Slip Op. 09−42

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and THAI I-MEI FROZEN FOODS CO., LTD. et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 07−00378
PUBLIC VERSION

[Plaintiffs' Motions for Judgment Upon the Agency Record are DENIED and Commerce's Determination is AFFIRMED.]

Dated: May 13, 2009

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Steptoe & Johnson LLP (*Eric C. Emerson* and *Michael T. Gershberg*) for Plaintiff Thai I-Mei Frozen Foods Co., Ltd.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); and *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

This action arises out of an administrative review of an antidumping order covering certain warmwater shrimp from Thailand conducted by the United States Department of Commerce ("Commerce"). Plaintiffs Ad Hoc Shrimp Trade Action Committee ("Ad Hoc"), an association of domestic producers and processors of warmwater shrimp, and Thai I-Mei Frozen Foods Co., Ltd. ("Thai I-Mei"), an exporter of warmwater shrimp, challenge certain decisions made by Commerce during the course of the administrative re-

view. Ad Hoc contests: (1) Commerce's decision not to apply 19 U.S.C. § 1677b(d) to Thai I-Mei's normal value calculations, (2) Commerce's calculation of Thai I-Mei's constructed export price ("CEP") profit, (3) Commerce's classification of Good Luck Product Co. Ltd.'s ("Good Luck") defective merchandise as an "indirect selling expense," and (4) Commerce's decision not to apply adverse facts available when calculating the dumping margin for Fortune Frozen Foods ("Fortune"). Thai I-Mei contests: (1) Commerce's choice of its constructed value ("CV") methodology as it pertains to the general and administrative ("G&A") expense component, (2) Commerce's calculation of Thai I-Mei's G&A and interest expenses ratios, (3) Commerce's denial of Thai I-Mei's CEP offset, and (4) Commerce's calculation of Thai I-Mei's assessment rate.

This court has jurisdiction under 28 U.S.C. § 1581(c). Because the challenged decisions are supported by substantial evidence and otherwise in accordance with law, Commerce's determination in *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 52,065 (September 12, 2007) ("Final Results") is AFFIRMED.

II
BACKGROUND

On April 7, 2006, Commerce initiated the first administrative review of an antidumping duty order covering certain frozen warmwater shrimp from Thailand. *Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand*, 71 Fed. Reg. 17,819 (April 7, 2006). The period of review was from August 4, 2004 to January 31, 2006. *Id*. Commerce selected as mandatory respondents the three largest Thai exporters of frozen warmwater shrimp in the respondent selection poll: Good Luck, Thai I-Mei, and Pakfood Public Co., Ltd, ("Pakfood"). Memorandum from Irene D. Tzafolias, Acting Director, Office AD/CVD Operations, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: *Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Selection of Respondents* (July 11, 2006), Public Record ("P.R.") 239, at 6.

On March 9, 2007, Commerce published its preliminary results in the Federal Register. *See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 10,669 (March 9, 2007) ("Preliminary Results"). Thereafter, on September 12, 2007, Commerce issued the final results of this review. *Final Results*, 72

Fed. Reg. 52,065. For the three selected respondents, Commerce found the following dumping margins: 10.75% for Good Luck, 2.58% for Thai I-Mei, and 4.29% for Pakfood. *Id.* at 52,069. For the fifteen respondents subject to the review who were not selected for examination, Commerce calculated a dumping margin of 4.31%, *id.*; this rate was based on the weighted average of the margins calculated for the three selected respondents, *id.* at n.5. Commerce also applied an adverse facts available ("AFA") margin of 57.64% to six respondents who did not cooperate with Commerce's requests for information. *Id.* On October 12, 2007, Ad Hoc filed this action under court number 07−00378. On January 4, 2008, Thai I-Mei was admitted as a Defendant-Intervenor in *Ad Hoc Shrimp Trade Action Committee v. United States*, Court Number 07−00378.[1] Thereafter, on January 11, 2008, the court entered an order consolidating *Ad Hoc Shrimp Trade Action Committee v. United States*, Court Number 07−00378, and *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, Court Number 07−00381, under consolidated Court Number 07−00378.[2]

III
STANDARD OF REVIEW

The court must uphold a determination by Commerce resulting from an administrative review of an antidumping duty order unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007).

The substantial evidence test "requires only that there be evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). Even if it is possible to draw two inconsistent conclusions from the evidence contained in the record, this does not render Commerce's findings unsupported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018,16 L. Ed. 2d 131 (1966).

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[1] On December 3, 2007, Thai I-Mei Frozen Foods Co., Ltd. ("Thai I-Mei") requested the right to intervene in this action. Because Thai I-Mei is an interested party to the administrative review from which this action arises (the first administrative review of antidumping duty order against frozen warmwater shrimp from Thailand) and several of Ad Hoc Shrimp Trade Action Committee's ("Ad Hoc") claims involve challenges to Commerce's calculation of Thai I-Mei's dumping margin, the court granted Thai I-Mei's Consent Motion to Intervene on January 4, 2008.

[2] In this consolidated action, Thai I-Mei is a plaintiff alongside Ad Hoc, because both parties are contesting Commerce's findings resulting from this particular administrative review as set out in *Certain Frozen Warmwater Shrimp from Thailand:Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 52,065 (September 12, 2007) ("Final Results").

While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record. *Cleo*, 501 F.3d at 1296 (citing *Universal Camera*, 340 U.S. at 487−88); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

To determine whether Commerce's interpretation and application of the antidumping statute at issue "is in accordance with the law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842−43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*."). Under the first step of the *Chevron* analysis, the court must ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (citing *Chevron*, 467 U.S. at 842−43).

The court reaches the second step of the *Chevron* analysis only "if the statute is silent or ambiguous with respect to the specific issue." *Id.* (citing *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 n.11. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation if the question had first arisen in a judicial proceeding. *Id.* (citations omitted).

IV
DISCUSSION

A
Legal Framework Of Antidumping

Goods imported into the United States are subject to an antidumping duty if Commerce determines that foreign merchandise is being

sold in the United States at "less than its fair value."[3] 19 U.S.C. § 1673; *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1375 (Fed. Cir. 2008). The amount of the antidumping duty reflects the amount by which the home-market price of the foreign like product (the "normal value") exceeds the price charged in the United States (the "export price"). 19 U.S.C. § 1677b(a)(1)(A)–(B). The U.S. price is calculated in one of two ways, as either the export price or the constructed export price, depending on the relationship between the producer or exporter and the U.S. purchaser. 19 U.S.C. § 1677a(a)−(b); *Ta Chen Stainless Steel Pipe, Ltd., v. United States*, 28 CIT 627,630, 342 F. Supp. 2d 1191, 1194 (2004). The difference between the normal value and the export price or constructed export price is referred to as the "dumping margin." 19 U.S.C. § 1677(35)(A). After an antidumping duty order is issued, the amount of the antidumping duty may be revised in subsequent administrative reviews. 19 U.S.C. § 1675(a)(1)(B).

In a subsequent administrative review, Commerce recalculates the normal value (or constructed value) and the export price (or constructed export price) to establish an updated dumping margin. 19 U.S.C. § 1675(a)(2)(A)(i)−(ii). Because the sale prices used to determine normal value and the U.S. price (whether calculated on the basis of export price or constructed export price) occur at different points in the chain of commerce and under different circumstances, certain adjustments are made in an to attempt to make them comparable. *Ta Chen*, 28 CIT at 630. Thus, the objective of making adjustments to account for such costs as packing expenses, duties, taxes, and shipping costs is to ensure "apples to apples" price comparisons. *Id. See Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 477 F. Supp. 2d 1332, 1357 (CIT 2007). ("In implementing the antidumping statute, Commerce is to calculate antidumping margins as accurately as possible. To ensure compliance with this purpose, Commerce is directed to make case-by-case determinations and consider data unique to the particular case before it. . . ") (citations omitted). When the U.S. price is calculated as the "constructed export price," certain additional adjustments are made to account for selling expenses in the United States. 19 U.S.C. § 1677a(d)(1).

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[3] In addition to the requirement that the United States Department of Commerce ("Commerce") make a less-than-fair-value determination, the statute also requires a finding by the International Trade Commission ("Commission") that a domestic industry will be injured by imports or sales of that merchandise before an antidumping duty can be imposed. 19 U.S.C. § 1673; *Fagersta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1275 n.1 (CIT 2008). The Commission's inquiry is not relevant to the issues raised in this case. For a comprehensive overview of the statutory regime governing the imposition of antidumping duties, see *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F. 3d 1372, 1375−76 (Fed. Cir. 2008), and *FAG Italia S.p.A. v. United States*, 291 F. 3d 806, 808−809 (Fed. Cir. 2002).

B
Ad Hoc Has Not Overcome Commerce's Determinations

Ad Hoc challenges four aspects of Commerce's determination. Each of the challenged aspects of the determination are upheld. First, Ad Hoc argues that Commerce failed to apply to Thai I-Mei the special rule for calculation of normal value for goods produced by multinational corporations, 19 U.S.C. § 1677b(d) ("MNC Provision"). Commerce permissibly elected not to apply the MNC Provision to calculate the normal value of Thai I-Mei's goods because some of Thai I-Mei's affiliates are located in nonmarket economy countries. Second, Ad Hoc claims that because of its general position at the administrative level regarding Commerce's alleged violation of 19 U.S.C. § 1677a(f)(2)(c), it is entitled to judicial review. Yet, prior to filing its Motion for Judgment Upon the Agency Record, Ad Hoc never argued that Commerce violated that specific section, either directly or by implication, and, thus, failed to exhaust its administrative remedies. Third, Ad Hoc claims that expenses related to defective products sold by Good Luck in the United States should be categorized as direct selling expenses because they bear a direct relationship to the particular sale. However, Good Luck eliminated the defective products from the "quantity sold" category analysis and Commerce accordingly categorized the expenses as "indirect selling expenses." Fourth, Ad Hoc argues that Commerce used unfettered discretion when it did not apply adverse facts available to calculate Fortune's dumping margin. In making that decision, however, Commerce acted within the legal limits of its discretion.

1
Commerce's Decision Not To Apply The MNC Provision To Thai I-Mei Is In Accordance With Law

Ad Hoc argues that all three elements of the MNC Provision apply to Thai I-Mei and that Commerce's failure to apply the MNC Provision to Thai I-Mei is "premised upon an unsustainable reading of the statute." Memorandum of Law in Support of Plaintiff Ad Hoc Shrimp Trade Action Committee's Rule 56.2 Motion for Judgment Upon the Agency Record ("Ad Hoc's Motion") at 6. Ad Hoc claims that Thai I-Mei fulfills all three of the MNC Provision's statutory criteria and, accordingly, that the MNC Provision should be applied to Thai I-Mei. *Id.* at 6−8.

a
Thai I-Mei Does Not Meet the Second Element of the MNC Provision

Ad Hoc claims that Thai I-Mei satisfied all three criteria of the MNC Provision. *Id.* at 6−7. The three elements of the MNC Provision are: (1) the company (Ad Hoc) that exported merchandise to the

United States also owns and controls producers of similar merchandise in other countries (here, the People's Republic of China ("PRC") and Vietnam); (2) 19 U.S.C. § 1677b(a)(1)(C) applies[4]; and (3) the normal value of the foreign like product produced outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country, here, Thailand.[5] At issue is whether the second element of the MNC Provision (whether 19 U.S.C. § 1677b(a)(1)(c) applies to Thai I-Mei) has been met.

Ad Hoc argues that element two of the MNC Provision has been met because Thai I-Mei's home market sales during the POR constituted less than five percent of its U.S. sales, and thus, Thai I-Mei did not have a viable home market. Ad Hoc's Motion at 7−8. Ad Hoc argues that because Thai I-Mei did not have a viable home market, its

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[4] That provision states, in pertinent part, that it applies when Commerce

> "determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity(or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States."

19 U.S.C. § 1677b(a)(1)(C)(ii)

[5] 19 U.S.C. § 1677b(d), the multinational corporation provision ("MNC Provision") states, in its entirety:

> Whenever, in the course of an investigation under this subtitle, the administering authority determines that-(1)subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in another country or countries,
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> (2) subsection (a)(1)(C) of this section [19 U.S.C. § 1677b(a)(1)(C)] applies,
>
> (3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country, it shall determine the normal value of the subject merchandise by reference to normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country. The administering authority, in making any determination under this paragraph, shall make adjustments for the differences between the cost of production (including taxes, labor, materials and overhead) of the foreign like product produced in facilities outside the exporting country and costs of production of the foreign like product produced in facilities in the exporting country, if such differences are demonstrated to its satisfaction. For purposes of this subsection, in determining the normal value of the foreign like product produced in a country outside of the exporting country, the administering authority shall determine its price at the time of exportation from the exporting country and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the exporting country.

19 U.S.C. § 1677b(d).

normal value was replaced by constructed value, and that Commerce cannot use constructed value as normal value unless 19 U.S.C. § 1677b(a)(1)(c) applies. *Id.* at 8 (citing 19 U.S.C. § 1677b(a)(4)). Correspondingly, Ad Hoc argues that "it is clear" that Thai I-Mei met element two of the MNC Provision. *Id.*

Thai I-Mei had neither a viable home market during the review nor any viable third country markets[6] and, as a result, its normal value was based on constructed value under 19 U.S.C. § 1677b(a)(4).[7] However, Commerce correctly concluded that element two of the MNC Provision could not be applied to Thai I-Mei because normal value was not based upon actual sales. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand- August 4, 2004, through January 31, 2006 (September 5, 2007), P.R. 532 ("*Final Decision Memo*") cmt. 10, at 38. Thai I-Mei's normal value was not based upon actual sales because the sales from PRC and Vietnam cannot form a proper basis for comparison as they are nonmarket economies. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986) (*quoting* S. Rep. No. 93−1298, at 174 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7311) ("[I]n state-controlled-economy countries . . . the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison.")[8] Because PRC and Vietnam were Thai I-Mei's affiliates and third country markets in the administrative review, their normal values were derived from

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[6] Thai I-Mei is affiliated with companies in the third country markets of PRC and Vietnam, both nonmarket economies. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand- August 4, 2004, through January 31, 2006 (September 5, 2007), P.R. 532 ("*Final Decision Memo*") cmt. 10, at 32. A nonmarket economy country is any foreign country that Commerce "determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise. 19 U.S.C. § 1677(18)(A).

