "be unduly burdensome and inhibit the timely completion of the investigation." 19 U.S.C. § 1677m(a)(2). However, because Fish One never applied for voluntary respondent status in the third administrative review, the exception is not relevant in this case.

Commerce has provided further guidance for requesting voluntary respondent status in its regulations under 19 C.F.R. § 351.204. The relevant sections read:

> If [Commerce] limits the number of exporters or producers to be individually examined under [19 U.S.C. § 1677f-1(c)(2)(B)] . . . [Commerce] will examine voluntary respondents (exporters or producers, other than those initially selected for individual examination) in accordance with [19 U.S.C. § 1677m(a)]. . . . An interested party seeking treatment as a voluntary respondent must so indicate by including as a title on the first page of the first submission, "Request for Voluntary Respondent Treatment."

19 C.F.R. § 351.204(d)(1) & (4).[27]

At no point during the administrative review underlying this case did Fish One make a request to Commerce for individual review as a voluntary respondent. Rather, in its first submission to Commerce following the selection of mandatory respondents, Fish One requested an individual review under its interpretation of the statutes and regulations relating to revocation.[28] *See* First Review Request Letter from Fish One to Commerce.

Lack of follow-through in the voluntary respondent process constitutes a failure to exhaust administrative remedies. *See Schaeffler Italia S.R.L. v. United States*, CIT , 781 F. Supp. 2d 1358, 1363 (2011) ("[P]laintiffs do not qualify for a remand order in this form, having withdrawn their request for voluntary respondent status during the review and thereby failing to exhaust their administrative remedies on the individual examination issue."); *Asahi Seiko Co. v. United States*, CIT , 755 F. Supp. 2d 1316, 1327 (2011) ("Asahi II") ("Ashai withdrew from the review rather than taking steps available to it for seeking its own rate, which involve seeking voluntary respondent status under [19 U.S.C. § 1677m(a)]. The court concludes, therefore, that Asahi failed to exhaust its administrative remedies . . . ."); *RHI Refractories Liaoning Co. v. United States*, CIT , 752 F. Supp. 2d 1377, 1380 (2011) (holding that respondent lacked standing to intervene in challenge to administrative review of antidumping duty order for failure to exhaust administrative review after withdrawing its re-

[27] In order to be eligible for voluntary respondent status, the exporter or producer must also submit the relevant information on the same schedule as the mandatory respondents. 19 U.S.C. § 1677m(a)(1)(A).

[28] Nor did Fish One seek voluntary respondent status in subsequent submissions. Furthermore, Fish One did not submit the documentation required of the mandatory respondents, which is a statutory requirement for receiving voluntary respondent status under 19 U.S.C. § 1677m(a).

quest for voluntary respondent status); *see also Asahi Seiko Co. v. United States*, CIT , 751 F. Supp. 2d 1335, 1341–42 (2010) ("Asahi I").

These recent cases hold that withdrawing from an administrative review rather than seeking voluntary respondent status constitutes a failure to exhaust administrative remedies, which bars a plaintiff's challenge to the respondent selection process. It is equally the case that a plaintiff, such as Fish One, that goes forward with a review but does not request voluntary respondent status, has also failed to exhaust its administrative remedies.[29] In both cases, plaintiffs have failed to take advantage of a "prescribed administrative remedy." *McKart*, 395 U.S. at 193; *see also L.A. Tucker Truck Lines*, 344 U.S. at 37 ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." (emphasis added)).

Fish One's argument that its failure to exhaust the administrative remedies was excused due to futility is unavailing. Fish One appears to argue that because it expected to receive a revocation review upon request — according to its interpretation of the statutes and regulations — it did not timely submit the necessary information to be considered as a mandatory respondent; therefore, it was futile for Fish One to object to the mandatory respondent selection process because it was time barred from becoming a mandatory respondent. Pl.'s Reply to Def.'s & Def.-Intervenor's Resp. Br. 8–9, ECF No. 71 ("Pl.'s Reply Br."). However, because it was Fish One's own interpretation of the law that rendered its objections untimely, it has no recourse to a futility exception, as it was not Commerce's decision, obstinance, or intractability, but rather Fish One's own conduct, that made the effort futile. Furthermore, there is no indication that Commerce would have refused to acknowledge Fish One's objections had they been timely lodged or lodged at all. Though Fish One argues that "Commerce would not have contravened its regulations and selected Fish One as a mandatory respondent," *Id.* at 9, Fish One offers no indication that this was, in fact, Commerce's position. The bar for a futility exception is high, requiring more than unlikeliness. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) ("The

[29] Even where this Court has found the mandatory respondent selection process flawed, it has denied relief to plaintiffs that failed to exhaust their administrative remedies by not seeking voluntary respondent status. *See* Asahi I, CIT at , 751 F. Supp. 2d at 1340–42; *Asahi II*, CIT at , 755 F. Supp. 2d at 1325–27. In this case, however, the court declines to rule on whether the Department's mandatory selection process was flawed. The court finds no need to reach this issue as Plaintiff has not shown that it exhausted its administrative remedies. *See* 28 U.S.C. § 2637(d) (2006); *Consol. Bearings*, 348 F.3d at 1003.

mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies."); *Schaeffler Italia*, CIT at , 781 F. Supp. 2d at 1364–65 ("Plainly, the voluntary respondent request was unlikely to have been approved had Schaeffler not withdrawn it, but Commerce did not close the door entirely on the prospect that Schaeffler Italia might be examined."). Resting solely on its conclusory allegation that Commerce would not have acted upon its objections, Fish One has not shown that lodging the objection would have been futile.[30] Fish One failed to exhaust its administrative remedies by not raising objections to the mandatory respondent selection at the administrative level and by not seeking voluntary respondent status. As such, the court will not reach the question of whether Fish One should have been individually reviewed as a mandatory respondent or the question of whether the mandatory respondent selection process was reasonable.