[7] 19 U.S.C. § 1677b(a)(4) provides that if Commerce determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i) [the price at which the foreign like product is first sold for consumption in the exporting country], then, notwithstanding paragraph (1)(B)(ii) [which provides instructions for determining the normal value based on third-country sales when the aggregate quantity or value of the foreign like product sold in the exporting country is insufficient for comparison purposes], the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection(e) of this section. [19 U.S.C. § 1677b(e)].

[8] Although the special "surrogate country" method enacted in 1974 for determining whether goods from nonmarket economy countries were being dumped, was repealed in 1976, Congress reenacted that special provision in the Trade Agreements Act of 1979. *See* Pub. L. No. 96−39, title I, S101, 93 Stat. 182.

surrogate values under 19 U.S.C. § 1677b(c) and not from actual sales of the foreign like product. Accordingly, when there are nonmarket economies, Commerce calculates normal value using the factors of production methodology. *See e.g., Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Requests for Comments*, 71 Fed. Reg. 61,716 (October 19, 2006); *See Final Decision Memo* cmt. 10, at 37. ("In [nonmarket economy] cases, [Commerce] disregards home market prices and the respondent's cost of production and calculates [normal value] on the reported factors of production."). When Commerce uses the factors of production methodology to calculate normal value, the MNC Provision does not apply because element two (whether 19 U.S.C. § 1677b(a)(1)(C) applies) has not been met.

Ad Hoc made this same argument in the parallel review involving shrimp from China in which Commerce concluded that the MNC Provision does not apply because the second element, (that 19 U.S.C. § 1677b(a)(1)(c) applies) is not satisfied when the exporting country is a nonmarket economy country. *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 Fed. Reg. 52,049 (September 12, 2007), and accompanying Issues and Decision Memorandum at cmt. 12. Ad Hoc's argument here, taken in context with *Certain Frozen Warmwater Shrimp from China*, suggests that the MNC Provision should apply when a nonmarket economy country is a non-exporting country, but should not apply when a nonmarket economy is an exporting country. It would be anomalous to interpret the MNC Provision as defining the term "multinational corporation" to include situations where there is a nonmarket economy in the non-exporting country but not in the exporting country because the normal value for Thai I-Mei's affiliates in the non-exporting country is not based on sales.

If the MNC Provision were applied in the manner Ad Hoc advocates, Commerce would be obligated to use the sales prices of Thai I-Mei's affiliates even though they operate in nonmarket economy countries, as the basis for normal value; this would result in the use of a nonmarket economy country company's actual sales values as the basis for normal value. *See* MNC Provision. Ad Hoc's suggested interpretation of the MNC Provision would contradict the entire premise of 19 U.S.C. § 1677b(c)[9], which provides for the use of sur-

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[9] 19 U.S.C. § 1677b(c) provides, in relevant part that if merchandise is exported from a nonmarket economy country and Commerce finds that the available information does not allow for calculation of normal value as provided in 19 U.S.C. § 1677b(a), Commerce shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in [19 U.S.C. § 1677b(c)(2)], the valuation of the factors of pro-

rogate values to determine normal value for nonmarket economy respondents. Lastly, Ad Hoc's interpretation would contradict the recognized concept that nonmarket economy sales prices cannot be used as a basis for normal value because of the likely price distortion. *See e.g. ICC Industries, Inc. v. United States*, 812 F.2d 694, 697 (Fed. Cir. 1987) ("Home market prices and costs are meaningless as a source of 'fair value' in [nonmarket economy] countries in view of the level of intervention by the government in setting relative prices.")

Because of the possibility of price distortion coming from the nonmarket economy affiliate countries, and Ad Hoc's failure to prove that element two of the MNC Provision applies to Thai I-Mei, Commerce correctly declined to apply the MNC Provision.

b

Commerce's Interpretation of the MNC Provision Is Reasonable

In addition to arguing that Thai I-Mei satisfies all three elements of the MNC Provision, Ad Hoc claims that Commerce's interpretation of the MNC Provision is "seriously flawed." Ad Hoc's Motion at 9. Ad Hoc argues that Commerce's interpretation of the legislative history "is inconsistent with the express language" of the MNC Provision. *Id*.

Because the MNC Provision is silent with respect to its application in the nonmarket economy context, Commerce's construction of the provision is evaluated for its reasonableness. *Chevron*, 467 U.S. at 844. Commerce's interpretation and application of the MNC Provision with respect to Thai I-Mei is reasonable in light of the statutory language and the legislative history.

The MNC Provision says that when all three elements described are satisfied, Commerce determines normal value by reference to the normal value at which the foreign like product is "sold" from facilities outside the exporting country. 19 U.S.C. § 1677b(d). The word "sold" in the statute indicates Congress intended Commerce to examine sale prices in the non-exporting country to determine normal value. In a nonmarket economy, Commerce does not consider sales prices because they are unreliable. *See* 19 U.S.C. § 1677(18)(A) (noting that "sales of merchandise in [a nonmarket economy] country do not reflect the fair value of the merchandise"). The MNC Provision also instructs Commerce to determine the normal value of the foreign like product in the exporting country by reference to the normal value at which it is sold from the non-exporting country, as adjusted under 19 U.S.C. § 1677b(a). *See* 19 U.S.C. § 1677b(d). Terms such as "sold," "cost of production," and "price" used in the MNC Provision regarding calculation of normal value in the non-exporting country

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duction shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

show Congressional intent that the MNC Provision not apply when the non-exporting country is a nonmarket economy because these terms are not applicable to nonmarket economies.[10]

The legislative history of the MNC Provision shows Congress was primarily concerned with situations where the home market was not viable and yet a respondent's low priced exports to the United States market were supported by higher priced sales of its affiliate in a third country market. S. Rep. No. 93−1298, at 174, 1974 U.S.C-.C.A.N. at 7311. Before the enactment of the MNC Provision in 1974, there was no means to counteract such discriminatory pricing, *i.e.* the setting of high prices in one foreign country to support low-priced exports to the United States from another country. *See id*. The MNC Provision allows use of the affiliate's normal value in the non-exporting country (*i.e.*, the company with "high-priced" home market sales) to compare to the United States price of the affiliate in the exporting country. 19 U.S.C. § 1677b(d); S. Rep. No. 93−1298 at 174, 1974 U.S.C.C.A.N. at 7311. This legislative concern does not appear to encompass respondents from nonmarket economies because the MNC Provision was designed to address discriminatory pricing behavior by the multinational corporation, it was not meant to apply when one affiliate within the multinational corporation is located in a nonmarket economy. *See* S. Rep. No. 93−1298 1974 U.S.C.C.A.N. at 7311−13. Accordingly, Commerce sought to address pricing practices of multinational corporations through the use of normal value of other countries not in the proceeding. Nonmarket affiliate countries do not set home market prices in the way a market economy would, nor in the way Congress envisioned because their prices are subject to state government control, and as a result were not intended by Congress to be included in the MNC Provision. *See id*.; *See also Georgetown Steel Corp. v. United States*, 801 F.2d at 1316.

Commerce declined to treat Thai I-Mei as an MNC because the non-exporting country was a nonmarket economy. The MNC Provision was intended to provide a remedy for discriminatory pricing by a multinational corporation which sells products of a plant in one foreign county at low prices to the United States, while the same company or its subsidiary in another foreign country subsidizes those low-priced sales with high-priced sales of the same product to customers in its own market. S.Rep. No. 93−1298 at 174, 1994 U.S.C.C.A.N. at 7311; *see also Kerr-McGee Chem. Corp. v. United*

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[10] There is a presumption with nonmarket economies that factors of production are under the control of the state and home market sales are usually not reliable indicators of normal value. *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619 431 F. Supp. 2d 1323, 1326 (2006) (citing 19 U.S.C. § 1677(18)(A), (C)).

States, 14 CIT 422, 424 (1990). Ad Hoc's proposed interpretation contradicts the language and intent of the MNC Provision, and Commerce acted reasonably when it chose not to apply the MNC Provision to Thai I-Mei.

2
Ad Hoc Did Not Exhaust Its Administrative Remedies With Respect To Its CEP Profit Calculations Argument

Ad Hoc's case brief in the administrative proceeding below challenged Commerce's preliminary calculation of CEP profit on the ground that it was "based on a misinterpretation of [Commerce's Import Administration Policy Bulletin No. 97/1]. . . and [agency] practice." Ad Hoc Case Brief, Case No. A−549−822, U.S. Department of Commerce, Import Administration (April 16, 2007) P.R. 503 ("Ad Hoc Administrative Case Brief") at 19. In its Administrative Case Brief, Ad Hoc argued that Commerce should use the information submitted by Thai I-Mei regarding its expenses to calculate the CEP profit amount rather than the information from Thai I-Mei's POR financial statements. *Id.* at 22. Commerce addressed this argument in the *Final Decision Memo*. *See Final Decision Memo* cmt. 14 at 59. Now, in its Motion for Judgment Upon the Agency Record, Ad Hoc argues that Commerce misapplied 19 U.S.C. § 1677a(f)(2)(c)(iii) by failing to include the majority of Thai I-Mei's profit experience and respondents' sales of subject merchandise in all countries . Ad Hoc's Motion at 14−15.

Commerce claims Ad Hoc never raised this argument in its Administrative Case Brief and, as a result, that it failed to exhaust its administrative remedies with respect to that argument. Defendant's Response at 19. Furthermore, Commerce argues that to allow Ad Hoc to continue with this argument would "deprive Commerce of the opportunity to address this issue in the first instance." *Id.* at 21.

Ad Hoc counters Commerce's exhaustion argument by claiming the point raised by Ad Hoc is not new but instead "merely a greater explication of the same issue raised in Plaintiff's Administrative case brief below." Plaintiff Ad Hoc Shrimp Trade Action Committee's Reply Brief in Support of Rule 56.2 Motion for Judgment upon the Agency Record ("Ad Hoc's Reply") at 5. Ad Hoc says that it is not arguing about whether Commerce should take the profit information of Thai I-Mei's affiliated importer, Ocean Duke, into account when calculating Thai I-Mei's CEP profit amount; rather it claims it is "simply explaining that Commerce should not use Thai I-Mei's POR financial statements given that Thai I-Mei's relationship with Ocean Duke renders Thai I-Mei's financial statement incomplete." *Id.* at 5−6 n. 4.

The exhaustion doctrine requires "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v.*

United States, 348 F.3d 997, 1003 (Fed. Cir. 2003) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). If a party does not exhaust available administrative remedies, "judicial review of administrative action is inappropriate." *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988).

Both the Federal Circuit and this court have held that failure to raise a specific argument in a case brief, even if the general issue is addressed, constitutes a failure to exhaust administrative remedies. *See e.g.*, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (holding that plaintiff's failure to raise a particular argument before Commerce precluded judicial review even though plaintiff characterized that argument as "simply another angle to an issue" that it did raise in the administrative proceeding.) Failure to raise a specific argument in a case brief is a failure to exhaust administrative remedies with respect to that argument because it "deprives [Commerce] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n. of Ala. v. Aragon*, 329 U.S. 143, 155, 67 S. Ct. 245, 91 L. Ed. 136 (1946); *Paul Muller Industrie Gmbh & Co. v. United States*, 502 F. Supp. 2d 1271, 1274−75 (CIT 2007) *aff'd*, (Fed. Cir. 2008) (noting that "rais[ing] general issues regarding inventory carrying costs is not adequate to apprise Commerce of what it would need to specifically respond to regarding [the inclusion of freight, duty, and brokerage fees in the calculation]."

Ad Hoc did not raise its current CEP profit calculation argument in the administrative proceeding below. As discussed above, the argument that Ad Hoc raised in its Motion for Judgment Upon the Agency Record is different than the argument raised in its Administrative Case Brief. *Compare* Ad Hoc's Motion at 14−15 *with* Ad Hoc Administrative Case Brief at 18−22.[11] This change of argument deprived Commerce of the "opportunity to consider the matter, make its ruling, and state the reason for its action." *See Aragon*, 329 U.S.

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[11] At oral argument, Ad Hoc stated that the arguments presented in its Administrative Case Brief and its Motion for Judgment Upon the Agency Record ("Ad Hoc's Motion") were the same. In its Administrative Case Brief Ad Hoc argued that Thai I-Mei incorrectly interpreted Import Administration Policy Bulletin No. 97/1 "Calculation of Profit for Constructed Export Price Transactions" (September 4, 1997) ("Policy Bulletin No. 97/1") and that Commerce should have used the expense information submitted by Thai I-Mei to calculate Thai I-Mei's CEP profit instead of Thai I-Mei's POR financial statements. Administrative Case Brief at 18−20. In its Motion, Ad Hoc argued that Commerce misinterpreted 19 U.S.C. § 1677a(f)(2)(c)iii and did not include Thai I-Mei's affiliate's profit and expense. Ad Hoc's Motion at 14−15. In oral argument, Ad Hoc claimed that the argument presented in its Motion was a natural extension of Ad Hoc's Administrative Case Brief argument. The two arguments are discrete. Failure to raise a particular argument is a failure to exhaust administrative remedies. *Unemployment Comp. Comm'n of Ala. v. Aragon*, 329 U.S. 143, 155, 67 S. Ct. 245, 91 L. Ed 136 (1946).

at 155. Accordingly, Ad Hoc has not exhausted its administrative remedies and is not entitled to judicial relief with respect to this argument.

3
Good Luck's Defective Merchandise Is An "Indirect Selling Expense"

Ad Hoc argues that Commerce erroneously treated expenses related to Good Luck's defective merchandise as "indirect selling expenses" when they are more appropriately classified as "direct selling expenses". Ad Hoc's Motion at 19. Ad Hoc claims that this contradicts Commerce's own regulations. *Id.* at 19−20 (citing 19 C.F.R. § 351.410(c)).

Good Luck incurred expenses for shipping to the United States defective merchandise which was ultimately destroyed by a customer. *Final Decision Memo* cmt. 7, at 26−27. Upon learning about the defective merchandise, Good Luck adjusted the "quantity sold" in its United States sales listing to accurately account for the defective merchandise. *Id.* at 27. Commerce verified that Good Luck (1) excluded the products from its United States sales listing, (2) reimbursed the customer who had purchased them, and (3) reduced the "quantity sold" figure in its U.S. sales listing by reporting the amount destroyed." *Id.* at 28 (citing Memorandum from Irina Itkin, Senior Analyst, to Shawn Thompson, Program Manager, Office 2, Office of AD/CVD Operations, U.S. Department of Commerce, Re: Verification of the Sales Response of Good Luck Product Co., Ltd. in the Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from Thailand (February 8, 2007), P.R. 455 ("Good Luck Verification") at 14).

Good Luck's expenses related to the defective merchandise are correctly classified as "indirect selling expenses" because the rejected merchandise was destroyed by the customer and Good Luck received no payment for the defective product. *See* Good Luck Verification at 14. Direct selling expenses are expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c); *See* Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103−316 ("SAA"), at 823−24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163−64.[12] Indirect selling expenses are expenses that do not bear a

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[12] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 n.2 (Fed Cir. 2005) (*quoting* 19 U.S.C. § 3512(d)).

direct relationship to the sale of subject merchandise, do not qualify as assumptions, and are not commissions, although they "may be attributed (at least in part) to such [direct] sales." SAA at 824, 1994 U.S.C.C.A.N at 4164.

This court has treated rejected merchandise expenses as "indirect selling expenses" if the merchandise has been excluded from the "quantity sold" figure. *See Agro Dutch Indus., Ltd. v. United States*, 30 CIT 320, 324 (2006), *rev'd on other grounds*, 508 F.3d 1024 (Fed. Cir. 2007). In *Agro Dutch*, the court sustained Commerce's determination that expenses incurred to ship rejected merchandise to and from the United States were not direct selling expenses because "[t]he underlying U.S. sales to which they related were canceled and excluded from the dumping analysis." *Id.*

Ad Hoc argues that *Agro Dutch* is inapposite because it claims the case applies only when the entire U.S. sale is canceled, not a part or portion of the sale, as is the case with Good Luck. Ad Hoc's Reply at 9−10. However, in *Agro Dutch*, the expenses were indirect because they were canceled and excluded from dumping analysis. *See Agro Dutch*, 30 CIT at 324. As in that case, Good Luck identified and cancelled the defective merchandise at issue and excluded it from the "quantity sold" figure, Good Luck Verification at 14, effectively making the expenses from the defective merchandise not directly related to any sale and excluded from the dumping analysis.

Ad Hoc overemphasizes the "direct relationship" component of the definition of direct selling expenses by repeatedly stating that the expenses related to Good Luck's defective products were clearly identifiable as part of a sale. *See* Ad Hoc's Motion at 19−20. This argument ignores the fact that indirect expenses can be reasonably attributed to the sale and do not have to be completely unrelated. *See* SAA at 824, 1994 U.S.C.C.A.N. at 4164 ("Such [indirect selling] expenses would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales"). That the rejected merchandise was part of a shipment that included acceptable merchandise does not prohibit it from being considered an indirect selling expense because such expenses "reasonably may be attributed to such sales." *See id.* The rejected merchandise was not sold and was excluded from the dumping analysis, just as in *Agro Dutch*. Whether the entire shipment or only a portion is rejected is irrelevant because in the underlying sale the amount of the defective merchandise is excluded from the dumping analysis (specifically the "quantity sold" figure). Thus, the expenses do not "result from" or "bear a direct relationship to" a particular sale, as is described in the applicable regulation and the SAA. 19 C.F.R. § 351.410(c); *see* SAA at 824, 1994 U.S.C.C.A.N. at 4164.

4
It Was Within Commerce's Discretion Not To Apply "Adverse Facts Available" When Calculating Fortune's Dumping Margin

Ad Hoc claims that Commerce erred when it declined to apply AFA to Fortune because Fortune failed to meet multiple deadlines and Commerce allegedly asked Fortune for information at improper times. Ad Hoc's Motion at 21−22. Ad Hoc bases this claim on an argument that Commerce acted in violation of law and yet its arguments in support relate solely to alleged weaknesses in supporting evidence. *See id.* at 22−28.

Commerce's use of the term "adverse facts available" refers to a two-step procedure: (1) the use of "facts otherwise available" when information requested by Commerce is either unavailable or deficient, 19 U.S.C. § 1677e(a); and (2) the use of "adverse inferences" in selecting from the "facts otherwise available" when a party fails to cooperate by not acting to the best of its ability, 19 U.S.C. § 1677e(b). *See Jinan Yipin Corp v. United States*, 526 F. Supp. 2d 1347, 1353 n.7 (CIT 2008). Commerce's use of "facts otherwise available" under the first step is subject to 19 U.S.C. § 1677m(d), which provides that if a party submits a deficient response to a request for information, Commerce must notify the party of the deficiency and, to the extent practicable, provide that party with an opportunity to remedy the problem. Generally, if a party notifies Commerce that it is having difficulty complying with a request for information, Commerce "*shall* consider" the party's ability to submit the information in the requested form and "*may* modify" the request. 19 U.S.C. § 1677m(c)(1) (emphasis added).

On March 2, 2007, Fortune Frozen Foods contacted Commerce and requested permission to re-file a quantity and value ("Q&V") questionnaire response. *See* Memorandum from Brianne Riker, Analyst, to the File, through Irina Itkin, Senior Analyst, Office 2, U.S. Department of Commerce, Re: 2004−2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Telephone Conversation with Fortune Frozen Foods (Thailand) Co., Ltd. (March 9, 2007). Commerce exercised its discretion per CFR 351.301(b), and instructed Fortune to file a Q&V questionnaire response after Fortune had communicated to Commerce in July 2007 of its difficulty in compiling the information requested. *Id.* Fortune responded to Commerce and filed the pertinent information. *Id.* Fortune made documented efforts to comply with Commerce's requests for additional information. *See id.*; Letter from Enoson Lai, Fortune Frozen Foods Co., Ltd., to U.S. Department of Commerce, AD/CVD Operations, Re: Certain Frozen Warmwater Shrimp from Thailand, Format for Reporting Quantity and Value of Sales (March 12, 2007), P.R. 482.

Commerce acted within its discretion by allowing Fortune to produce a conforming response. Commerce's discretion in this area is recognized by this court. *See, e.g. AK Steel Corp. v. United States*, 28 CIT 1408, 1416−17, 346 F. Supp. 2d 1348, 1355(2004) (disregarding an argument that Commerce must prove that an importer acted to the best of its ability before declining to draw adverse inference because the argument "runs counter to the discretion afforded to Commerce [by 19 U.S.C. § 1677e(b)] in the application of adverse facts available."); *NTN Corp. v. United States*, 28 CIT 108, 117, 306 F. Supp. 2d 1319, 1329 (2004) ("Commerce enjoys broad, although not unlimited, discretion with regard to the propriety of its use of facts available."); *see also Nat'l Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994) ("Once such deadlines have passed, whether Commerce accepts the late submissions is within its discretion.") Commerce also acted within its discretion when it decided not to apply adverse facts available in calculating Fortune's dumping margin. Ad Hoc has not demonstrated that these actions are "not in accordance with law." *See Chevron*, 467 U.S. at 842−43.

B

Thai I-Mei Has Not Overcome Commerce's Determination

Thai I-Mei challenges four aspects of Commerce's determination. Each of the challenged aspects of the determination is upheld. First, Thai I-Mei argues that Commerce's decision to use Thai I-Mei's own G&A and interest expense information while using other respondents' financial information to create Thai I-Mei's CV is not in accordance with law. Commerce permissibly interpreted 19 U.S.C. § 1677e(b)(ii) when it used Thai I-Mei's own G&A and interest expense data while using other respondents' data for the other components of Thai I−Mei's CV calculation. Second, Thai I-Mei argues that cost of manufacture ("COM") should be used instead of cost of goods sold ("COGS") as the denominator in Thai I-Mei's G&A and interest expense ratios because COM is a more accurate figure. However, use of COGS instead of COM to calculate Thai I-Mei's G&A and interest expense ratios is an accepted agency practice. Third, Thai I-Mei claims it should qualify for a CEP offset, yet, Thai I-Mei has not met the necessary burden of proof because it did not prove that its normal value was established at a more advanced level of trade than the constructed export price level. Fourth, Thai I-Mei argues that Commerce should have used the entered value of Thai I-Mei's entries during the period of review instead of the entered value of its sales during the period of review as the denominator in its antidumping duty assessment rate. Commerce's use of the entered value of sales as the denominator was consistent with agency regulation.

1

Commerce's Methodology For Calculating Thai I-Mei's Constructed Value Is In Accordance With Law

Thai I-Mei argues that Commerce failed to correctly calculate its constructed value because it did not choose to apply in its entirety one of the methodologies listed in 19 U.S.C. § 1677b(e)(2)(B). Brief in Support of Plaintiff Thai I-Mei's Motion for Judgment Upon the Agency Record ("Thai I-Mei's Motion") at 9−10. Thai I-Mei additionally claims that Commerce's interpretation of 19 U.S.C. § 1677b(e)(2)(B)(ii) is inconsistent with both the plain language of the statute and Commerce's past practice. *Id*. at 9. Thai I-Mei states that Commerce erred when it used Thai I-Mei's own G&A and interest expenses and Pakfood and Good Luck's data for the rest of the Thai I-Mei CV components. *Id*.

If there is no viable third country market from which to derive a price, and there is no third country in which sales of a foreign like product exist to form an adequate basis for comparison against sales of the allegedly dumped merchandise, Commerce uses "constructed value" to calculate normal value.19 U.S.C. § 1677b(a)(4); *See Koyo Seiko Co. v. United States*, 551 F. 3d 1286, 1289 (Fed. Cir. 2008). Constructed value becomes the proxy for normal value in these instances and is a determination of the foreign like product price. *Id*. CV is normally calculated as the sum of: (1) a company's cost of manufacture, 19 U.S.C § 1677b(e)(1); (2) selling and G&A expenses (collectively cost of production) plus an amount for profit, 19 U.S.C. § 1677b(e)(2)(A); and (3) the cost of packaging. U.S.C. 19 U.S.C. § 1677b(e)(3). With respect to the second component of the CV calculation, if actual information is not available to calculate selling expenses, G&A expenses, and profit, Commerce is directed by statute to employ one of the three methodologies described in 19 U.S.C. § 1677b(e)(2)(B).

There are three alternative methodologies used to create CV if actual data are not available with respect to the expenses described in 19 U.S.C. § 1677b(e)(2)(A). These are: (i) actual amounts incurred and realized by the producer being investigated for selling and G&A expenses and profit in connection with foreign market sales of the general same category of products, 19 U.S.C. § 1677b(e)(2)(B)(i); (ii) the weighted average of actual amounts incurred and realized for selling and G&A expenses and profit by other producers being investigated in connection with foreign market sales in the ordinary course of trade of a foreign like product, 19 U.S.C. § 1677b(e)(2)(B)(ii); or (iii) any other reasonable method to calculate selling and G&A expenses and profit, provided that the amount for profit does not exceed the profit normally realized by other companies for foreign market sales of the same general category of products, 19 U.S.C. § 1677b(e)(2)(B)(iii). *See also* SAA at 840, 1994

U.S.S.C.A.N at 4176. While 19 U.S.C. § 1677b(e)(2)(B) allows alternative methodologies to derive constructed value, there is no priority of the approaches and no one methodology has to be applied in full by Commerce. *See Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1033−34 981 F. Supp. 630, 648 (1997) (recognizing Commerce's discretion to calculate G&A and interest expenses of normal value).

Thai I-Mei's argument that Commerce may use only one of the alternative methodologies listed in 19 U.S.C. § 1677b(e)(2)(B) ignores the critical statutory language and contradicts the purpose of using constructed value. The statute states that one of the methodologies should be used "if actual data is not available." 19 U.S.C. § 1677b(e)(2)(B); *see also* SAA at 840, 1994 U.S.C.C.A.N. at 4176. Commerce has interpreted this language to mean that the alternative methodologies will be used only if the statutorily preferred "actual amounts" incurred by the respondent are unavailable. *Final Decision Memo* cmt. 15 at 61. By choosing to use Thai I-Mei's own data for G&A and interest expenses, Commerce did not bar the use of other respondents' information to construct other elements of Thai I-Mei's CV calculation.

Commerce chose to use the second alternative methodology.[13] Here, Commerce used Thai I-Mei's available data with respect to the G&A and interest expenses and filled in the rest of the required data with information from Pakfood and Fortune. *Id.* cmt. 15, at 60. If some actual amounts incurred by respondent are on the record, then that data is available for Commerce to use, since the actual data is preferred.