III. The zero percent dumping margin assigned to Fish One in the third administrative review does not guarantee revocation

Finally, Fish One argues that because it received a zero percent dumping margin in the third administrative review and has complied with all relevant statutory and regulatory obligations, "a strict interpretation of the statute and regulations warrants a finding that Commerce simply take the information placed by Fish One on the record, verify it, and issue its decision regarding revocation." Pl.'s Br. 20. Insofar as this argument reiterates Fish One's prior assertion that either the statute or regulations should be read to require Commerce to review and revoke the order as it pertains to Fish One, these arguments have been discussed above. Fish One's further argument that, having received a *de minimis* rate for three consecutive years, it is now entitled to revocation is contrary to the plain language of both the statute and regulations. As has been discussed, both the statute and regulations clearly make the grant of revocation discretionary.

The argument advanced by Fish One is very similar to one dis-

[30] *Zhejiang* is not to the contrary. In *Zhejiang*, the Court held that the plaintiffs could challenge the mandatory selection process despite not having completed the voluntary respondent process. *Zhejiang*, CIT at , 637 F. Supp. 2d at 1265. On the facts of that case, the Court found that it would have been futile for the plaintiffs to continue seeking voluntary respondent status because "Commerce had informed Zhejiang's counsel that Commerce would not accept Zhejiang as either a mandatory or voluntary respondent." Id. At no point in the administrative review at issue here did Commerce indicate that it would not accept voluntary respondents, or more to the point, that it would not accept Fish One as a voluntary respondent. *See* Corus Staal, 502 F.3d at 1379.

missed by this Court in *Hyundai*. In that case, the plaintiff "maintain[ed] that except in extraordinary cases, Commerce should automatically revoke an AD order when respondent can show three years of no dumping and has furnished the required no-dumping agreements." *Hyundai*, 23 CIT at 307–08, 53 F. Supp. 2d at 1339–40. The Court found that such an argument lacked merit because both the statute and regulations made revocation a discretionary decision by Commerce. *Id.* at 308, 1340. Though the regulatory language has changed since *Hyundai*, *see supra* note 13, the court finds that the reasoning behind *Hyundai* continues to be valid. As discussed above, Commerce has reasonably interpreted the statutes and regulations related to revocation. Together the statutes and regulations create a process for determining whether Commerce should exercise its statutory discretion to revoke an order. According to Commerce's reasonable interpretation, this process requires an individual review of a respondent, which did not occur in this case. There is nothing in the statutory or regulatory language that compels Commerce to make a revocation determination other than through this process. As in *Hyundai*, Commerce has the discretion to revoke orders, and so long as it acts reasonably in construing and enforcing the statutory and regulatory provisions, the Court will not upset its decision. Thus, Fish One's assertion that three consecutive years of *de minimis* dumping margins and compliance with statutory and regulatory requirements should guarantee revocation is without merit.

CONCLUSION

Consistent with the court's Order dated Aug. 9, 2011, the issue concerning calculation of separate rates for cooperative non-individually investigated respondents is voluntarily REMANDED for reconsideration in light of the Court's decision in *Amanda Foods (Vietnam) Ltd. v. United States*, CIT , 774 F. Supp. 2d 1286 (2011).

For all the foregoing reasons, the remainder of the Department's *Final Results*, 74 Fed. Reg. 47,191, are AFFIRMED.

Commerce shall have until February 13, 2012, to complete and file its remand redetermination. Plaintiff shall have until February 27, 2012, to file comments. Defendant and Defendant-Intervenors shall have until March 12, 2012, to file any reply.

Dated: December 14, 2011
New York, New York

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

Slip Op. 11–156

C.B. IMPORTS TRANSAMERICA CORP., Plaintiff, UNITED STATES, v. Defendant.

Before: Donald C. Pogue,Chief Judge
Court No. 11–00036

[Granting Defendant's motion to dismiss]

Dated: December 14, 2011

Peter S. Herrick of Miami, FL, for Plaintiff.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With him on the brief were Tony West, Assistant Attorney General and Barbara S. Williams, Attorney in Charge, International Trade Field Office. Of counsel on the brief was Beth Brotman, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Pogue, Chief Judge:

In this matter, Plaintiff, C.B. Imports Transamerica Corporation ("C.B. Imports"), seeks review of the liquidation, by the Defendant, United States Customs and Border Protection ("Customs"), of an entry of automotive safety glass from the People's Republic of China ("China"). Am. Compl. ¶¶ 23–39, ECF No. 8. Customs moves to dismiss for lack of subject matter jurisdiction.[1] Mem. Supp. Def.'s Mot. Dismiss 3–4, ECF No. 16. The court finds that Plaintiff's alleged claim under 28 U.S.C. § 1581(i) (2006) is time-barred. Accordingly, this case will be dismissed.

BACKGROUND

C.B. Imports is an importer located in Puerto Rico. Am. Compl. ¶ 1. On September 20, 2002, C.B. Imports made entry[2] number 261–0419198–1, consisting of automotive safety glass from China. Am. Compl. ¶ 5; Mem. Supp. Def.'s Mot. Dismiss 1. Customs entered the goods on October 31, 2002, subject to an antidumping duty under case number A-570–867–000. Am. Compl. ¶ 9. The goods were entered at a duty rate of 124.50%, requiring C.B. Imports to make a

[1] Customs, in the alternative, seeks dismissal for failure to state a claim. Mem. Supp. Def.'s Mot. Dismiss 3–4. However, because the court concludes that the Plaintiff's claim is time-barred, it does not reach the question of whether Plaintiff has stated a claim upon which relief can be granted.