Moreover, Commerce's effort to use as much of the respondent's actual data as possible and supplement that information by using alternative methodologies to fill in the blanks embraces the purpose of CV itself, which is to be an accurate proxy for normal value. *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 477 F. Supp. 2d 1332, 1357 (CIT 2007) ("[I]n implementing the antidumping statute, Commerce is to calculate antidumping margins as accurately as possible. To ensure compliance with this purpose, Commerce is directed to make case-by-case determinations and consider data unique to the particular case before it. . . . ") (citations omitted). Accordingly, Com-

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[13] Thai I-Mei claims in its reply that Commerce used 19 U.S.C. § 1677b(e)(2)(A) to derive the constructed value for Thai I-Mei. *See* Plaintiff Thai I-Mei Reply Brief in Support of Its Motion for Judgment Upon the Agency Record at 2 n.1 ("It was not clear from the Final Results whether Commerce used values under [19 U.S.C. § 1677b(e)(2)(A)]or [19 U.S.C. § 1677b(e)(2)(B)(iii)]. Commerce has now clarified that it was the former."(citation omitted)) However, Commerce used 19 U.S.C. § 1677b(e)(2)(B)(ii) as it stated in the *Final Decision Memo* and in Defendant's Response. *Final Decision Memo*, cmt. 15, at 58.("[Commerce] calculated Thai I-Mei's CV selling expenses and profit rate . . . under [19 U.S.C. § 1677b(e)(2)(B)(ii)]."); Defendant's Response at 27 ("There are three . . . alternative methodologies, the second of which (alternative ii) [19 USC 1677b(e)(2)(B)(ii)] is relevant here.")

merce acted in accordance with law when it used Thai I-Mei's own G&A and interest expenses in an attempt to accurately calculate Thai I-Mei's CV.

2
Commerce's Use Of Cost of Goods Sold In Thai I-Mei's G&A And Interest Expense Ratios Is In Accordance With Law

Thai I-Mei asserts that Commerce's methodology to calculate its G&A and interest expense ratios is inconsistent with Commerce's established practice of adjusting (in certain cases) the cost of goods sold ("COGS") denominator in an effort to obtain "symmetry between a ratio and the amount to which it is applied." Thai I-Mei's Motion at 16. Thai I-Mei claims that Commerce does occasionally adjust COGS which is used as a denominator in the calculation of G&A and interest expense ratios, and that Commerce erred in not adjusting Thai I-Mei's COGS to reflect differences from COM . Thai I-Mei's Motion at 17−18.

To support its argument that Commerce has previously adjusted other respondents' COGS denominators, Thai I-Mei cites to several reviews where Commerce has adjusted the COGS denominator to account for differences from COM. *Id.*at 16−17.[14] While Commerce acknowledges that it has deviated from normal practice in the past and given COM adjustments, Commerce points out that it made an adjustment to Thai I-Mei's COGS in the Preliminary Results by allowing the deduction of scrap revenue, "in order to obtain symmetry between the [G &A and interest expense] ratios and the amount to which they are applied."[15] *Final Decision Memo*, cmt. 15, at 64−65.

While the statute provides the general description of calculating the G&A and interest expenses for CV, it does not require a specific method of calculation. 19 U.S.C. § 1677b(e)(2). Commerce's Antidumping Manual states that "G&A [expense] is calculated by dividing the fiscal year G&A expenses by the fiscal [COGS] (adjusted for categories of expense not included in COM, such as packing) and

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[14] *See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 6,259, and accompanying Issues and Decision Memorandum at cmt. 14 (February 10, 2004) (Manufacturer Mexinox received a COM offset (due to stock strip evaluation offset) from the G&A calculation); *Notice of Final Determination of Sales at Less Than Fair Value : Live Swine from Canada*, 70 Fed. Reg. 12,181, Decision and accompanying Issues and Decision Memorandum at cmt. 13 (March 11, 2005) (Manufacturer Oak Park received a COM offset (due to salvage value of culled cows) ; *Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part*, 69 Fed. Reg. 6,255, and accompanying Issues and Decision Memorandum at cmt. 23 (February 10, 2004) (Exporter Tomasello received a COM offset (due to scrap revenue offset) from the G&A calculation).

[15] The specific issue Commerce recognized was that in the normal books and records, Thai I-Mei recorded scrap revenues under the "other revenue" section of the financial statements. Because Thai I-Mei offset the reported costs by this amount, Commerce allowed for the deduction of the scrap revenue from the COGS. *Final Decision Memo* cmt. 15, at 64.

then applying the percentage to the COM of the product." *Antidumping Manual*, Ch. 8 at 58, available at http://ia.ita.doc.gov/admanual. Because there is no bright-line definition of what G&A and interest expenses are or how the corresponding ratios should be calculated, Commerce, over time, developed the methodology described in its *Antidumping Manual*. *See Id.* Commerce's standard practice is to calculate a ratio of fiscal year G&A expenses divided by COGS, and then apply this ratio to COM to determine the exact amounts for G&A and expenses. *Id.*

Commerce did not make the exact changes Thai I-Mei requested.[16] However, it did make changes relating to Thai I-Mei's scrap revenue offset and also gave a clear and reasonable explanation as to why the changes Thai I-Mei requested were not acceptable. *See Final Decision Memo*, cmt. 15 at 64−65. Commerce found that Thai I-Mei's request did not amount to an exceptional situation. *Id.* The methodology employed by Commerce is used for year to year accuracy and to avoid legal challenges due to the fluctuations Thai I-Mei's suggested model creates. *Id.* at 65. Commerce explained that the change Thai I-Mei requested would create inconsistencies in the current methodology:

> [U]nlike packing/movement expenses or scrap revenue, the total POR inventory changes could have either a favorable or unfavorable effect on the expense ratios depending on whether the inventory balance increases or decreases in a given year. Thus from POR to POR parties can argue for the method that benefits them most and it is important for the Department to remain consistent . . .

Final Decision Memo cmt. 15, at 65.

Commerce's COGS adjustment methodology was fairly applied to Thai I-Mei in the *Final Results* and is reasonably used to obtain consistency in the calculation of G&A and interest expense ratios.

3
Commerce's Decision To Deny Thai I-Mei A CEP Offset Is Supported By Substantial Evidence

In the *Final Results*, Commerce denied Thai I-Mei a CEP offset.[17]

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[16] Specifically Thai I-Mei argues that Commerce should exclude the total POR inventory changes from the COGS, which is used as the denominator of the G&A and interest expense ratio calculation, in order to convert COGS to COM. Brief in Support of Plaintiff Thai I-Mei's Motion for Judgment Upon the Agency Record at 19−20.

[17] A constructed export price ("CEP") offset is a reduction in the normal value amount of indirect selling of the expenses in the country in which normal value is determined on sales of the foreign like product. 19 U.S.C. § 1677b(a)(7)(B). Commerce makes a CEP offset when it has determined that the normal value of an exporter is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the CEP,

Final Decision Memo cmt. 13, at 50. Commerce found that although Good Luck and Pakfood performed certain sales functions for their home market sales that Thai I-Mei did not perform for its U.S. sales, the differences "were not material selling distinctions that were significant enough to warrant a separate [level of trade ("LOT")]. *Id.* On this basis, Commerce found that Thai I-Mei's LOT was not more advanced than its level of CEP sales, and that neither a LOT adjustment nor a CEP offset was warranted. *Id.* Here, Thai I-Mei asserts that Commerce erred by not considering that most of Thai I-Mei's few selling activities were performed at a low level of intensity while Good Luck's and Pakfood's selling activities were more numerous and performed [at a higher] level of intensity. Thai I-Mei's Motion at 27, 32.

Thai I-Mei also argues that its sales activities were "entirely different" than the sales activities of Good Luck and Pakfood, and that this difference would account for a LOT offset in sales and marketing. *Id.* at 29. Thai I-Mei argues that it did less sales and marketing than Good Luck and Pakfood because both "Good Luck and Pakfood both "performed sales forecasting/market research, sales promotion/ trade shows/advertising, and retail display activities, while Thai I-Mei did not." *Id.* Commerce concluded that the "selling activities, either individually or in the aggregate, are not significant enough to conclude that the marketing stages of the companies differ." *Final Decision Memo* cmt 13, at 52. Regarding sales and marketing, Commerce noted that, while Good Luck and Pakfood employees did attend trade shows, this activity was infrequent at best. *Id.* Commerce found that Good Luck's sales promotion activities were limited in scope.[18] *Id.* at 53.

While it is Commerce's responsibility to determine if a petitioner qualifies for a CEP offset, it is the responsibility of the respondent requesting the CEP offset to procure and present the relevant evidence to Commerce. 19 C.F.R. § 351.401(b)(1) "The interested party in possession of the relevant information must establish the amount and the nature of a desired judgment."; *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,370 (May 19, 1997) *Antidumping Duties: Final Rule* ("[A]ll adjustments, including LOT adjustments, must be demonstrated to the satisfaction of the Secre-

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but the data available does not provide an appropriate basis to make a level of trade adjustment under 19 U.S.C. § 1677b(A)(ii). *See* 19 U.S.C. § 1677b(a)(7)(B). To establish that sales are made at different levels of trade and, thus, qualify for a CEP offset, "[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining there is a difference in the stage of marketing." 19 C.F.R. § 351.412(c)(2).

[18] Good Luck's sales promotion activities consisted of Good Luck employees attending a few public trade fairs at branches of Good Luck's various customers [[customers' names omitted]] and a [[fair organized by one of Good Luck's home market customers]] giving away sample tastes of shrimp to certain customers. Good Luck Supplemental Sections A, B, and C Questionnaire Response. (October 25, 2006) Confidential Record ("C. R.") 76, at 17−19.

tary."); *Corus Eng'g Steels, Ltd. v. United States*, 27 CIT 1286, 1290 (2003) ("[B]urden of proof is upon the claimant to prove entitlement [to a CEP offset].")

Thai I-Mei did not meet its burden of presenting sufficient evidence to support its request for a CEP offset because it proffered no evidence on the record to support the claims that any of the companies' selling functions were performed at different levels of intensity, despite the respondents' differing characterizations. *See* Thai I-Mei's Motion at 25−28. Thai I-Mei relies on a chart comparing its selling activities to those of Pakfood and Good Luck. Thai I-Mei's Motion at 27. The chart itself does not adequately convey the different level of trade that is required for a CEP offset because it does not describe the differences in sales activities with any particularity. Accordingly, Thai I-Mei has not met its burden of proof to qualify for a CEP offset.

4
Commerce Permissibly Calculated Thai I-Mei's Assessment Rate

In the *Final Results*, Commerce calculated Thai I-Mei's antidumping duty assessment rate by dividing the total antidumping duties owed during the POR by the total entered value of of Thai I-Mei's POR sales. *See Final Decision Memo* cmt 18 at 76 ("We have calculated Thai I-Mei's assessment rate using the dumping margin found on the sales examined (*i.e.* the sales included in our margin calculations) divided by the entered value of those sales.") Thai I-Mei argues that Commerce incorrectly calculated Thai I-Mei's antidumping duty assessment rate when it used for the ratio the total entered value of all Thai I-Mei period of review ("POR") *sales* instead of the entered value of all Thai I-Mei POR *entries*. Thai I-Mei's Motion at 33−38.

Thai I-Mei states that Commerce's error in its antidumping calculations results from an "attempt to create unity between the wrong values in the assessment rate calculation" by calculating the numerator and the denominator on the same basis. *Id.* at 35. Thai I-Mei argues that Commerce's approach of using all of Thai I-Mei's sales that occurred during the POR and applying that figure to both the numerator and denominator is wrong because it does not create the symmetry required to collect the proper amount of antidumping duty rates. *Id.* Thai I-Mei suggests that the symmetry that is required is "between the denominator of the assessment rate and the amount to which it is applied." *Id.* Thai I-Mei did not provide any authority in support of this proposition. Thai I-Mei's proposal is inconsistent with the methodology contemplated by the relevant authority.

Pursuant to the applicable regulation, Commerce "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered value of such*

merchandise covered by the review." 19 C.F.R. § 351.212(b)(1) (emphasis added). Additionally, Commerce is to calculate such rates "by dividing the absolute dumping margin found on merchandise reviewed by the entered value of that merchandise." *Antidumping Duties:Final Rule*, 62 Fed. Reg. at 27,314. Commerce states that it has a "longstanding practice of calculating . . . assessment rate[s] based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties." *Final Decision Memo*, cmt 18 at 75 (citing *Color Picture Tubes From Japan; Final Results of Antidumping Administrative Review*, 62 Fed. Reg. 34,201, 34,211 (June 25, 1997); *Antifriction Bearings (Other Than Tapered Roller Bearings) From France, Germany, Italy, Japan, Singapore, and the United Kingdom* ; *Final Results of Antidumping Duty Administrative Reviews*, 61 Fed. Reg. 2,081, 2,083 (January 15, 1997)).

This court and the Federal Circuit have held that Commerce may calculate antidumping duties by the entered value of sales. *See FAG Kugelfischer Georg Schafer KGaA v. United States*, 19 CIT 1177, 1181 (1995), *aff'd*, 86 F.3d 1179 (Fed. Cir. 1996). In *FAG Kugelfischer*, the plaintiff challenged Commerce's assessment rate methodology of dividing the calculated antidumping duties by the entered value of the sales used to calculate those duties, arguing that Commerce should have used actual entered value of entries during the period of review. *Id*. at 1178. The Court rejected plaintiff's argument, concluding that Commerce's method was "more accurate" even though "Commerce was aware of [the plaintiff's] data on the record pertaining to total sales and actual entered values." *Id*. at 1181.