[2] "'Entry' means that documentation required . . . to be filed with the appropriate Customs officer to secure the release of imported merchandise from Customs custody, or the act of filing that documentation." 19 C.F.R. § 141.0a(a) (2011).

$51,250.43 cash deposit. *Id.* ¶¶ 5–9. Customs liquidated[3] the entry on February 6, 2004 with a doubling of antidumping duties and then reliquidated the entry on February 27, 2004 to correct the erroneous doubling of duties. *Id.* ¶ 13; Mem. Supp. Def.'s Mot. Dismiss 2.

C.B. Imports claims that its entry was actually subject to antidumping duty case number A-570–867–009, for which liquidations were suspended on July 31, 2003. Am. Compl. ¶¶ 11, 14. In addition, the antidumping duty order for automotive safety glass from China was revoked on June 5, 2007. *Automotive Replacement Glass Windshields from the People's Republic of China*, 72 Fed. Reg. 31,052, 31,052 (Dep't Commerce June 5, 2007) (final results of sunset review and revocation of antidumping duty order) ("*Revocation Order*"). On August 24, 2009, C.B. Imports requested that, in light of the revocation, Customs refund its cash deposit. Am. Compl. ¶ 19. Customs responded on August 26, 2009, informing C.B. Imports that it would not refund the deposit because the entry had already been liquidated. *Id.* ¶ 20.

C.B. Imports initiated this action on February 17, 2011, asserting that the court has jurisdiction to hear its claim under § 1581(i). Am. Compl. ¶ 4. Customs contends that C.B. Imports cannot assert § 1581(i) jurisdiction because it should have filed a protest of the liquidation and subsequently sought review of any denial of its protest under 28 U.S.C. § 1581(a)(2006). Mem. Supp. Def.'s Mot. Dismiss 3. Customs also contends that C.B. Imports' claim under § 1581(i) is time-barred by the two year statute of limitations for such claims.[4] *Id.*; *see also* 28 U.S.C. § 2636(i) (2006).

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[3] "*Liquidation* means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2011).

[4] Because the court concludes that Plaintiff's alleged § 1581(i) claim is time-barred, it need not address the Defendant's other claimed basis for dismissal, that a § 1581(i) claim is barred because § 1581(a) provided an adequate, available remedy. *See Volkswagen of Am., Inc. v. United States*, 31 CIT 233, 236, 475 F. Supp. 2d 1385, 1389 (2007) ("Jurisdiction is not appropriate under § 1581(i) when 'another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.'" (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987))). Section 1581(a) gives the court jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 19 U.S.C. § 1581(a). When a plaintiff fails to protest a Customs duty and seeks review under § 1581(a), that plaintiff cannot then seek recourse under § 1581(i). *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008) ("[A plaintiff] cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) unless such traditional means are manifestly inadequate." (internal quotation marks ommitted)); *Shah Bros. v. United* States, CIT , 770 F. Supp. 2d 1367, 1369–70 (2011).

STANDARD OF REVIEW

Whether jurisdiction exists is a question of law. *See* Sky Tech. LLC v. SAP AG, 576 F.3d 1374, 1378 (Fed. Cir. 2009). Because the Defendant has moved to dismiss for lack of jurisdiction, the court accepts as true the factual allegations in the Plaintiff's Amended Complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183, 191 (1984). However, the Plaintiff bears the burden of establishing jurisdiction. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991) ("A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." (citing KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936))).

DISCUSSION

I. Plaintiff's alleged claim under 28 U.S.C. § 1581(i) is statutorily time-barred

The court has broad residual jurisdiction under § 1581(i) over actions challenging Customs' administration and enforcement of antidumping duty orders.[5] However, C.B. Imports' alleged § 1581(i) claim is statutorily time-barred.

Actions brought pursuant to § 1581(i) must be brought "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i). C.B. Imports filed suit on February 17, 2011 to challenge what it believes was the improper liquidation of its entry by Customs on February 27, 2004. Giving C.B. Imports the benefit of the doubt, the court will assume, *arguendo*, that the cause of action accrued when the antidumping duty order was revoked and C.B. Imports became eligible for the refund of its cash deposit. However, the notice of that revoca-

[5] Section 1581(i) states in relevant part:

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

28 U.S.C. § 1581(i).

tion was published in the Federal Register on June 5, 2007.[6] *Revocation Order*, 72 Fed. Reg. at 31,052. Thus, C.B. Imports' alleged claim under § 1581(i) was time-barred as of June 6, 2009. *See* 28 U.S.C. § 2636(i).

II. The Administrative Procedures Act does not offer an alternative basis for jurisdiction

C.B. Imports argues that it is not subject to the statute of limitations applicable to § 1581(i) claims because it has an independent cause of action under section 10 of the Administrative Procedures Act ("APA"), 5 U.S.C. § 702 (2006). Mem. Supp. Pl.'s Opp'n Def.'s Mot. Dismiss 5, ECF No. 18. However, it is well established that the APA is not a jurisdictional statute. *See Volkswagen of Am.*, 31 CIT at 235, 475 F. Supp. 2d at 1388. To hear an APA claim, the court must "have an independent basis for jurisdiction under 28 U.S.C. § 1581." *Id.* As C.B. Imports cannot assert a timely claim under § 1581(i), as explained above, it also cannot assert a cause of action under the APA. *See Royal United Corp. v. United States*, CIT , 714 F. Supp. 2d 1307, 1314 (2010) ("It is, of course, axiomatic that this Court exercises jurisdiction pursuant to Subsection 1581(i) to adjudicate a cause of action under the APA.").

CONCLUSION

For the foregoing reasons, the court concludes that Plaintiff's alleged claim is time-barred. The case must therefore be DISMISSED. Judgment will be entered accordingly.

Dated: December 14, 2011
New York, New York

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

Slip Op. 11–157

LEGACY CLASSIC FURNITURE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 10–00352

[Commerce's scope determination sustained in part and remanded in part]

Dated: December 15, 2011

[6] Because a Federal Register publication is always constructive notice, *see* Isaac Indus. v. United States, CIT, 780 F. Supp. 2d 1372, 1375 & 1375 n.8 (2011), C.B. Imports cannot toll the statute of limitations based on lack of notice of the revocation.

Mark E. Pardo, Max F. Schutzman, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, of Washington, DC, for plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant, and *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director.

OPINION & ORDER

CARMAN, JUDGE:

Plaintiff Legacy Classic Furniture, Inc. ("Legacy") brought this case to challenge a determination by the United States Department of Commerce ("Commerce") that Legacy's Heritage Court Bench is within the scope of the antidumping duty order on wooden bedroom furniture from China ("WBF Order"). For the reasons set forth below, Commerce's determination is sustained in part and remanded in part.

BACKGROUND

The product in question is Legacy's Heritage Court Bench—a piece of furniture that serves both as a storage unit and a seating bench. It is described as "a backless wooden seating bench measuring 50 inches wide by 19 inches tall by 20 inches deep." Wooden Bedroom Furniture from the People's Republic of China: Scope Ruling on Legacy Classic Furniture, Inc.'s Heritage Court Bench ("Final Scope Ruling"), App. to Pl.'s R. 56.2 Mot. for J. on the Agency Rec. (Pl.'s App.") Ex. 1 at 2 (Nov. 22, 2010). The body of the bench "is made from solid hardwood with Okume Mahogany veneers and a cocoa brown wood finish." *Id.* It has a top "that consists entirely of a padded leather surface," and is attached by hinges to the base, which has a cedar-lined interior. *Id.*

According to its own terms, the WBF Order covers furniture "made substantially from wood products," which is "generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms." *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329, 332 (Jan. 4, 2005). The subject merchandise explicitly includes "chests," which are defined as "typically a case piece taller than it is wide" which "can either include drawers or be designed as a large box incorporating a lid." *Id.* The WBF Order explicitly excludes "benches . . . and other seating furniture." *Id.*

Commerce evaluated whether Legacy's Heritage Court Bench was within the scope of the WBF Order according to the factors and procedure set out in 19 C.F.R. § 351.225(k). Final Scope Ruling at 4.

This regulation specifies that when Commerce is "considering whether a particular product is included within the scope of an order," it will first "take into account" the following factors: "(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). Only when these so-called "(k)(1) factors" are not dispositive is Commerce to proceed to consider the "(k)(2) factors": "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." *Id.* § 351.225(k)(2).

I. *Commerce's Consideration of the (k)(1) Factors*

Commerce determined that it was unable to complete the scope determination upon consideration of the (k)(1) factors alone. Final Scope Ruling at 8. Specifically, it determined that Legacy's Heritage Court Bench had characteristics of both a chest—which would be included within the scope of the order—and also a bench—which would be excluded from the order. Id. A chest is defined in the WBF Order as "typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid." 70 Fed. Reg. at 332 n.5. Reasoning that Legacy's Heritage Court Bench met the description of a "large box incorporating a lid," Commerce concluded that it qualified as a chest, albeit an atypical chest. *Id.* at 6. The agency also acknowledged that the product "has physical characteristics which allow it to be used for seating, characteristics that are shared by benches." *Id.* The agency concluded that upon "examination of the records established by [Commerce] and the ITC in the underlying investigation, and a past scope determination, . . . the record of the WBF proceeding does not contain sufficient information to permit [Commerce] to determine whether the Heritage Court Bench is covered by the scope of the WBF Order without further analysis." *Id.* at 8. In other words, Commerce found the (k)(1) factors not to be dispositive.

II. *Commerce's Consideration of the (k)(2) Factors*

The agency then turned to consider the factors set out in 19 C.F.R. § 351.225(k)(2). The following is a summary of Commerce's conclusions on each of the (k)(2) factors.

A. Physical Characteristics of the Product

Commerce once again noted that because the Heritage Court Bench is "a large box with a lid," it fits within the definition of a chest included in the WBF Order. Final Scope Ruling at 9. The agency also considered whether the product meets the definition of a bench. Because the WBF Order uses but does not define the term "bench", the agency considered the definitions of bench provided by Legacy: "1) a seat without a back, usually a long oval or oblong; 2) a long seat for more than one person; 3) a long, usually backless seat; and 4) a long seat, with or without a back, usually of wood." *Id.* at 9–10. Commerce reasoned that "these definitions are unhelpful here because they do not address the storage components of the Heritage Court Bench, which is a critical consideration in its treatment under the WBF order," and concluded that the physical characteristics of the product indicate that the product falls "within the definition of a chest as defined by the scope of the WBF order." *Id.* at 10.

B. Expectations of the Ultimate Purchasers

Commerce found that there was "no direct evidence on the record regarding the expectations of the ultimate purchasers," but nevertheless concluded that this factor pointed towards including Legacy's product within the scope of the WBF Order. *Id.* at 10–11. The agency decided that the cedar-lined nature of the interior of the chest indicated it was intended to be used for clothing storage, which would be consistent with use in bedrooms. *Id.* at 10. Commerce reasoned that although the product has a padded top which purchasers "may also expect to use" for seating, the box design and cedar lined nature of the storage unit were its defining characteristics, because "[o]therwise, it is reasonable to assume customers would simply buy a bench with no storage capacity." *Id.* at 11.