Here, Commerce additionally explained that it chose its methodology because it found that it "yields the best representation of what the dumping margins on sales of merchandise entered are because in most cases respondents are unable to link specific entries to specific sales." *Final Decision Memo*, cmt. 18 at 76. While Thai I-Mei has provided the entry date for each of its reported U.S. transactions, Commerce choose to examine all sales during the POR, and not sales tied to POR entries, because "[a]bsent a complete universe of POR entries from which to derive the numerator of the assessment rate," Commerce found that it was "inappropriate to include the value of all POR entries in the denominator of th[e] calculation." *Id*. Since Thai I-Mei did not have every POR entry marked and listed, Commerce reasonably choose only to examine sales during the POR.

V
CONCLUSION

For the foregoing reasons Plaintiff Ad Hoc's Motion for Judgment Upon the Agency Record is DENIED, Plaintiff Thai I-Mei's Motion for Judgment Upon the Agency Record is DENIED, and Commerce's determination in *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 52,065 (September 12, 2007) is AFFIRMED.

Slip Op. 09−48

ALMOND BROS. LUMBER CO. et al., Plaintiffs, v. UNITED STATES, and RON KIRK, UNITED STATES TRADE REPRESENTATIVE, Defendants.

Before: Richard K. Eaton, Judge
Court No. 08−00036

[Defendants' motion to dismiss granted.]

Dated: May 20, 2009

Saltman & Stevens, P.C. (*Alan I. Saltman, Ruth G. Tiger and Marisol Rojo*) for plaintiffs.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, United States Department of Justice Commercial Litigation Branch, Civil Division (*David S. Silverbrand*); Office of the General Counsel, United States Trade Representative (*J. Daniel Stirk*); United States Customs and Border Protection (*Andrew Jones*), for defendants.

OPINION

Eaton, Judge: This case involves the Softwood Lumber Agreement between the United States and Canada, which was entered into in 2006 to resolve the ongoing disputes between those countries relating to the softwood lumber trade. *See* Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Sept. 12, 2006, *available at* http://www.ustr.gov/assets/World_Regions/Americas/Canada/asset_upload_file847_9896.pdf (last visited May 7, 2009) (hereinafter "Softwood Lumber Agreement" or "SLA").[1] Plaintiffs, each domestic producers of softwood lumber products, challenge a provision of the SLA that provides for the government of Canada to distribute

[1] A copy of the Softwood Lumber Agreement is available in the library of the United States Court of International Trade.

$500 million solely to domestic lumber producers who are members of the Coalition for Fair Lumber Imports ("Coalition").

Before the court is defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See* USCIT Rules 12(b)(1) and (5); Defs.' Mem. Supp. Mot. Dismiss ("Defs.' Mem."); Defs.' Mem. Support 2nd Mot. Dismiss ("Defs.' 2nd Mem."). Because the court lacks jurisdiction to hear plaintiffs' claims, the motion to dismiss is granted.

BACKGROUND

Both the United States and Canada have significant softwood lumber industries, and the majority of Canada's softwood lumber products are exported to the United States. *See* Defs.' Mem. 7. In May 2002, following investigations by the Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC"), Commerce imposed both antidumping duties and countervailing duties on Canadian softwood lumber. Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36,068 (Dep't of Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36,070 (Dep't of Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and countervailing duty order). As a result of Commerce's imposition of these unfair trade duties, legal disputes arose in various fora including this Court, North American Free Trade Agreement ("NAFTA") tribunals, and the World Trade Organization. Defs.' Mem. 7–8.[2] One of the parties to many of these disputes was the Coalition. Defs.' Mem. 8.

I. The Softwood Lumber Agreement

In 2006, the United States, through the United States Trade Representative[3] ("USTR"), and the Government of Canada began negotiations to resolve the various disputes. The negotiations proved successful, and in September of that year the USTR and the Canadian representative executed the SLA. *See generally* Softwood Lumber Agreement. Pursuant to the Agreement, both governments, as well as all represented parties and participants, agreed to terminate the legal actions related to softwood lumber to which they were parties. *See* Softwood Lumber Agreement, art. II and Annex 2A; Second Am. Compl. ¶ 71; Defs.' Mem. 8.

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[2] A list of these proceedings may be found in the Softwood Lumber Agreement, Annex 2A.

[3] Pursuant to 19 U.S.C. § 2171, the USTR, established within the Executive Office of the President, has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy . . . and shall be the chief representative of the United States for, international trade negotiations. . . . " 19 U.S.C. § 2171(c)(1)(A)–(C).

The SLA also required the United States to revoke its countervailing and antidumping duty orders on softwood lumber from Canada, effective retroactively to May 22, 2002. Softwood Lumber Agreement, art. III, ¶ 1. The United States was thus required to refund the cash deposits it had collected from May 22, 2002 until the time the Agreement went into effect. Softwood Lumber Agreement, art. III, ¶ 2. Accordingly, effective October 12, 2006, Commerce instructed United States Customs and Border Protection to cease collection of cash deposits provided for in the unfair trade duty orders, liquidate all unliquidated entries, and "refund all deposits collected on such entries . . . to the importers of record."[4] Certain Softwood Lumber Products From Canada, 71 Fed. Reg. 61,714 (Dep't of Commerce Oct. 19, 2006) (notice of rescission of countervailing duty reviews and revocation of countervailing duty order); Certain Softwood Lumber Products From Canada, 71 Fed. Reg. 61,714 (Dep't of Commerce Oct. 19, 2006) (notice of rescission of antidumping duty reviews and revocation of antidumping duty order).[5]

In exchange, Canada agreed to impose certain "Export Measures"[6] on its domestic softwood lumber producers. Softwood Lumber Agreement, art. VI. Canada also agreed to purchase the rights to some of the cash deposits[7] to be refunded by the United States and distribute (1) $500 million to United States lumber producers identified as members of the Coalition; (2) $50 million to a binational industry council; and (3) $450 million for "meritorious initiatives" in the United States. See Softwood Lumber Agreement, art. IV and Annex 2C, ¶ 5 ("Canada or its agent shall distribute . . . $US 500 million to the members of the Coalition for Fair Lumber Imports. . . . ").

With respect to the intended recipients, the United States was required to provide Canada with "information identifying . . . beneficiaries." Softwood Lumber Agreement, Annex 2C, ¶ 4. Beneficiaries included "the members of the Coalition for Fair Lumber Imports." *Id.* Plaintiffs, domestic lumber producers, were not members of the Coalition, and thus, were not designated as beneficiaries of the distributed funds.

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[4] During the period from May 22, 2002 to the start of negotiations in 2006, the United States had collected approximately $5 billion in cash deposits. Defs.' Mem. 8.

[5] In addition, the United States agreed, until at least the year 2013, not to initiate any antidumping or countervailing duty investigations under Title VII of the Tariff Act of 1930 or any successor law, actions under Section 201 to 204, or 301 to 307 of the Trade Act of 1974, or Section 204 of the Agriculture Act of 1956 with respect to imports of softwood lumber products from Canada. Softwood Lumber Agreement, art. V, ¶ 1(a)−(d).

[6] Export measures are essentially quotas or export taxes. *See* Softwood Lumber Agreement, art. XXI, ¶ 23.

[7] "Canada or its agent shall purchase the rights to the amounts of the cash deposits for Covered Entries and accrued interest from the Escrow Importers and make disbursements in accordance with Annex 2C." Softwood Lumber Agreement, art. IV, ¶ 4.

II. Plaintiffs' Complaint

On March 14, 2008 plaintiffs filed an amended complaint[8] containing two counts relating to payments made by Canada pursuant to the SLA. *See* First Am. Compl. By these Counts II and III, plaintiffs challenged the legality of the defendants' identification as beneficiaries of the Canadian payments "only members of the Coalition." *See* Pls.' Opp. 1. Specifically, in Count II, plaintiffs alleged that defendants

> did not require the Government of Canada to distribute any of the money in question on a pro-rata basis to all 240+ members of the domestic softwood lumber industry that were adversely affected by illegal dumping and subsidies of Canadian softwood lumber. Instead, defendants required only that Canada make a distribution to an account whose sole beneficiaries were the approximately 100 domestic softwood lumber companies that belonged to a particular organization − the Coalition for Fair Lumber Imports.

First Am. Compl. ¶ 81. Count II asserts that the identification of Coalition members as the sole beneficiaries of the Canadian payments violated the Administrative Procedure Act ("APA"), 5 U.S.C. ¶ 706, by being " 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. . . . ' " First Am. Compl. ¶ 84.

In addition, the amended complaint contained Count III which

> alleges that defendants' actions in requiring Canada to make distribution to only those adversely affected domestic producers who were also members of the Coalition and not to all affected domestic producers on its face violates the Equal Protection component of the Due Process Clause of the Fifth Amendment to the Constitution by impermissibly discriminating between similarly situated producers and denying a benefit to certain of those producers.

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[8] Plaintiffs sought voluntary dismissal of Count I of its Second Amended Complaint on October 10, 2008. Pls.' Notice of Dismissal of Count 1. On January 29, 2008, plaintiffs filed a complaint with this Court alleging that the USTR violated the Continued Dumping and Subsidy Offset Act ("CDSOA") by failing to distribute funds to all affected domestic producers. Compl. ¶ 68. Congress enacted the CDSOA, (commonly referred to as the "Byrd Amendment"), in October 2000. 19 U.S.C. § 1675c, *repealed by* Pub. L. No. 109−171, § 7601, 120 Stat. 4, 154 (2006). Thus, plaintiffs initially based their case on provisions of the CDSOA which state that duties assessed pursuant to a countervailing duty order or an antidumping duty order shall be distributed on an annual basis "to the affected domestic producers for qualifying expenditures." *Id.* Plaintiffs insisted, in their initial complaint, that they were entitled to distributions pursuant to the CDSOA.

Apparently, plaintiffs' voluntary dismissal resulted from the opinion in *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008), *cert. denied, United States Steel Corp. v. Canadian Lumber Trade Alliance*, 129 S. Ct. 344 (U.S. Oct. 6, 2008) (No. 07−1470), which held that the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from NAFTA member countries, such as Canada.

First Am. Compl. ¶ 88. As to Count III, plaintiffs insisted that there was "no legitimate governmental purpose for defendants having discriminated among affected domestic producers. . . ." First Am. Compl. ¶ 89. On April 17, 2008 defendants filed their first motion to dismiss (1) for lack of subject matter jurisdiction based on the political question doctrine,[9] or alternatively (2) for an alleged failure by plaintiffs to state claims upon which relief can be granted. *See* Defs.' Mem.; USCIT Rules 12(b)(1) and (5).

Thereafter, plaintiffs filed a second amended complaint which added Count IV by which plaintiffs "challenge[d] actions of defendants in requiring the Government of Canada to make a compensatory payment in the amount of $500 million to an account whose sole beneficiaries were the members of the Coalition." Second Am. Compl. ¶ 91 (allegation in support of Count IV). Plaintiffs asserted that Canada's payment of $500 million to affected domestic producers was a "governmental function" of the United States and that "[t]he determination of exactly how this compensatory payment by Canada should be divided among all adversely affected domestic softwood lumber producers was a governmental function which could not legally be delegated to non-governmental entities such as the members of the Coalition." Second Am. Compl. ¶ 92. In other words, plaintiffs argued that defendants should not have directed the $500 payment solely to members of the Coalition and, in addition, should not have allowed the Coalition to distribute that payment based on "how much money each member of the Coalition had contributed to the Coalition's litigation efforts." Second Am. Compl. ¶ 94.

Defendants then filed a second motion to dismiss, reiterating their initial argument under the political question doctrine, adding a lack of subject matter jurisdiction argument, and seeking to dismiss all counts for failure to state a claim upon which relief could be granted. *See* Defs.' 2nd Mem. 2.

DEFENDANTS' MOTION TO DISMISS

I. Establishing Jurisdiction

"A jurisdictional challenge to the court's consideration of Plaintiff's action raises a threshold inquiry." *Hartford Fire Ins. Co. v. United States*, 31 CIT ___, ___, 507 F. Supp. 2d 1331, 1334 (2007) (citations omitted). Thus, before reaching the merits of plaintiffs' complaint, the court must assess defendants' motion to dismiss for lack of subject matter jurisdiction.

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[9] Based on separation of powers concerns, the political question doctrine precludes judicial review of subject matter such as government agreements with foreign powers. The doctrine prevents the judiciary from stepping into the executive branch's political realm. *See Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 401−402 (2d Cir. 1977).

"The party seeking to invoke this Court's jurisdiction has the burden of establishing such jurisdiction." *Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005) (citations omitted) ("*Autoalliance Int'l*"). A "mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling. . . . " *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quotation omitted). "To avoid dismissal in whole or in part for lack of subject matter jurisdiction, [plaintiffs] must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of their claims." *Schick v. United States*, 31 CIT ___ ,___ , 533 F. Supp. 2d 1276, 1281 (2007) ("*Schick*") (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (explaining that a plaintiff "must allege in his pleading the facts essential to show jurisdiction.")).

II. Parties' Arguments

As noted, defendants argue in their motion to dismiss that there are several reasons why the court is barred from entertaining plaintiffs' claims. Their primary contention, however, is that the court does not possess jurisdiction under 28 U.S.C. § 1581. *See* Defs.' 2nd Mem. 4. As set forth below, the court finds that plaintiffs fail to meet their burden of establishing jurisdiction because they fail to plead sufficient facts in support of jurisdiction. *See Schick*, 31 CIT at ___ , 533 F. Supp. 2d at 1281. Accordingly, the court does not reach the other arguments in defendants' motion to dismiss.