C. Ultimate Use of the Product

As with the previous factor, Commerce again found "no direct evidence" regarding the ultimate use of the Heritage Court Bench, but nevertheless concluded that this factor also pointed towards the inclusion of Legacy's product within the scope of the WBF Order. *Id.* at 11–12. Commerce notes that on Legacy's website, the product is described as a "cedar lined leather storage bench," and states that "**the Department's impression** is that the piece was designed with a focus on storing items, and that the leather top was incorporated for additional functionality and character." *Id.* at 11 (emphasis added). Commerce concluded that the product's "cedar-lined storage area strongly indicates that the intended ultimate use of the product is

storage." *Id.* at 12.

D. Channels of Trade in Which the Product is Sold

On this factor, Commerce concludes that there is "no evidence that the Heritage Court Bench is sold through different channels of trade than WBF." *Id.* Because Legacy appears to sell both subject merchandise and non-subject merchandise on its website, the agency succinctly concludes that this factor is not dispositive on the scope determination. *Id.*

E. The Manner In Which The Product is Displayed and Advertised

On this final factor, Commerce observes that Legacy sells the Heritage Court Bench on its website "in the same section as benches," but also "as part of its bedroom furniture line." *Id.* at 13. The agency also notes that on several websites, including Legacy's, the product's cedar-lined storage component "is prominently advertised and displayed," and therefore concludes that "Legacy displays and advertises the Heritage Court Bench as piece [sic] of furniture that is consistent with the definition of subject chests." *Id.*

Based upon the foregoing analysis, Commerce concludes that "the weight of the evidence on the record supports the finding that the Heritage Court Bench is included in the scope of the WBF order." *Id.* at 14.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) and reviews the determinations of the agency according to the standard set out in 19 U.S.C. § 1516a(b)(1)(B) ("[t]he 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.").

DISCUSSION

I. *Commerce's Determination With Respct to the (k)(1) Factors Is Sustained*

Commerce's determination that the factors set out in 19 C.F.R. § 351.225(k)(1) are not dispositive on the scope determination is supported by substantial evidence on the record and is otherwise in accordance with law, and is therefore sustained. The evidence on the record supports the view that Plaintiff's Heritage Court Bench has characteristics of both a bedroom chest, which would be within the scope of the order, and also of a bench, which would not be within the

scope of the order. Because the Court sustains the agency's determination that the (k)(1) factors were inconclusive, the scope determination must be completed in consideration of the (k)(2) factors.

Legacy's argument that the Heritage Court Bench must necessarily be excluded from the scope of the WBF Order according to the language of the scope alone is unpersuasive. Legacy contends that because the WBF Order contains an unqualified exclusion of "benches" and "other seating furniture," if a product is a bench or a piece of seating furniture, it cannot possibly fall within the scope of the order. (Br. In Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Pl.'s Mot.") 9–17.) Plaintiff's argument ignores, however, the possibility that a product satisfies the definitions of items both within and without the scope of the order. The WBF Order enumerates the types of chests that are within its scope, and the products thus identified are included *without qualification*. Specifically, the order covers "wooden bedroom furniture," and states that "[t]he subject merchandise includes . . . chests," which are defined to explicitly include the type "designed as a large box incorporating a lid." 70 Fed. Reg. at 332, 332 n. 5. Because Legacy's product appears to fit this definition of a bedroom chest in addition to meeting the definition of a bench, Commerce was correct in determining that the (k)(1) factors were not dispositive on the scope determination. When a scope determination is sought for product that simultaneously meets the definition of items included and excluded from the scope of an antidumping order, the scope determination cannot be made solely upon resort to the (k)(1) factors. 19 C.F.R. § 351.225(k).

II. *Commerce's Determinations With Respect to the (k)(2) Factors Are Set Aside*

The Court finds that each conclusion Commerce made regarding the five factors set out in 19 C.F.R. § 351.225(k)(2) is not supported by substantial evidence on the record, and must be set aside. Specifically, on the four factors that Commerce found to support inclusion of Plaintiff's product within the scope of the WBF Order, the Court finds that the record evidence cannot support such a conclusion. Additionally, the one factor that Commerce found inconclusive on the scope determination does not take into account the breadth of the record evidence, and therefore cannot be sustained. For the reasons set forth below, the scope determination is remanded to Commerce for a redetermination consistent with this opinion.

The Court will review the agency's conclusion on each of the five (k)(2) factors sequentially.

A. Physical Characteristics of the Product

First, the logic Commerce employs to justify its conclusion that the physical characteristics of Legacy's Heritage Court Bench bring it within the scope of the WBF Order does not withstand scrutiny. Simply put, Commerce acknowledges that Plaintiff's product meets the *prima facie* definitions of both a chest and a bench, but decides that the features that are not essential to a bench prohibit regarding the product as a bench. Ergo, the product is more of a chest, within the scope of the WBF Order. However, the same reasoning could be employed to opposite effect: the agency might *just as well* have concluded that the product meets the definition of a chest, but that the features that are not essential to a chest (such as a padded leather seat) prohibit regarding the product as a chest. The Court can find no justification in Commerce's analysis, nor any evidence on the record to explain this asymmetry, and must therefore remand for a redetermination.

Consistent with the Court's standard of review, the Court does not substitute its own judgment for that of the agency, nor does the Court purport to tell Commerce how it must ultimately regard this factor. Perhaps Commerce will find that the product equally meets the definitions of a chest and a bench, and that this factor is therefore inconclusive. Or perhaps Commerce will find that the product's seating characteristics negate defining it as a chest, and that its storage characteristics negate defining it as a bench, but similarly, that this factor is inconclusive. Or perhaps the agency will reach a different conclusion altogether. As it stands, however, the conclusion that the physical characteristics of Legacy's Heritage Court Bench warrant inclusion within the scope of the WBF Order is not supported by substantial evidence on the record and otherwise in accordance with law, and is therefore set aside.

B. Expectations of the Ultimate Purchasers

Commerce's reasoning with respect to the expectations of ultimate purchasers suffers from the same flaw as the previous factor—arbitrariness. While acknowledging that some purchasers may intend to use the Heritage Court Bench for seating, the agency pronounces that the product's storage capability is its most distinguishing characteristic. This *must* be so, according to the agency, because otherwise a purchaser "would simply buy a bench with no storage capacity." Final Scope Ruling at 11. The error in this logic is that, again, the inverse is just as plausible. Consumers simply wishing to buy a bedroom chest for clothing storage need not purchase such an atypical chest—an oblong product of appropriate seating

height (19"), wider than it is tall, with a built in padded leather seat. Because the Court finds in Commerce's explanation no rationale for its stated conclusion over this alternative, the Court must again remand for redetermination. The conclusion that the expectations of the ultimate purchasers suggest Plaintiff's product falls within the scope of the WBF Order is not supported by substantial evidence on the record and otherwise in accordance with law, and is therefore set aside.

C. Ultimate Use of the Product

With respect to the third (k)(2) factor, the ultimate use of the product, Commerce commits the same error for a third time. Here, the agency candidly admits that it based its decision on an "impression" that the piece was designed "with a focus on storing items, and that the leather top was incorporated for additional functionality and character." *Id.* This impression has no support on the record, at least no support over and against the alternative—that the product was primarily designed as a seating unit, with an added bonus of cedar-lined storage. With no record evidence regarding the actual ultimate use of the product, the agency's unsupported view that the product is primarily a chest, rather than primarily a bench, requires a remand.

What makes the agency's conclusion on this third (k)(2) factor especially curious is that Commerce criticizes the position advanced by Legacy *for the same reasons* the Court now rejects Commerce's position. Legacy had argued before the agency that if the storage feature of the bench went unused, the product's primary purpose as seating furniture could still be fulfilled. Commerce responded that "[t]his reasoning is not persuasive because the same claim can be made" in the other direction: "*i.e.*, if the seating function is not used, then it can still be used for storage." *Id.* at 12. Remarkably, Commerce then *endorses this alternative view as correct*, stating "that the intended ultimate use of the product is storage," for no other reason than that the product has a cedar-lined storage area. *Id.* To summarize, Legacy baldly asserted that the primary purpose of the product was for seating, and Commerce rejected that, noting it could just as easily be said that the primary purpose of the product was for storage. Then, Commerce baldly asserted that the primary purpose of the product was for storage, failing to acknowledge that the primary purpose of the product might just as easily be for seating. Because the conclusion that the ultimate use of the product is for storage is not supported by substantial evidence on the record and otherwise in accordance with law, the Court must set it aside.

D. Channels of Trade in Which the Product is Sold

The fourth of the (k)(2) factors received the most cursory treatment, and warrants a remand for more thorough consideration. When considering the "channels of trade" in which Legacy sells the Heritage Court Bench, Commerce appears to have limited its view to only the sections of Legacy's website on which the product is sold. But the record indicates that a number of third-party websites also offer the Heritage Court Bench for sale. Commerce acknowledged Legacy's argument that the product "is offered for sale by retailers that sell no WBF subject to this order, *i.e.*, seating furniture," but failed to consider these other retailers in reaching its conclusion. *Id.* Commerce's conclusion—that the channels of trade is not dispositive on the scope ruling—is not supported by substantial evidence on the record, as it appears to have been based on just one of the many outlets through which the Heritage Court Bench is sold, and ignores abundant additional record evidence on this question. On remand, the agency is directed to consider all record evidence regarding the channels of trade in which the Heritage Court Bench is sold before determining whether this particular (k)(2) factor has a bearing on the agency's scope ruling.

E. The Manner In Which the Product is Displayed and Advertised

On the final (k)(2) factor, Commerce's conclusion that the product is displayed and advertised "as a piece of furniture that is consistent with the definition of subject chests" does not take full view of all record evidence to the contrary. *Id.* at 13. Commerce does fairly acknowledge that the product is sold on Legacy's website "in the same section as benches," as well "as part of [Legacy's] bedroom furniture line." *Id.* But the agency takes disproportionate notice of the display and advertisement of the product's storage component, both on Legacy's website and on third party websites. *Id.* While accurate, this observation is incomplete. On Legacy's website, for instance, the Heritage Court Bench is fully described as a "Leather Storage Bench; Cedar lined; Lift top." Pl.'s App. Ex. 7 at 1. Both the cedar storage component and the leather top are prominently displayed and advertised. Similarly, on www.juststoragebenches.com, the Heritage Court Bench is advertised according to its measurements and six prominent features: "Durable wood construction[;] Handsome medium wood finish[;] Cushioned seat with genuine leather upholstery[;] Lift-top with full-length piano and safety hinges[;] Cedar-lined interior[;] Cutout base apron." *Id.* Ex. 9 at 2. Once again, the product is here sold both for its chest- and bench-like qualities. Because the agency's determi-

nation on this final factor fails to take into account record evidence that weighs against the conclusion it reached, the agency's determination is not supported by substantial evidence and otherwise in accordance with law, and must therefore be set aside.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Commerce's determination that the factors set out in 19 C.F.R. § 351.225(k)(1) are not dispositive of this scope determination is SUSTAINED, and it is further