Plaintiffs insist that the court has jurisdiction over its complaint pursuant to both 28 U.S.C. § 1581(i)(2)[10] and (i)(4). In an effort to satisfy the requirement that they plead facts sufficient for the court to conclude that it has jurisdiction, plaintiffs allege that jurisdiction exists based on the negotiation and entry into force of the SLA and the administration and enforcement by defendants of the agreement. *See* Pls.' 2nd Opp. 4. The law identified by plaintiffs as providing jurisdiction is section 301 of the Trade Act of 1974, codified at 19 U.S.C. § 2411(c). Pls.' 2nd Opp. 4. Thus, the linchpin for plaintiffs'

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[10] 28 U.S.C. § 1581(i) states:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)−(h) of this section and subject to the exception set forth in subsection (j) 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 the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)−(3) of this subsection and subsections (a)−(h) of this section.

jurisdictional claim is that the SLA was both negotiated and entered into by the USTR pursuant to the authority given her[11] in 19 U.S.C. § 2411(c)(1)(D).[12] Under that provision, whenever the USTR "determines that any act, policy, or practice of a foreign country is unjustifiable and burdens or restricts United States commerce, or is unreasonable or discriminatory and burdens or restricts United States commerce," the trade representative may enter into agreements with such foreign country committing that country to eliminate the act, policy or practice or provide the United States with compensatory trade benefits.[13] *See* Pls.' 2nd Opp. 4−5 (citing 19 U.S.C. § 2411(c)(1)(D)). Plaintiffs contend that this is what occurred here and that by

> entering into the SLA and requiring therein that Canada provide a compensatory trade benefit in the form of the payment to domestic softwood lumber producers of a portion of the estimated duties which the United States had collected and then refunded to Canada, the USTR was acting pursuant to her au-

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[11] The USTR at the time of the negotiation and entry intoforce of the SLA was Susan Schwab.

[12] Under § 2411(c)(1)(D), if the USTR determines that the rights of the United States under any trade agreement are being denied, or that an act, policy, or practice of a foreign country violates a United States trade agreement or burdens or restricts United States commerce, the USTR is authorized to

> enter into binding agreements with such foreign country that commit such foreign country to—
>
> (i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section,
>
> (ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or
>
> (iii) provide the United States with compensatory trade benefits that—
>
> (I) are satisfactory to the Trade Representative, and
>
> (II) meet the requirements of paragraph (4).

19 U.S.C. § 2411(c)(D).

Paragraph 4 of the statute provides:

> (4) Any trade agreement described in paragraph (1)(D)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section. . . .

19 U.S.C. § 2411(c)(4).

[13] Examples of the USTR's published determinations documenting the exercise of this authority are: Determination Under Section 304 of the Trade Act of 1974 [19 U.S.C. § 2414]: Practices of the Government of India Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals, 63 Fed. Reg. 29,053 (Office of the USTR May 27, 1998); Notice of Agreement; Monitoring and Enforcement Pursuant to Sections 301 and 306 [19 U.S.C. § 2416]: Canadian Exports of Softwood Lumber, 61 Fed. Reg. 28,262 (Office of the USTR June 5, 1996).

> thority under 19 U.S.C. 2411(c)(1)(D) in addition to acting in accordance with her general duties and responsibilities under 19 U.S.C. § 2171.

Pls.' 2nd Opp. 5 (footnote omitted). Put another way, plaintiffs maintain that the court has § 1581(i) jurisdiction because the SLA was negotiated pursuant to 19 U.S.C. § 2411(c)(1)(D), which provides for the entry into agreements that provide for compensatory trade benefits.[14] Apparently, for plaintiffs, these compensatory trade benefits are the equivalent of duties. *See* 28 U.S.C. § 1581(i)(2) ("the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . duties . . . on the importation of merchandise for reasons other than the raising of revenue. . . . ").

Defendants respond that the SLA was simply not negotiated nor executed pursuant to § 2411(c)(1)(D). Defs.' Reply 2 ("[N]o part of the negotiations or entry into force of the SLA entailed any statutory authority derived from 19 U.S.C. § 2411 . . . ."). Defendants further argue that plaintiffs have offered no support for their contention that the USTR negotiated or entered into the SLA pursuant to § 2411 as is required to establish jurisdiction. *See Schick*, 31 CIT at ___ , 533 F. Supp. 2d at 1281 (stating that plaintiffs "must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of their claims."). Rather, defendants contend that "the overall authority and functions" of the USTR are found in 19 U.S.C. § 2171, which, *inter alia*, invests the USTR with the duty to develop and coordinate the implementation of United States international trade policy. Defs.' Reply 2; *see* 19 U.S.C. § 2171(c)(1)(A). Defendants thus urge the court to find that plaintiffs have not satisfied their burden of alleging facts sufficient to find that it has jurisdiction over plaintiffs' claims.

III. Plaintiffs Fail to Meet Their Burden of Demonstrating Jurisdiction

Like all federal courts, the Court of International Trade is a court of limited jurisdiction. As such, the Court has an obligation to "determine that the matter brought before it remains within the metes and bounds of such delimitation." *Agro Dutch Indus. Ltd. v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1293, 1294 (2005) (citation

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[14] Although plaintiffs seem to base a portion of their argument on the notion that the payments to the Coalition are compensatory trade benefits, the court does not believe that the actual existence of compensatory trade benefits under the SLA is determinative for purposes of jurisdiction. Under 19 U.S.C. § 2411(c)(1)(B), the USTR may, under certain circumstances, impose duties. For the court, if the SLA were indeed the product of § 2411 then, because the statute *provides* for the imposition of duties, the court would have jurisdiction pursuant to the "arising under" provision of 28 U.S.C. § 1581(i).

omitted). A primary source of federal jurisdiction rests in "arising under" jurisdiction. The principal federal statute providing for this jurisdiction is 28 U.S.C. § 1331, which grants jurisdiction to the federal district courts for claims "arising under" federal law.[15] 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States."); *see* Wright, Miller, & Cooper, 13D Fed. Prac. & Proc. 3d § 3562.

The statute under which plaintiffs claim jurisdiction here, 19 U.S.C. § 1581(i)(4), is also an "arising under" statute. *See* 28 U.S.C. § 1581(i)(2) (actions arising out of a law providing for duties on the importation of merchandise other than for raising revenue) and 28 U.S.C. § 1581(i)(4) (actions arising out of the administration and enforcement of paragraph (2) of this subsection); *Schick v. United States*, 554 F.3d 992 (Fed. Cir. 2009) (finding that the trial court lacked jurisdiction to consider claim under § 1581(i)(4) where claim did not arise out of a law providing for the administration and enforcement of matters referred to in 19 U.S.C. § 1581(g)(2)). As noted, the sole arising under statute cited by plaintiffs as the basis for § 1581(i) jurisdiction is 19 U.S.C § 2411(c)(1)(D). *See* 19 U.S.C. § 2411(c)(1)(D).

Beyond the bare claim that the SLA was the product of § 2411, however, plaintiffs provide no support for their contention that it was negotiated or executed pursuant to that statute, despite having ample opportunity to do so. Defendants filed their motion to dismiss the second amended complaint on October 24, 2008, contesting, among other things, the court's subject matter jurisdiction. *See* Defs.' 2nd Mem. 5, citing 28 U.S.C. § 1581(i)(4) ("The Court does not possess jurisdiction in this case because Almond Brothers has neither alleged a claim that arises out of any law of the types identified, nor a claim that arises out of the administration and enforcement with respect to the matters referred to in paragraphs (1)−(3) of this subsection and subsections (a)−(h) of this section.' "). Given the chance to provide supporting jurisdictional facts, on December 1, 2008,

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[15] The outer limits of the federal courts' subject matter jurisdiction are set forth in Article III, Section 2 of the United States Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Minister and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between and State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

plaintiffs filed their opposition brief, claiming that this Court does have jurisdiction over Counts II−IV of plaintiffs' complaint "pursuant to both 28 U.S.C. § 1581(i)(2) and § 1581(i)(4) because each count arises out of a law providing for duties on the importation of merchandise and the administration and enforcement by defendants with respect to estimated duties, specifically, section 301 of the Trade Act of 1974, 19 U.S.C. § 2411(c)." Pls.' 2nd Opp. 4. However, the opposition brief failed to provide any facts to support this claim.

Defendants, in their reply brief filed January 12, 2009, noted, "Almond Bros. has failed to provide any support for its contention that the SLA was negotiated or entered into pursuant to section 301 authority. In fact, there is no support for such an argument." Defs.' 2nd Reply 4. Indeed, as defendants point out, there is no indication that the USTR performed any of the actions required by the provisions governing § 2411 before she commenced the negotiations resulting in the entry into force of the SLA. *See* Defs.' 2nd Reply 4.

Plaintiffs received another chance to plead facts demonstrating that the SLA was negotiated or entered into pursuant to § 2411 when they requested and received the court's permission to file a sur-reply to defendants' reply in support of their motion to dismiss. *See* Pls.' Sur-reply to Defs.' Reply Supp. Mot. Dismiss. In the sur-reply, filed on February 6, 2009, plaintiffs again failed to assert any of the necessary jurisdictional facts in support of their argument that the SLA was negotiated or entered into pursuant to § 2411. In short, plaintiffs have had their chance to support their argument with jurisdictional facts and have failed to do so.

Pursuant to USCIT Rule 8(a), "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court's jurisdiction. . . . " Further, while jurisdictional facts are normally found in the complaint, it is well settled that in considering a Rule 12(b)(1) motion contesting jurisdiction, the court may consider matters outside the pleadings. *See, e.g., Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Cedars-Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). Specifically,

> When reviewing a motion to dismiss pursuant to USCIT Rule 12(b)(1), the court must determine whether the moving party is attacking the sufficiency of the jurisdictional pleadings or the factual basis for the court's jurisdiction. If a motion to dismiss refutes or contradicts the plaintiff's jurisdictional allegations, the court treats the motion as questioning the factual basis for the court's subject matter jurisdiction. "In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion." *Cedars-Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (internal citations omitted). All other facts underlying the jurisdictional claims are in dispute and are subject to fact-finding by this Court. Thus, a court may

> review evidence outside the pleadings to determine facts necessary to rule on the jurisdictional issue.

Autoalliance Int'l, 29 CIT at 1088–89, 398 F. Supp. 2d at 1332 (internal citations omitted).

Accordingly, in light of the dearth of jurisdictional facts in the pleadings, the court has looked to the public record, i.e., the Federal Register, to determine if the SLA was negotiated or executed pursuant to § 2411.

First, it should be noted that the SLA itself does not state the authority that authorized its negotiation or entry into force. *See* Softwood Lumber Agreement, art. II. Second, an examination of the public record reveals no basis to believe that 19 U.S.C. § 2411 provided the authority used by the USTR to negotiate or execute the SLA.

In accordance with the codified statute, prior to taking the retaliatory actions[16] [17] authorized by § 2411(c)(1)(D), the USTR must conduct an investigation and make a determination. *See* 19 U.S.C. §§ 2412, 2414. Thus, the sections succeeding 19 U.S.C. § 2411 set out the steps that the USTR must perform before action can be taken under § 2411. Here, the published public record demonstrates

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[16] If the United States Trade Representative determines under section 2414(a)(1) of this title that—

> (A) the rights of the United States under any trade agreement are being denied; or
>
> (B) an act, policy, or practice of a foreign country—
>
> (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
>
> (ii) is unjustifiable and burdens or restricts United States commerce;
>
> the Trade Representative shall take action authorized in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

19 U.S.C. § 2411(a)(1).

[17] If the Trade Representative determines under section 2414(a)(1) of this title that—

> (1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and
>
> (2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c) [referring to the scope of authority under § 2411] of this section, subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. . . .

19 U.S.C. § 2411(b).

that none of these steps was taken prior to the negotiation of the SLA. Specifically, the USTR did not initiate any type of investigation pursuant to § 2412 or make a determination pursuant to § 2414 before negotiating the Agreement. *See* 19 U.S.C. § 2411(a) and (b).

That no investigation was commenced can be shown by the publication requirement. "If the Trade Representative determines that an investigation should be initiated under this subchapter with respect to any matter in order to determine whether the matter is actionable under section 2411 of this title, the Trade Representative shall publish such determination in the Federal Register and shall initiate such investigation." 19 U.S.C. § 2412(b)(1)(A).[18]

Neither is there any indication that the USTR made the necessary determination pursuant to § 2414 before the SLA was negotiated:

> On the basis of the investigation initiated under section 2412 of this title and the consultations (and the proceedings, if applicable) under section 2413 of this title, the Trade Representative shall—
>
> (A) determine whether—
>
> (i) the rights to which the United States is entitled under any trade agreement are being denied, or
>
> (ii) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 2411 of this title exists, and
>
> (B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade Representative should take under subsection (a) or (b) of section 2411 of this title.

19 U.S.C. § 2414(a).

Had the USTR made any determination pursuant to § 2414(a), that determination, too, would have been published in the Federal Register pursuant to 19 U.S.C. § 2414(c). 19 U.S.C. § 2414(c) ("The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1) of this section, together with a description of the facts on which such determination is based.").[19] No publication relating to a determination undertaken

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[18] *See, e.g.*, Initiation of Section 302 [19 U.S.C. § 2412] Investigation and Request for Public Comment: Wheat Trading Practices of the Canadian Wheat Board, 65 Fed. Reg. 69,362 (Office of the USTR November 16, 2000) (notice announcing the initiation of an "investigation to determine whether certain acts, policies or practices of the Government of Canada and the Canadian Wheat Board with respect to wheat trading are unreasonable and burden or restrict U.S. commerce and are, therefore, actionable under section 301."). No equivalent publication relating to an investigation undertaken pursuant to § 2411 prior to the SLA's negotiation could be found.