ORDERED that Commerce's determination that Legacy's Heritage Court Bench falls within the scope of the WBF Order is SET ASIDE, and it is further

ORDERED that this case is remanded to Commerce with instructions to make a redetermination that reconsiders each of the five factors set out in 19 C.F.R. § 351.225(k)(2) in light of the Court's opinion, and it is further

ORDERED that the stay entered by the Court on Plaintiff's motion for oral argument (ECF No. 41) is hereby LIFTED, and it is further

ORDERED that Plaintiff's motion for oral argument (ECF No. 39) is hereby DENIED, and it is further

ORDERED that the results of this redetermination on remand shall be filed no later than **Thursday, February 16, 2012**, and it is further

ORDERED that Plaintiff may file comments on such remand results, not to exceed 20 pages, and that such comments shall be filed no later than **Thursday, March 15, 2012**, and it is further

ORDERED that Defendant may file a reply to Plaintiff's comments, not to exceed 15 pages, and that such reply shall be filed no later than **Thursday, March 29, 2012.**

Dated: December 15, 2011
New York, New York

Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 11–158

JTEKT CORPORATION AND KOYO CORPORATION OF U.S.A., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 08–00324

[Issuing a remand order in compliance with the decision of the U.S. Court of Appeals for the Federal Circuit vacating and remanding, in part, the court's judgment issued in this litigation]

Dated: December 15, 2011

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin LLP, of Washington, DC, for plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Daniel J. Cannistra and *Alexander H. Schaefer*, Crowell & Moring, LLP, of Washington, DC, for plaintiffs Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc.

Donald J. Unger, *Diane A. MacDonald*, and *Joseph W. LaFramboise*, Baker & McKenzie, LLP, of Washington, DC, for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Deborah R. King* and *Brian Soiset*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, *Lane S. Hurewitz*, *Terence P. Stewart*, and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

In *JTEKT Corp. v. United States*, 34 CIT __, 717 F. Supp. 2d 1322 (2010) ("*JTEKT I*"), the Court of International Trade affirmed the final determination that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in the eighteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) ("Final Results"). In *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT II* "), the Court of Appeals for the Federal Circuit ("Court of Appeals") affirmed in part, and vacated and remanded in part, the judgment issued in *JTEKT I*. Before the court is the mandate issued by the Court of Appeals. CAFC Mandate in Appeal # 2010–1516, -1518 (Aug. 5, 2011) ("Mandate"), ECF No. 83. This Opinion and Order is issued in compliance with that mandate.

I. BACKGROUND

Detailed background on this litigation is provided in *JTEKT I*, 34 CIT __, 717 F. Supp. 2d 1322, 1324–28, and *JTEKT II*, 642 F.3d 1378, 1379–80, and is summarized briefly herein. JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") brought an action in 2008 pursuant to Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a, to contest certain determinations made by the Department

in the Final Results. Under *JTEKT Corp. v. United States*, Consolidated Court No. 08–00324, the court consolidated with JTEKT's action other cases contesting the Final Results, which were brought by plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN") and Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc. (collectively, "Aisin"). Order (Feb. 18, 2009), ECF No. 32.

II. DISCUSSION

JTEKT I affirmed the Final Results with respect to all determinations contested in this litigation. *JTEKT I*, 34 CIT __, 717 F. Supp. 2d 1322 at 1340. Specifically, the Court of International Trade denied relief on the claims of NTN and Aisin challenging the Department's application of "zeroing" methodology to non-dumped sales and also denied relief on various claims of JTEKT and NTN that were directed to the Department's applying its revised "model match" methodology, under which the Department identifies the foreign like product with respect to individual models of ball bearings that comprised the subject merchandise. *JTEKT I*, 34 CIT __, 717 F. Supp. 2d 1322 at 1327–40. The remand issued by the Court of Appeals in *JTEKT II* is confined to the Department's use of the zeroing methodology in the Final Results. As defined by the Court of Appeals in *JTEKT II* and in a previous decision, *Dongbu Steel Co. Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*"), "zeroing is the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes." *JTEKT II*, 642 F.3d. at 1383–85 (citing *Dongbu*, 635 F.3d at 1366).

In *Dongbu*, the Court of Appeals, noting that the Department was no longer using the zeroing methodology in antidumping investigations, stated that "while we have repeatedly upheld Commerce's use of zeroing in administrative reviews, we have never considered the reasonableness of interpreting 19 U.S.C. § 1677(35) in different ways depending on whether the proceeding is an investigation or an administrative review."[1] *Dongbu*, 635 F.3d at 1370. The appellate court concluded that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is

[1] In section 771(35) of the Tariff Act of 1930, 19 U.S.C. § 1677(35), Congress defined the term "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" and the term "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

arbitrary." *Id.* at 1372–73. In reaching its conclusion, the Court of Appeals reasoned that the government's decision to implement an adverse report of the World Trade Organization regarding zeroing in antidumping investigations "standing alone does not provide sufficient justification for the inconsistent statutory interpretations." *Id.* at 1372. *Dongbu* vacated the judgment of the Court of International Trade with respect to affirmance of the zeroing methodology and remanded for further proceedings "to give Commerce the opportunity to explain its reasoning." *Id.* at 1373. Speculating that Commerce might be unable to justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and administrative reviews, the Court of Appeals added that "[i]n such circumstances, Commerce is of course free to choose a single consistent interpretation of the statutory language." *Id*.