[19] It is worth noting that the USTR has sought to comply with the provisions relating to investigations and determinations when seeking to enforce the SLA. *See* Initiation of Sec-

pursuant to § 2411 could be found with respect to the negotiation or entry into force of the SLA. Consequently, there can be no argument that the SLA was the product of § 2411 because there is no evidence that the USTR performed any of the required acts that could result in action thereunder.

As stated previously, plaintiffs' sole basis for invoking the jurisdiction of the court is that the SLA was negotiated and entered into pursuant to 19 U.S.C. § 2411(c)(1)(D). Because they have failed to meet their burden of pleading facts from which the court could conclude that the SLA was indeed the product of § 2411, the court cannot accept plaintiffs' argument that it has jurisdiction under the arising under provisions of § 1581(i). *See Autoalliance Int'l*, 29 CIT at 1088, 398 F. Supp. 2d at 1332. That being the case, the court finds that it does not have jurisdiction to hear the claims made in plaintiffs' complaint.[20]

CONCLUSION

Based on the Court's lack of subject matter jurisdiction, defendants' motion to dismiss is granted and plaintiffs' complaint is dismissed.

Slip Op. 09–49

UNITED STATES, Plaintiff, v. **SCOTIA PHARMACEUTICALS LIMITED, CALLANISH LTD., and QUANTANOVA, CANADA, LTD.,** Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 03–00658

[Denying plaintiff's application for a judgment by default against defendant Callanish Ltd. in the amount of $17,734,926, providing plaintiff with leave to amend the complaint as to Callanish Ltd., and granting plaintiff's request for dismissal as to defendants Scotia Pharmaceuticals Limited and Quantanova, Canada, Ltd.]

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tion 302 [19 U.S.C. § 2412] Investigation, Determination of Action Under 301, and Request for Comments: Canada — Compliance with Softwood Lumber Agreement, 74 Fed. Reg. 16,436 (Office of the USTR Apr. 10, 2009) (notice of initiation of investigation of and determination that Canada "is denying U.S. rights under the SLA"). The notice of initiation of investigation pursuant to a violation under the SLA further underscores the plaintiffs' failure to submit evidence that the negotiation and entry into force of the SLA itself was the product of USTR action under section 301.

[20] The court does not reach defendants' arguments for dismissal pursuant to the political question doctrine or for failure to state a claim. However, it should be noted that plaintiffs' claims cannot succeed if a court is asked to review the substance of an executive agreement, rather than to review a claim that the agreement violates a specific statute or Constitutional right. *See, e.g., Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 402 (2d Cir. 1977).

Dated: May 20, 2009

Michael F. Hertz, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Domenique Kirchner*); *Kevin B. Marsh*, Bureau of Customs and Border Protection, of counsel, for plaintiff.

OPINION AND ORDER

Stanceu, Judge: Plaintiff United States brought this action under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988), against defendants Scotia Pharmaceuticals Limited ("Scotia Pharmaceuticals"), Callanish Ltd. ("Callanish"), and Quantanova, Canada, Ltd. ("Quantanova") on September 16, 2003. The government sought to recover a civil penalty for alleged violations of § 1592 by defendants arising out of fifty-three consumption entries of merchandise, made between September 1, 1988 and March 24, 1992, that the government alleged to have been capsules of "evening primrose oil," a substance used as a food additive that could not be imported lawfully at the time of the entries at issue. Of the three defendants, all of which are located outside of the United States, plaintiff successfully effected service of process only upon Callanish. Pl.'s Req. for Entry of Default 1. Because Callanish failed to appear by licensed counsel and failed to plead or otherwise defend itself within twenty days of being served with the summons and complaint, the Clerk of this Court, pursuant to USCIT Rules 12 and 55, entered Callanish's default. Entry of Default 1.

On May 8, 2008, plaintiff applied for a judgment by default against Callanish in the amount of $17,734,926 pursuant to USCIT Rule 55(b). Pl.'s Req. for Default J. as to Callanish Ltd. 1−2 ("Pl.'s Req. for Default J."). The government requested dismissal of defendants Scotia Pharmaceuticals and Quantanova because of its inability to effect service of process on those defendants. *Id.* at 1. Plaintiff did not submit, in support of its application for judgment by default, a complete record of the administrative penalty proceedings that were conducted before the United States Customs Service[1] ("Customs") and that gave rise to this action. In October 2008, plaintiff supplemented its application with various documents related to those administrative proceedings and responded to certain questions the court earlier had raised concerning the application for judgment by default. Pl.'s Resp. to Court's Aug. 21, 2008 Req. for Additional Information.

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[1] The Customs Service since has been renamed as the Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107−296, § 1502, 116 Stat. 2135, 2308−09 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108−32, at 4 (2003).

Upon review of the complaint and plaintiff's application, the court holds that plaintiff has not established its entitlement to the judgment by default that it seeks against defendant Callanish for a civil penalty under 19 U.S.C. § 1592. The court, therefore, will deny plaintiff's application but will also allow plaintiff the opportunity to amend its complaint. Because plaintiff has not effected service upon defendants Scotia Pharmaceuticals and Quantanova, the court grants plaintiff's request to dismiss these defendants.

I. BACKGROUND

Beginning on February 12, 1985, the Food and Drug Administration ("FDA") issued a series of import alerts announcing that evening primrose oil could not be sold lawfully in the United States without FDA approval, that this substance did not have FDA approval, and that all import shipments of evening primrose oil offered for entry into the United States were to be detained by Customs. Pl.'s Req. for Default J. 4. Plaintiff's complaint alleges that during the period of September 1, 1988 through March 24, 1992, defendants violated 19 U.S.C. § 1592 by participating in a fraudulent scheme to introduce evening primrose oil into the United States through various ports of entry by means of material false statements, documents, acts and/or material omissions and are jointly and severally liable for a civil penalty under § 1592. Compl. ¶¶ 6−9, 21−22. Plaintiff alleges that defendants, as part of this scheme, knowingly provided false invoices to "Health Products International and/or Pine Lawn Farms in order to conceal from Customs the identity of the merchandise being imported and the identity of the true parties to the transactions." *Id*. at ¶ 11.

Plaintiff's complaint does not allege the identity of the party who filed entry documents with Customs for the fifty-three entries allegedly used to import evening primrose oil. The complaint, however, does allege that the documents filed with respect to those entries were false in multiple respects. The complaint alleges, specifically, that: (1) the entry documentation falsely described the merchandise as "edible capsules of vegetable oil" or "edible oil capsules with alpha-tocopheryl," or used similar designations, and in several instances stated that the merchandise was "for use [as] a vitamin supplement for cattle" or "not for human consumption," when in fact the merchandise was evening primrose oil intended for human consumption and prohibited by the FDA as an unsafe food additive within the meaning of 21 U.S.C. §§ 342 and 348 (1988); (2) the buyers of the merchandise falsely were identified as "Genesis II of Mid America, Inc." (on thirteen of the subject entries) and "Pine Lawn Farms, Inc." (on forty of the entries) although the true buyer was "Health Products International;" (3) the sellers of the merchandise falsely were identified as "Pineridge Ltd." (on thirteen of the entries), "B.V. Handelmij Commelin," (on thirty-seven of the entries)

and Callanish (on three of the entries), when in fact the true seller was Efamol Limited ("Efamol") or its successor, Scotia Pharmaceuticals; and (4) for thirty-seven of the consumption entries, the entry documents falsely identified the country of origin as the Netherlands rather than the true origin, the United Kingdom. *Id.* ¶¶ 12−15.

Customs conducted an administrative penalty proceeding under 19 U.S.C. § 1592(b) against defendants prior to bringing this action. *See id.* ¶ 17. On or about August 18, 1997, Customs issued pre-penalty notices to defendants or their predecessors in interest. *Id.* The pre-penalty notices provided defendants with notice that Customs was considering a civil penalty equal to the domestic value of the evening primrose oil, which Customs believed to include fifty-three consumption entries, for a total domestic value of $18,019,436. *Id.* ¶¶ 17, 22. On or about March 19, 2001, Customs issued to defendants or their predecessors in interest an administrative penalty notice demanding a monetary penalty in the amount of $18,019,436. *Id.* ¶ 17. The complaint alleges that defendants did not pay any part of the assessed penalty. *Id.* ¶ 18.

Plaintiff commenced this action on September 16, 2003. Summons 2. Because all three defendants are located outside of the United States, plaintiff attempted to procure service upon them pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. *See* Pl.'s Status Report 1, Dec. 5, 2003. Plaintiff completed service of process upon defendant Callanish on January 19, 2004 but was not able to procure service of process upon Scotia Pharmaceuticals or Quantanova. Pl.'s Status Report 1, May 7, 2004.

On February 7, 2006, the United States filed Plaintiff's Request for Entry of Default, requesting that default be entered against Callanish on the grounds that the company failed to appear by licensed counsel and defend the allegations pleaded in the complaint. Default was entered with respect to Callanish by the Clerk of the Court of International Trade on February 8, 2006 pursuant to USCIT Rules 12 and 55.[2] Entry of Default 1.

On May 8, 2008, the United States, pursuant to USCIT Rule 55(b),[3] applied for judgmentby default against Callanish for $17,734,926 "with prejudgment and post-judgment interest in the

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[2] USCIT Rule 12 requires defendants other than the United States to file an answer within twenty days after being served with the summons and complaint. USCIT Rule 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."

[3] USCIT Rule 55(b) provides that if the defendant has failed to defend the complaint against it, and plaintiff's claim "is for a sum certain or for a sum which can be made certain by computation," then "the court − on the plaintiff's request with an affidavit showing the amount due must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person."

amount established by 28 U.S.C. §§ 1961(a) & (b)." Pl.'s Req. for Default J. 1. In its application for a judgment by default, plaintiff argues that defendants violated 19 U.S.C. § 1592 because they fraudulently

> entered, introduced, or attempted to enter or introduce, or aided or abetted another to enter or introduce or attempt to enter or introduce into the United States merchandise consisting of capsules of [evening primrose oil] under cover of 52 consumption entries filed at various ports of entry throughout the United States . . . by means of material and false acts, statements and/or omissions[.]

Id. at 5−6. Although plaintiff's complaint alleged fifty-three fraudulent consumption entries, Complaint ¶¶ 7, 22, plaintiff later "determined that one of the 53 entries listed in the Pre-Penalty Notice, the Notice of Penalty, and plaintiff's complaint is a drawback entry." Pl.'s Req. for Default J. 7−8. Plaintiff therefore reduced its claim from the $18,019,436 sought in the complaint to $17,734,926, stating that it "seeks penalties for consumption entries, not drawback entries." *Id.*

Plaintiff seeks a penalty equal to the domestic value of the evening primrose oil entered on the fifty-two entries, $17,734,926, which is equivalent to the statutory maximum penalty for a violation of 19 U.S.C. § 1592(c)(1) occurring as a result of fraud, plus pre-judgment and post-judgment interest as provided by law. *Id.* at 7−8. Plaintiff also requests that defendants Scotia Pharmaceuticals and Quantanova be dismissed because plaintiff has not been successful in obtaining service upon these defendants. *Id.* at 1.

II. DISCUSSION

The court first considers plaintiff's application for a judgment by default against defendant Callanish. When a party is found to be in default, the court must accept as true all well-pled facts in the complaint except those pertaining to the amount of damages. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2nd Cir. 1981). An entry of default, however, is not sufficient to entitle a party to the relief it seeks. *See Nishimatsu Const. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("[A] defendant's default does not in itself warrant the court in entering a default judgment."). Even after an entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2688, at 63 (3d ed. 1998); *see also Nishimatsu Const. Co.*, 515 F.2d at 1206−08 (vacating district court's entry of default judgment because the pleadings were insufficient to support the judgment). "There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Const. Co.*, 515 F.2d at 1206. Accord-

ingly, the court must decide whether the well-pled facts asserted by plaintiff in its complaint, and deemed to be admitted by Callanish as a result of the entry of default, are sufficient to establish liability for a violation of 19 U.S.C. § 1592 that is grounded in fraud.[4]

Under § 1592(a)(1)(A), it is unlawful for any person to enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of material and false documents, statements, or acts or material omissions, whether by fraud, gross negligence, or negligence. 19 U.S.C. § 1592(a)(1)(A)(i)−(ii). The statute also prohibits the aiding and abetting of another to commit a violation of § 1592(a)(1)(A). *Id.* § 1592(a)(1)(B). Thus, to plead a violation of § 1592(a)(1)(A) by Callanish, whether based on fraud or a lesser level of culpability, the complaint must allege facts that allow the court to conclude that Callanish entered, introduced, or attempted to enter or introduce merchandise into the commerce of the United States by means of material and false documents, statements, acts, or omissions. *Id.* § 1592(a)(1)(A)(i)−(ii). To plead that Callanish is liable under § 1592(a)(1)(B), the complaint must allege facts under which the court could conclude that Callanish aided and abetted another to violate § 1592(a)(1)(A). *Id.* § 1592(a)(1), (e)(2).

Although the general pleading standard stated in USCIT Rule 8(a) requires that the complaint provide only "a short and plain statement of the claim showing that the pleader is entitled to relief," the Court's rules state a heightened pleading standard for fraud claims. USCIT Rule 9(b) provides that "a party must state with particularity the circumstances constituting fraud." The reference to "circumstances" in the analogous Federal Rule of Civil Procedure 9(b) is to "matters such as time, place, and contents of the false representations or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what the defendant obtained thereby." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1297, at 74 (3d ed. 2004).

The heightened pleading standard of Rule 9(b), however, has not been held invariably to apply where a defendant does not raise a Rule 9(b) objection in response to the pleadings. *See* 2 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 9.03[5] (3d ed. 2008) ("If the failure to plead with particularity under Rule 9(b) is not raised in the first responsive pleading or in an early motion, the issue will be deemed waived."); *see also Todaro v. Orbit Int'l Travel, Ltd.*, 755 F. Supp. 1229, 1234 (S.D.N.Y. 1991) (" 'The specificity requirements of [Rule 9(b)] have been imposed to ensure that a defendant is apprised of the fraud claimed in a manner sufficient to permit the framing of an adequate responsive pleading. A party who fails to raise a 9(b) ob-

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[4] Plaintiff's complaint contains only one exhibit, a list of the fifty-three entry numbers, with filer codes and the dates of entry. The complaint does not incorporate any other document by reference or otherwise. *See* Compl. Ex. A.

jection normally waives the requirement.' " (quoting *United Nat'l Records, Inc. v. MCA, Inc.*, 609 F. Supp. 33, 39 (N.D. Ill. 1984))); *but see Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392−93 (9th Cir. 1988) (reversing entry of judgment by default on plaintiff's claim for violation of the Racketeer Influenced and Corrupt Practices Act, 18 U.S.C. § 1964(c) (1982), based on mail and wire fraud because the complaint failed to meet the particularity requirements of Rule 9(b)). Nevertheless, the court need not decide, for the purposes of ruling on plaintiff's application, whether a party seeking a judgment by default on a fraud claim must plead with particularity the circumstances constituting fraud. The court concludes that plaintiff's complaint, even when not judged according to a heightened standard of pleading, fails to allege facts or omissions by Callanish that, if presumed to be true, would constitute a violation of § 1592 that was committed by fraud.

The complaint mentions Callanish by name in making two factual allegations. The first allegation, that Callanish is a "British corporation with its business address at Breasclete, Isle of Lewis, Scotland, United Kingdom," states nothing of substance relevant to the issue of liability of Callanish under § 1592. *See* Compl. ¶ 4. The second allegation, that Callanish was falsely identified as the seller of the merchandise in documents submitted in conjunction with three of the subject entries, fails to attribute to Callanish an act or omission punishable under § 1592. *See id.* ¶ 14. The remaining allegations in the complaint refer to the "defendants" only collectively. *See id.* ¶¶ 6, 7, 9, 11, 17, 18, 19, 21, 22.

Paragraph six alleges that each of the three defendants are related entities that "jointly and separately" participated in a scheme to introduce evening primrose oil into the commerce of the United States at a time when its importation was prohibited. *Id.* ¶ 6. This allegation, although informing the court that Callanish was associated with the alleged scheme, makes no allegation as to what Callanish did in furtherance of the scheme and fails to link Callanish to any of the fifty-two entries, even though plaintiff seeks to recover a civil penalty against Callanish based on the total domestic value of the merchandise on all of those entries.

Paragraph eleven alleges that "defendants knowingly provided false invoices to Health Products International and/or Pine Lawn Farms in order to conceal from Customs the identity of the merchandise being imported and the identity of the true parties to the transactions." *Id.* ¶ 11. This allegation appears to be related to paragraph thirteen, which alleges that the entry documentation falsely informed Customs that Pine Lawn Farms was the buyer even though the true buyer of the imported merchandise was Health Products International. *Id.* ¶ 13. The court reasonably may infer from these allegations that Callanish had some role in a false invoicing scheme. However, in addressing all three defendants collectively, paragraph

eleven, even when construed with paragraph thirteen, fails to attribute any specific act or omission to Callanish and fails to relate that act or omission to the fifty-two entries on which Customs seeks a penalty. Paragraph thirteen adds, vaguely, that "[t]hese false statements had the potential to affect Customs' processing of merchandise and to impact Customs' operations." *Id*. Even more perplexing is the next sentence in the paragraph: "It is necessary for Customs to determine the true buyers for purposes of valuation." *Id*. These two sentences do not appear to be directed to the central allegation made by the remainder of the complaint−that all three defendants are liable for a penalty because the entry documentation falsely and fraudulently described the merchandise, which was prohibited from importation, as something other than evening primrose oil. Paragraph eleven of the complaint, even when construed with paragraph thirteen and the remainder of the complaint, fails to plead facts under which Callanish would be liable for a civil penalty under § 1592 based on fraud that occurred with respect to any, or all, of the fifty-two consumption entries at issue.

Paragraphs seven, nine, and twenty-one of the complaint address the central allegation in the complaint but do not cure the defect that exists in the pleading as a whole with respect to Callanish. In these paragraphs, plaintiffs allege, in effect, that "defendants entered, introduced, or attempted to enter or introduce, or aided or abetted another to enter or introduce or attempt to enter or introduce" evening primrose oil into the United States under cover of fifty-two consumption entries. *Id*. ¶ 7; *see also* Compl. ¶¶ 9, 21. The allegations in these paragraphs are nothing more than a formulaic recitation of the elements of a cause of action under 19 U.S.C. § 1592(a)(1)(A) and (B). Even though "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . [a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Ashcroft v. Iqbal*, 556 U.S. ___ , Slip. Op. 07−1015, at 13−14 (May 18, 2009) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964−65 (2007)). These paragraphs do not attribute to Callanish an act or omission that affected any specific entry among the fifty-two entries on which plaintiff seeks a civil penalty. Moreover, the actions defendants are alleged to have taken in paragraphs seven, nine, and twenty-one are pled in the alternative. According to the facts as alleged, Callanish could have entered, *or* attempted to enter, *or* aided and abetted another to enter, *or* aided and abetted another to attempt to enter, evening primrose oil into the United States. No person is identified as the person whom Callanish may have aided and abetted. Plaintiff's allegations, taken together, require the court to speculate as to what Callanish is being alleged to have done. *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (de-

fining well-pled facts as those that are "plausible, non-conclusory and *non-speculative*" (citing *Twombly*, 127 S. Ct. at 1964−65 (emphasis added))).

Similarly, the remaining paragraphs of the complaint, *i.e.*, paragraphs seventeen, eighteen, nineteen, and twenty-two, do not add factual allegations sufficient to plead a valid cause of action under § 1592 with respect to Callanish. *See* Compl. ¶¶ 17−19, 22. Paragraphs seventeen and eighteen refer to the administrative penalty proceeding conducted by Customs. *See id.* ¶¶ 17−18. Paragraph nineteen describes defendants' waivers of the statute of limitations. *Id.* ¶ 19. Paragraph twenty-two is a statement of a legal conclusion alleging that all three defendants, "[b]y reason of the fraud referred to above," are jointly and severally liable pursuant to 19 U.S.C. § 1592(c)(1) for a civil penalty set at the domestic value of all the imported merchandise on the subject entries. *Id.* ¶ 22.

In summary, the complaint is deficient as a whole because, first, it fails to attribute to Callanish any material and false statement or act, or any material omission, related to the entry or introduction, or attempted entry or introduction, of merchandise into the United States on any of the fifty-two entries, such that the court could conclude, upon presuming all well-pled facts to be true, that Callanish is liable for a civil penalty under 19 U.S.C. § 1592(a)(1)(A). *See* 19 U.S.C. § 1592(a)(1)(A). Second, the complaint does not allege, for purposes of § 1592(a)(1)(B), that Callanish, specifically, aided and abetted any person to commit specific acts or omissions that are within the scope of the conduct made unlawful by § 1592(a)(1)(A) with respect to any or all of those entries. 19 U.S.C. § 1592(a)(1)(A), (B). For all of these reasons, the court must deny plaintiff's application for judgment by default against Callanish.

The court also considers plaintiff's request for dismissal of defendants Scotia Pharmaceuticals and Quantanova. *See* Pl.'s Req. for Default J. 1. Without satisfaction of the procedural requirements of service of process, a federal court may not exercise personal jurisdiction over a defendant. *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 880 (Fed. Cir. 1997). Because it has been informed of plaintiff's inability to obtain service of the complaint on Scotia Pharmaceuticals and Quantanova, the action as to Scotia Pharmaceuticals and Quantanova will be dismissed.

Plaintiff has the opportunity to amend its complaint as to defendant Callanish. *See Nishimatsu Const. Co.*, 515 F.2d at 1208 (concluding that plaintiff's complaint was insufficient to support a default judgment on plaintiff's contract claim against the defendant, vacating the relevant portion of the default judgment entered by the district court, and remanding with instructions to allow plaintiff to amend its complaint to state a claim against the defendant). Allowing plaintiff an opportunity to amend its complaint is particularly appropriate here because plaintiff, under Rule 15(a)(1)(A), may

amend its pleading once as a matter of course before being served with a responsive pleading. USCIT Rule 15(a)(1)(A). Due to the default of defendant Callanish, no responsive pleading within the meaning of USCIT Rule 15(a)(1)(A) has been filed. Plaintiff is allowed sixty days in which to file an amended complaint.

III. CONCLUSION AND ORDER

From its review of the complaint and of plaintiff's application for judgment by default, the court concludes that plaintiff has not established its entitlement to a judgment by default against defendant Callanish for a civil penalty under 19 U.S.C. § 1592. Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that plaintiff's application for judgment by default against defendant Callanish be, and hereby is, DENIED; it is further

ORDERED that plaintiff shall have sixty days from the date of this Opinion and Order in which to file an amended complaint pursuant to USCIT Rule 15(a)(1)(A); it is further

ORDERED that should plaintiff fail to file an amended complaint within sixty days of the date of this Opinion and Order, plaintiff, upon entry of a further order, shall be required to show cause why a judgment should not be entered dismissing this action; it is further

ORDERED that plaintiff's request with respect to defendants Scotia Pharmaceuticals and Quantanova be, and hereby is, GRANTED; and it is further

ORDERED that the action as to Scotia Pharmaceuticals and Quantanova will be dismissed.

Slip Op 09–50

NUCOR CORPORATION, GERDAU AMERISTEEL, INC., and COMMERCIAL METALS COMPANY, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and EKINCILER DEMIR ve CELIK SANAYI A.S., EKINCILER DIS TICARET A.S., HABAS SINAI ve TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., COLAKOGLU DIS TICARET A.S., COLAKOGLU METALURJI A.S., KAPTAN DEMIR CELIK ENDUSTRISI ve TICARET A.S., KAPTAN METAL DIS TICARET ve NAKLIYAT A.S., DILER DEMIR CELIK ENDUSTRISI ve TICARET A.S., DILER DIS TICARET A.S., TAZICI DEMIR CELIK SANAYI ve TURIZM TICARET A.S., KROMAN CELIK SANAYII A.S., Defendant-Intervenors.

Before: **MUSGRAVE, Senior Judge**
Consol. Court No. 07−00457

JUDGMENT

This matter having consolidated complaints filed on behalf of the plaintiff members of the domestic U.S. industry and of the

intervenor-defendant foreign manufacturers and exporters Ekinciler Demir ve Celik Sanayi A.S. and Ekinciler Dis Ticaret A.S. ("Ekinciler"), each contesting aspects of *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination to Revoke in Part,* published by the International Trade Administration, U.S. Department of Commerce ("Commerce") at 72 Fed. Reg. 62630 (Nov. 6, 2007), and the members of the domestic industry having voluntarily dismissed their complaints and Ekinciler having interposed a motion for judgment on the agency record developed in connection therewith; and the court in slip opinion 09–30, 33 CIT ___ (Apr. 14, 2009), having granted Ekinciler's motion to the extent of remand to Commerce for the purpose of recalculating Ekinciler's costs of production without imputing depreciation for the so-called "melt shop modernization account," the nature of which the court remarked was "uncontroverted" since the evidence of record in opposition to Ekinciler's proof thereon amounted to mere speculation or conjecture, with no finding by Commerce that the account was other than as represented by Ekinciler, notwithstanding that the account was maintained among its books and records as a so-called "capitalized asset," and Commerce, in its remand results, expressing dissatisfaction with that portion of the opinion concerning Commerce policy on the treatment foreign exchange losses (Commerce reiterating that Ekinciler failed to exhaust its administrative remedies because it never gave Commerce "the opportunity to explain its policy," which Commerce continues to aver is described in *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea,* 66 Fed. Reg. 52097 (Oct. 12, 2001), but which review precedes by a year and a half the policy announced in *Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Administrative Review,* 68 Fed. Reg. 11045, 11048 (Mar. 7, 2003) ("we will normally include in the interest expense computation *all* foreign exchange gains and losses") (italics added), and concerning which exhaustion of administrative remedies is inapplicable because (1) under that doctrine all that is required is a brief statement alerting the agency to a plaintiff's position such that the agency can address it, *see, e.g., China Steel Corp. v. United States,* 2 CIT 715, 740−41, 264 F. Supp. 2d 1339, 1364 (2003), and which requirement Ekinciler met in its administrative case brief, *see, e.g.,* Pl.s' Reply at 14, and (2) it is well-settled that it is incumbent upon the agency, presumed to know its own policies, to explain any deviations therefrom, *see, e.g.,* Slip Op. 09−30 at 5 and cases cited, and the court therefore considering such argument of Commerce without merit), and Commerce further expressing dissatisfaction with the court's order because Commerce's intent "was to properly match costs to the periods that benefitted from such costs" and averring further that "Ekinciler received a benefit during the [period of re-

view] from the capitalization of these expenses as an asset in its financial statements" and that "[t]he capitalization of this asset helped generate revenues over the periods subsequent to the 2001 financial crisis, including the POR, impacting Ekinciler's cost of production," but without further specifics explaining such rationalization or speculation, which appears to be *post hoc* in any event, and Commerce's remand having otherwise complied with the court's order and resulting in a recalculated dumping margin of 0.11 percent; now, therefore, in view of the foregoing, it is hereby

ORDERED, ADJUDGED and DECREED that defendant's Final Results of Redetermination Pursuant to Court Remand (May 14, 2009), be, and they hereby are, sustained.