In *JTEKT II*, the Court of Appeals, agreeing with an argument that NTN made on appeal, concluded that "*Dongbu* requires us to vacate and remand." *JTEKT II*, 642 F.3d at 1384. Drawing a distinction with *Dongbu*, in which case Commerce did not provide an explanation of its reasoning for its inconsistent statutory interpretations, the court observed that in this case, "Commerce explained its reasoning for continuing to zero in administrative reviews, but not in investigations."[2] *Id.* The Court of Appeals, however, found the Department's explanation unsatisfactory. "While Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question . . . why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other." *Id.* at 1384–85.

The court construes the mandate issued in *JTEKT II* according to principles discussed in the appellate court's opinion and in *Dongbu*,

[2] The explanation the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") provided when it issued the final determination at issue in this case was as follows:

> Antidumping investigations and administrative reviews are different proceedings with different purposes. Specifically, in antidumping investigations, the Act specifies particular types of comparisons. . . . In antidumping investigations, the Department generally uses average-toaverage comparisons whereas in administrative reviews the Department generally uses average-to-transaction comparisons.
>
> The purpose of dumping margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports. In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of subject merchandise to the antidumping duty order.

JTEKT Corp. v. United States, 642 F.3d 1378, 1384 (Fed. Cir. 2011) ("*JTEKT II*") (quoting Joint Appendix 173–74).

635 F.3d at 1371–73. Thus, in fulfilling the mandate issued in *JTEKT II*, the court must order a remand so that the Department is presented the opportunity to explain why, in the Department's view, it is reasonable to construe 19 U.S.C. § 1677(35) inconsistently with respect to antidumping investigations and with respect to administrative reviews of antidumping duty orders. *See JTEKT II*, 642 F.3d at 1384–85, *Dongbu*, 635 F.3d at 1372–73. To be adequate under the standard established by the Court of Appeals, any such explanation must identify a "basis *in the statute* for reading 19 U.S.C. § 1677(35) differently in administrative reviews than in investigations," *Dongbu*, 635 F.3d at 1372 (emphasis added), and must explain why the differences between antidumping investigations and antidumping administrative reviews "make it *reasonable* to continue zeroing in one phase, but not the other." *JTEKT II*, 642 F.3d at 1385 (emphasis added).

As it did in *Dongbu*, the Court of Appeals in *JTEKT II* vacated the judgment of the Court of International Trade with respect to the affirmance of the Department's decision to apply zeroing in the Final Results. *Id*. at 1385, Mandate. In both *JTEKT II* and *Dongbu*, the Court of Appeals held that the Department's use of zeroing in the respective reviews could not be sustained due to the absence of a satisfactorily explained statutory construction of 19 U.S.C. § 1677(35). As a matter of logical necessity, effectuation of the mandate the Court of Appeals issued in this litigation requires that Commerce be directed to reconsider its original decision to apply zeroing in the Final Results. Upon such reconsideration during the remand proceeding, Commerce is free to modify that decision. *See Dongbu*, 635 F.3d at 1373 (" . . . Commerce is of course free to choose a single consistent interpretation of the statutory language."). Should Commerce decide upon remand that it will not apply zeroing in the Final Results, it must include in its remand redetermination a recalculation of the margin to be applied to NTN.[3]

[3] Commerce determined a margin of 11.96% for NTN Corporation. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823, 52,825 (Sept. 11, 2008) ("Final Results"). Of the plaintiffs in the consolidated action before the Court of International Trade, only American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN") and Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc. (collectively, "Aisin") raised valid claims challenging the Department's use of zeroing in the Final Results. *JTEKT Corp. v. United States*, 34 CIT __, 717 F. Supp. 2d 1322, 1325 n. 1 (2010) ("*JTEKT I*"). Because Aisin did not appeal the judgment the Court of International Trade entered in *JTEKT I*, that judgment is final as to Aisin's claim challenging zeroing. JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") included in its complaint a claim challenging the Department's use

III. CONCLUSION

The court orders a remand in which Commerce must reconsider its decision to apply zeroing in the Final Results. On remand, Commerce must modify that decision and recalculate NTN's margin accordingly, or it must provide an explanation, as discussed in the foregoing, of why it considers it reasonable to construe 19 U.S.C. § 1677(35) inconsistently with respect to antidumping investigations and with respect to administrative reviews of antidumping duty orders.

ORDER

In response to the decision and mandate issued by the Court of Appeals in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011), it is hereby

ORDERED that Commerce shall issue a redetermination upon remand ("Remand Redetermination") in which it reconsiders the decision it made in *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) ("Final Results") to follow its zeroing procedure; it is further

ORDERED that, on remand, Commerce either must modify that decision or must explain how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to the use of the zeroing methodology in antidumping investigations and the opposite way with respect to the use of that methodology in antidumping administrative reviews; it is further

ORDERED that Commerce, should it choose to modify its decision on zeroing, is, as discussed in *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1673 (Fed. Cir. 2011), "of course free to choose a single consistent interpretation of the statutory language," *i.e.* the language of 19 U.S.C. § 1677(35); it is further

ORDERED that should Commerce decide not to apply zeroing on remand or decide to otherwise modify its decision, Commerce shall redetermine the margin of NTN as appropriate; it is further

ORDERED that Commerce shall file its Remand Redetermination with the court within sixty (60) days from the date of this Opinion and Order; and it is further

ORDERED that defendant and defendant-intervenor shall have thirty (30) days from the date on which that redetermination is filed with the court to file comments thereon.

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of zeroing, which claim *JTEKT I* held to have been abandoned when JTEKT omitted that claim from its USCIT Rule 56.2 motion for judgment on the agency record. *Id.* at __ n. 3, 1326–27 n. 3. The holding that JTEKT had abandoned its zeroing claim was not reversed upon appeal by *JTEKT II*.

Dated: December 15, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE