# U.S. Customs and Border Protection

Slip Op. 10–1

SAHA THAI STEEL PIPE (PUBLIC) COMPANY LTD., Plaintiff, v. UNITED STATES, Defendant, and ALLIED TUBE AND CONDUIT CORP., and WHEATLAND TUBE COMPANY, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 08–00380

**JUDGMENT**

The plaintiffs having filed challenges to certain findings of the defendant International Trade Administration, U.S. Department of *Commerce ("ITA") sub nom. Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 61019 (Oct. 15, 2008), and having consolidated those actions and interposed motions for judgment upon the record pursuant to USCIT Rule 56.2, resulting in remand of the matter to the ITA for further consideration; and the ITA having filed herein on December 14, 2009 its Final Results of Redetermination Pursuant to Remand, dated December 11, 2009, pursuant to Slip Op. 09–116 (Oct. 15, 2009); and the court having reviewed the Redetermination and finding it in accordance with the order of remand and not having received any comment thereon or opposition thereto from any party to this case by December 29, 2009; after due deliberation, it is therefore

**ORDERED, ADJUDGED and DECREED** that the ITA's Results of Redetermination Pursuant to Remand dated December 11, 2009 be, and they hereby are, sustained.

Dated: January 4, 2010
New York, New York

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

Slip Op. 10–2

GERBER FOOD (YUNNAN) CO., LTD. and GREEN FRESH (ZHANGZHOU) CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR PRESERVED MUSHROOM TRADE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge

Court No. 04–00454

[Affirming, pursuant to voluntary remand, the redetermination of the final results of an antidumping administrative review in which the United States Department of Commerce applied "facts otherwise available" and "adverse inferences" with respect to certain sales transactions]

Dated: January 5, 2010

*Garvey Schubert Barer* (*Lizbeth R. Levinson* and *Ronald M. Wisla*) for plaintiffs.

*Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); *Scott D. McBride*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

*Kelley Drye & Warren LLP* (*Michael J. Coursey* and *John M. Herrmann*) for defendant-intervenor.

## OPINION

**Stanceu, Judge:**

The court has reviewed the Redetermination Pursuant to Court Remand ("Remand Redetermination") filed by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") on July 29, 2009. Defendant sought and obtained an order for a voluntary remand following plaintiffs' commencement of an action to contest the Department's final determination ("Final Results") in the fourth administrative review of an antidumping order on certain preserved mushrooms from China. Order, May 5, 2009; *see Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review & Final Results & Partial Rescission of the Fourth Antidumping Duty Admin. Review*, 69 Fed. Reg. 54,635 (Sept. 9, 2004) ("*Final Results*").

With respect to plaintiff Green Fresh (Zhangzhou) Co., Ltd. ("Green Fresh"), the Remand Redetermination announces the Department's decision "to calculate a margin for it free of facts otherwise available." Remand Redetermination 7. As to plaintiff Gerber Food (Yunnan) Co., Ltd. ("Gerber"), Commerce states that it "has limited its application of AFA ["adverse facts available"] to only those sales transactions for which Gerber continued to use Green Fresh invoices in order to avoid paying the proper antidumping duties during the *Fourth Mushrooms Review* POR [*i.e.*, the 'period of review']." *Id.* at 4. During the fourth administrative review, Commerce had found that those sales transactions pertained to twenty-three entries of merchandise subject to the review that Gerber made using Green Fresh's invoices, rather

than its own invoices. *Id.* at 3. Finally, Commerce concludes in the Remand Redetermination that a rate of 121.33% is appropriate to apply as an adverse inference because it is "derived from Gerber's own verified data, submitted by that respondent in the most recent review prior to the *Third Mushrooms Review* in which it actively participated." Remand Redetermination 5–6. The Remand Redetermination includes a finding that Gerber "failed to cooperate by not acting to the best of its ability." *Id.* at 6; 19 U.S.C. § 1677e(b) (2006). In the Final Results, Commerce had found that Gerber did not act to the best of its ability "in its reporting of information to the U.S. government, both at the time of entry of the merchandise and in its previous submissions to the Department, relating to the agreement between Gerber and Green Fresh which directly pertained to the transactions under review in this POR." *Final Results*, 69 Fed. Reg. at 54,637.

Pursuant to the court's Order of May 5, 2009, which granted defendant's request for a voluntary remand, plaintiffs were provided the opportunity to file with the court comments on the Remand Redetermination within thirty days of the filing of the Remand Redetermination. *See* Order, May 5, 2009. Neither of the plaintiffs nor defendant-intervenor filed comments. Under these circumstances, the court reasonably may infer that the parties concur in the Remand Redetermination. *See Wuhan Bee Healthy Co., Ltd. v. United States*, 32 CIT __, __, Slip Op. 08–61, at 12 (May 29, 2008) ("Under such circumstances, Commerce 'may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency's [remand results],' and the court will uphold the parties' concurrence." (quoting *AL Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285, 366 F. Supp. 2d 1236, 1245 (2005))).

The court is affirming the Remand Redetermination on the basis of the assumed concurrence of the parties and will enter judgment accordingly. In so doing, the court does not express or imply agreement with all of the statements that Commerce makes in its notice announcing the Remand Redetermination. The court disagrees specifically with the Department's statements in the Remand Redetermination opining on the scope of the Department's "inherent authority." Remand Redetermination 7–9. The court concludes that these statements pertaining to the scope of inherent authority are not a correct statement of the law. The statements in question are unnecessary to the Department's decisions in this case and are inconsistent with the reasoning in *Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT 753, 774–75, 387 F. Supp. 2d 1270, 1289–90 (2005). They also appear to be inconsistent with the Department's statement

in the concluding paragraph of the Remand Redetermination that, in invoking the use of facts otherwise available and an adverse inference as to Gerber, Commerce is acting under the authority of 19 U.S.C. § 1677e(a) and (b). *See* Remand Redetermination 9.

Dated: January 5, 2010
New York, New York

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

Slip Op. 10–3

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and HYUNDAI HYSCO, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 08–00131

[Denying plaintiff's motion for judgment upon the agency record on its claim contesting the final results of an administrative review of an antidumping duty order]

Dated: January 11, 2010

*Skadden, Arps, Slate, Meagher & Flom LLP* (*Jeffrey D. Gerrish, John J. Mangan, Robert E. Lighthizer, Ellen J. Schneider, Luke A. Meisner*, and *Soo-Mi Rhee*) for plaintiff.

*Wiley Rein LLP* (*Timothy C. Brightbill*) for plaintiff-intervenor.

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

*Akin Gump Strauss Hauer & Feld LLP* (*J. David Park, Bryce V. Bittner, Jarrod M. Goldfeder, Lisa W. Ross*, and *Natalya D. Dobrowolsky*) for defendant-intervenor.

## OPINION

**Stanceu, Judge:**

### I.
### Introduction

Plaintiff United States Steel Corporation ("U.S. Steel") contests the final determination ("Final Results") issued in 2008 by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in a periodic administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("subject merchandise") from the

Republic of Korea ("Korea"). *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin. Review*, 73 Fed. Reg. 14,220 (Mar. 17, 2008) ("*Final Results*"). Plaintiff and plaintiff-intervenor Nucor Corporation ("Nucor") are U.S. producers of corrosion-resistant carbon steel flat products. Plaintiff claims that Commerce, in determining a dumping margin for defendant-intervenor Hyundai HYSCO ("HYSCO"), a Korean manufacturer and exporter of subject merchandise, unlawfully failed to make a downward adjustment in the calculation of the constructed export price ("CEP") of U.S. sales of HYSCO's subject merchandise to account for certain indirect selling expenses that HYSCO incurred in Korea. *Id.* at 14,220; Compl. ¶ 12. Because substantial record evidence supports the Department's determination that the indirect selling expenses were not incurred on behalf of the sales of HYSCO's subject merchandise to unaffiliated purchasers in the United States, the court rejects plaintiff's claim.

## II.
## Background

In September 2006, Commerce initiated the thirteenth administrative review of an antidumping duty order on certain corrosion-resistant carbon steel flat products from Korea for the period of August 1, 2005 through July 31, 2006 (the "period of review"). *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 71 Fed. Reg. 57,465, 57,465 (Sept. 29, 2006). In its response to Section A of Commerce's questionnaire ("Section A Response"), HYSCO reported that it sold subject merchandise to unaffiliated distributors in the United States through a wholly-owned U.S. subsidiary, Hyundai Hysco USA, Inc. ("HHU"), that HHU is located in Houston, Texas and has a branch sales office in Los Angeles, California, and that both HYSCO and HHU were involved in the sales negotiation process with the unaffiliated distributors. *Letter from Akin Gump to Sec'y of Commerce* 12–13, 20–21 (Nov. 14, 2006) (Admin. R. Doc. No. 44) (at pages 6–7 and 14–15 of the Section A Response) ("*Section A Resp.*"). The Section A Response added that "HHU directly communicates with the customers throughout the sales process, receives the U.S. customers' orders, places the corresponding orders with HYSCO, invoices the customers, arranges U.S. customs clearance, brokerage, and wharfage, and takes title to the merchandise." *Id.* at 12–13 (at pages 6–7 of the Section A Response).

HYSCO provided in its Section A Response, in response to Commerce's instructions, a "Level of Trade Chart" listing fifteen activities (identified as "Selling Functions Services by Channel of Distribution") that HYSCO performed in its home market, along with brief

definitions for each of these activities. *Id.* at 20–22, Ex. 6 (at pages 14–16 and Ex. 6 of the Section A Response). In a supplemental questionnaire, Commerce asked a series of questions concerning HYSCO's activities in maintaining HHU, the U.S. sales affiliate, and how the costs associated with those activities were reported. *Letter from Program Manager, Dep't of Commerce, to Akin Gump* 3–4 (Dec. 21, 2006) (Admin. R. Doc. No. 70) ("*Supplemental Questionnaire*"). In its response to the supplemental questionnaire ("Supplemental Response"), HYSCO explained that although it performed general activities in Korea necessary to support sales to the United States, it did not perform activities devoted solely to maintaining or supporting its U.S. sales subsidiaries. *Letter from Akin Gump to Sec'y of Commerce* 11–13 (Jan. 30, 2007) (Admin. R. Doc. No. 95) (at pages 5–7 of the Supplemental Response) ("*Supplemental Resp.*"). The response also informed Commerce that HYSCO records the expenses associated with these general activities as selling, general and administrative ("SG&A") expenses and included a second chart, which it labeled as "Expense Field associated with Selling Activity" (the "Selling Functions Chart"), that identified selling functions as indirect selling expenses incurred in the country of manufacture, Korea. *Supplemental Resp.* Ex. S-9. Commerce reviewed and verified HYSCO's questionnaire responses and, with respect to the reporting of the indirect selling expenses, found no discrepancies. *Mem. from Int'l Trade Compliance Analyst, Office 3, to The File* 6–7 (Aug. 31, 2007) (Admin. R. Doc. No. 231) ("*Verification Report*").

Commerce published preliminary results of the thirteenth review ("Preliminary Results") in September 2007, in which it preliminarily assigned HYSCO a weighted-average dumping margin of 0.51%. *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Prelim. Results & Partial Rescission of Antidumping Duty Admin. Review*, 72 Fed. Reg. 51,584, 51,588 (Sept. 10, 2007) ("*Prelim. Results*"). Following publication of the Preliminary Results, plaintiff and plaintiff-intervenor argued in case briefs that the antidumping statute required Commerce to adjust CEP for certain of HYSCO's indirect selling expenses. *Issues & Decisions for the Final Results of the Thirteenth Admin. Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2005–2006) (Final Results)*, at 27–28 (Mar. 10, 2008) ("Decision Mem."). Rejecting these arguments, Commerce explained that because HYSCO's questionnaire responses showed that there were no indirect selling expenses incurred in Korea on behalf of U.S. sales to unaffiliated parties, it would be inappropriate to adjust HYSCO's indirect sales expense ratio for these expenses.

*Id.* Commerce made no such adjustment in the Final Results, in which Commerce assigned to HYSCO a weighted-average dumping margin of 0.53%. *Final Results*, 73 Fed. Reg. at 14,221.

Plaintiff brought this action on April 16, 2008. *See* Summons. Before the court is plaintiff's motion for judgment upon the agency record. Pl.'s Mot. for J. on the Agency R. Under Rule 56.2; Mem. in Supp. of Pl.'s Mot. for J. on the Agency R. Under Rule 56.2 ("Pl.'s Mem.").

## III.
## Discussion

The court exercises jurisdiction under 28 U.S.C. § 1581(c), under which the court reviews actions brought under 19 U.S.C. § 1516a, including actions contesting the final results of an administrative review issued under 19 U.S.C. § 1675(a). 19 U.S.C. §§ 1516a, 1675(a) (2006); 28 U.S.C. § 1581(c) (2006). In reviewing the Final Results, the court is required to hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In the thirteenth review, Commerce resorted to CEP for calculating HYSCO's antidumping margin because Commerce found that HYSCO sold subject merchandise to its U.S. subsidiaries and that the subsidiaries resold the merchandise to unaffiliated customers. *See Decision Mem.* 27–28; 19 U.S.C. § 1677a(b) (2006). With respect to CEP, the statute requires in 19 U.S.C. § 1677a(d) that Commerce reduce the starting price used to establish constructed export price, *i.e.*, the price at which the merchandise is resold by an affiliated party to an unaffiliated purchaser, by the amount of certain expenses "generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." 19 U.S.C. § 1677a(d)(1) (2006).[1] The Department's regulations

[1] In pertinent part, the statute provides:

For purposes of this section, the price used to establish constructed export price shall also be reduced by–

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)–

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

provide that the Secretary of Commerce, in establishing CEP, "will make adjustments for expenses associated with commercial activities in the United States that *relate* to the sale to an unaffiliated purchaser, no matter where or when paid." 19 C.F.R. § 351.402(b) (2009) (emphasis added). The regulations further state that "[t]he Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act [i.e., 19 U.S.C. § 1677b(a)(6)(C)(iii)]." *Id.* The regulation codifies the principle that the purpose of a CEP adjustment for selling expenses is to arrive at a constructed export price that approximates what export price would have been. *See Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) (citing *The Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316 (Vol. 1), at 823 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4163, and *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,371 (May 19, 1997) (the "*Preamble* "), and stating that "[t]o calculate CEP at a price corresponding to EP [*i.e.*, export price], Commerce logically must deduct only those expenses incurred solely in CEP transactions, *i.e.*, only those expenses associated with the sale of subject merchandise to an unaffiliated purchaser in the United States by a party affiliated with the foreign producer or exporter.").

In claiming that Commerce erred in declining to make a downward adjustment under 19 U.S.C. § 1677a(d) for certain of the indirect selling expenses that HYSCO incurred, plaintiff does not challenge the validity of 19 C.F.R. § 351.402(b). Instead, plaintiff's claim poses the question of whether substantial record evidence supports Commerce's finding that the particular indirect selling expenses that plaintiff identifies were not incurred "on behalf of" the sales that HHU made to unaffiliated purchasers in the United States. *Decision Mem.* 28. In view of the Department's regulation, the court considers Commerce to have reached an implicit determination that these expenses did not "relate to" the sales to the unaffiliated distributors, within the meaning of 19 C.F.R. § 351.402(b). *See* 19 C.F.R. § 351.402(b); *Decision Mem.* 27–28. In reviewing the issue presented by this case, the court looks to the evidence on the record considered as a whole. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (stating that the court may affirm a determination as supported by substantial record evidence even if some evidence detracts from the Department's conclusion).

(D) any selling expenses not deducted under subparagraph (A), (B), or (C); . . . . 19 U.S.C. § 1677a(d) (2006).

Plaintiff makes two arguments in its memorandum in support of its motion for judgment upon the agency record. First, plaintiff argues that the record lacks substantial evidence to support Commerce's finding that no selling expenses were incurred in Korea on behalf of U.S. sales to unaffiliated parties. Pl.'s Mem. 9–13. Second, plaintiff argues that Commerce's finding must be overturned because the facts present in the thirteenth review are not distinguishable from those in the two previous reviews, in which Commerce made downward adjustments in determining CEP based on findings that HYSCO performed selling functions related to U.S. sales to unaffiliated parties. *Id.* at 13–16.

The record evidence at the center of this dispute includes the Section A Response, which incorporated the Level of Trade Chart and definitions for the various selling activities that the chart attributed to HYSCO. *Section A Resp.* Ex. 6. It also includes HYSCO's Supplemental Response, which included the Selling Functions Chart. *Supplemental Resp.* Ex. S-9. The record contains, further, the report of the verification that Commerce conducted on HYSCO's business records, in which Commerce reported that it found no discrepancies in the submitted information on HYSCO's indirect selling expenses. *Verification Report* 6–7.

Plaintiff argues that HYSCO's questionnaire responses provide "clear and undisputed record evidence" that HYSCO incurred some indirect selling expenses for which a downward adjustment in CEP must be made. Pl.'s Mem. 9. In support of this argument, plaintiff points to seven of the fifteen selling activities that HYSCO identified in those responses and, specifically, in charts included therein (*e.g.*, the Level of Trade Chart and the Selling Functions Chart). *Id.* at 10–11. Plaintiff argues that the questionnaire responses establish, first, that HYSCO incurred indirect selling expenses in performing these selling activities and, second, that HYSCO performed seven of these activities "in support of its sales to unaffiliated U.S. customers." *Id.* at 10. The seven selling activities that plaintiff relies on for its claim are "Strategic/Economic Planning," "Personnel Training/ Exchange," "Engineering Services," "Advertising," "Procurement/ Sourcing Services," "Market Research," and "Technical Assistance." [2] *Id.* at 11; *see Section A Resp*. Ex. 6.

The Section A Response, which contains a listing of the seven selling activities in question in the Level of Trade Chart and definitions for these activities, does not resolve the issue of whether these

[2] The other eight reported selling activities were "Sales Forecasting," "Sales Promotion," "Packing," "Order Input/Processing," "Direct Sales Personnel," "Sales/Marketing Support," "Provide Warranties Service," and "Freight & Delivery Arrangement." *Letter from Akin Gump to Sec'y of Commerce* Ex. 6 (Nov. 14, 2006) (Admin. R. Doc. No. 44) ("*Section A Resp.*").

seven activities related to HHU's resale transactions. Without further explanation or clarification, each of the seven activities could be construed to refer to business activities occurring outside the United States or to refer to business activities in the United States other than those resale transactions. Commerce was induced by the Section A Response to issue a supplemental questionnaire soliciting information to resolve whether indirect selling expenses pertaining to the listed selling activities should result in a deduction to CEP. *Supplemental Questionnaire* 3–4. This inquiry resulted in HYSCO's statement that "HYSCO does not perform activities in Korea devoted solely to maintaining or supporting the U.S. sales subsidiaries." *Supplemental Resp*. 11 (at page 5 of the Supplemental Response). The Supplemental Response further stated that "HYSCO does perform general activities necessary to support sales to the United States, for example, scheduling production and making logistics arrangements for shipments of the finished products." *Id.* This statement does not compel a conclusion that the activities related to the resale transactions in the United States, as opposed to the related party sales transactions. The statement in the Supplemental Response that "HYSCO also performs general activities that indirectly support its overseas subsidiaries," *id.*, might be construed to give rise to an inference that the indirect support provided to one of those subsidiaries, HHU, related to the resale transactions because, the record shows, HHU was a sales subsidiary. Nevertheless, Commerce was not required to draw such an inference, and other record evidence would call such an inference into question. The Section A Response included the statement that "HHU directly communicates with the customers throughout the sales process, receives the U.S. customers' orders, places the corresponding orders with HYSCO, invoices the customers, arranges U.S. customs clearance, brokerage, and wharfage, and takes title to the merchandise." *Section A Resp*. 12–13 (at pages 6–7 of the Section A Response); *see Supplemental Resp*. 12–13 (at pages 6–7 of the Supplemental Response).

The record shows, additionally, that Commerce based its acceptance of HYSCO's explanation on its having verified HYSCO's questionnaire responses. *See Decision Mem.* 28. After verifying HYSCO's questionnaire responses, Commerce stated that it would not make a CEP adjustment for any of HYSCO's indirect selling expenses, explaining that "HYSCO's questionnaire response shows that there were no selling expenses incurred in Korea on behalf of U.S. sales to unaffiliated parties, as reported in their LOT [*i.e.*, the Level of Trade Chart]," that Commerce found no discrepancies upon verification,

and that Commerce concluded that it would be inappropriate to make an adjustment to HYSCO's indirect selling expense ratio in the Final Results. *Id.*

In summary, plaintiff's arguments do not persuade the court that the questionnaire responses are "clear and undisputed record evidence" that the seven selling activities resulted in indirect selling expenses that HYSCO incurred in Korea and that related to HHU's sales to unaffiliated customers in the United States. *See* Pl.'s Mem. 9–10. Although the record evidence supports a finding that HYSCO incurred indirect selling expenses in Korea in performing these seven selling activities, when considered as a whole the record evidence does not preclude Commerce from determining that the indirect selling expenses resulting from these seven activities did not relate to HHU's sales to the unaffiliated U.S. distributors. Moreover, in this judicial proceeding, the "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999) (quoting *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966)).

Plaintiff's second argument, that Commerce must deduct the subject indirect selling expenses in the thirteenth review because it deducted expenses related to HYSCO's selling activities in the eleventh and twelfth reviews, Pl.'s Mem. 6–7, also falls short on the administrative record before the court. Plaintiff argues specifically that the selling activities performed by HYSCO in the thirteenth review were "*identical*" to those HYSCO performed in the twelfth review. *Id.* at 16. The records of the eleventh and twelfth administrative reviews are not before the court, so the court is unable to confirm the premise of plaintiff's argument. However, even were the court to accept this premise, it would not follow that the court must set aside Commerce's decision in the thirteenth review not to make an adjustment in CEP to account for the indirect selling expenses in question. Under the substantial evidence component of the applicable standard of review, the court must review the findings and determinations that Commerce made in reaching the final results of the thirteenth review, and it must do so according to the evidence on the administrative record before it. 19 U.S.C. § 1516a(b)(1)(B)(i). Commerce's factual findings in the eleventh and twelfth administrative reviews, whether correct or not, are not before the court for review. Additionally, some evidence of record in the thirteenth review does not support the premise of plaintiff's argument. The record contains HYSCO's statement that "[w]hile HYSCO employees have visited HHU for sales

meetings and to assist in providing general technical advice to customers, they did not conduct any such travel or meetings during the POR." *Supplemental Resp.* 12 (at page 6 of the Supplemental Response). This statement is evidence that the activities conducted by HYSCO in the thirteenth review may have differed from those in prior reviews in a way that is relevant to the issues presented in this case.[3]

Finally, plaintiff argues in its reply brief that a remand is required because defendant, in its brief opposing plaintiff's motion, misstates the legal standard applicable in this case. Plaintiff refers to defendant's argument that Commerce does not deduct indirect selling expenses incurred by the foreign producer in the foreign country that are general in nature rather than related directly to sales to the unaffiliated U.S. customer. Reply Br. in Supp. of Pl.'s Mot. for J. on the Agency R. under Rule 56.2, at 11–12 ("Pl.'s Reply") (citing Def.'s Mem. in Opp'n to Pl.'s Mot. for J. upon the Agency R. 7 ("Def.'s Opp'n")). As plaintiff points out, defendant argued that Commerce does not adjust for indirect selling expenses that are general in nature and do not relate directly to the sale to the unaffiliated customer in the United States. Def.'s Opp'n 7. However, defendant's argument is a *post hoc* rationalization for the Department's decision, as plaintiff itself recognizes. *See* Pl.'s Reply 10. The court finds nothing in the Final Results or the incorporated decision memorandum stating that Commerce made its decision based on a finding that HYSCO's selling expenses were "general" in nature or a finding that these expenses did not relate "directly" to the sales to the unaffiliated distributors. *See Decision Mem.* 27–28. It was based instead on a finding that HYSCO incurred no selling expenses in Korea "on behalf of U.S. sales to unaffiliated parties." *Id.* at 28. There is no meaningful distinction between this express finding and a finding that the expenses at issue did not "relate to" the sale to the unaffiliated purchasers, within the meaning of the Department's regulation. 19 C.F.R. § 351.402(b).

[3] Commerce disagreed with U.S. Steel's argument, made during the thirteenth review, "that the facts in the instant review are identical to those in the previous reviews." *Issues & Decisions for the Final Results of the Thirteenth Admin. Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2005–2006) (Final Results)*, at 27 (Mar. 10, 2008) ("*Decision Mem.*"). Commerce stated in the issues and decisions memorandum that it adjusted CEP for a portion of HYSCO's indirect selling expenses in the eleventh and twelfth reviews because it found in those reviews that HYSCO performed most of the selling functions involved in the U.S. resales. *Id.* at 27–28. Drawing a distinction with the previous two reviews, Commerce stated that "[i]n this review, HYSCO's questionnaire response shows that there were no selling expenses incurred in Korea on behalf of U.S. sales to unaffiliated parties, as reported in their [Level of Trade] chart." *Id.* at 28.

For the reasons set forth above, the court must affirm the Department's decision not to adjust the CEP of HYSCO's subject merchandise to account for the seven categories of indirect selling expenses identified by plaintiff.

## IV.
## Conclusion

The court will affirm the Final Results because plaintiff has failed to show that the Department acted contrary to law in calculating HYSCO's CEP without deducting the indirect selling expenses identified by plaintiff. Judgment will be entered accordingly.

Dated: January 11, 2010
New York, New York

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

Slip Op. 10–4

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Judge Judith M. Barzilay
Court No. 03–00115

[Plaintiff's Motion for Partial Judgment Upon the Agency Record is denied, and Defendant's Motion to Dismiss is granted.]

Dated: January 12, 2010

*Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP* (*Robert B. Silverman, Ned H. Marshak, Robert F. Seely*, and *Joseph M. Spraragen*); of counsel: *Paulsen K. Vandevert*, for Ford Motor Company.

*Tony West*, Assistant Attorney General; *Barbara S. Williams*, Attorney In Charge International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny*), for Defendant United States; *Beth C. Brotman*, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

## OPINION

**Barzilay, Judge:**

## I.
## Introduction

Plaintiff Ford Motor Company ("Ford") brings suit based upon its contention that the North American Free Trade Agreement ("NAFTA") Certificates of Origin need not be filed with U.S. Customs & Border Protection ("Customs") within one year of the date of im-

portation for an importer to have a valid claim for a NAFTA refund under 19 U.S.C. § 1520(d).[1] Rather, Ford asserts that an importer may submit the certificates any time before the underlying entry liquidations are final. Pl. Br. 9–14. Ford further contends that, even if it submitted the certificates more than one year from the date of importation, Customs could grant the company's § 1520(d) claim under either 19 C.F.R. § 181.31–32 or the NAFTA Reconciliation Program. Pl. Br. 9–14. Ford also argues that 19 C.F.R. § 10.112 compels Customs to accept the untimely filed certificates. Pl. Br. 14–18. The United States disagrees and moves the court to dismiss this case for lack of subject matter jurisdiction. Def. Br. 4–19. The court agrees with Defendant's framing of the issue as crucially one of jurisdiction based upon Federal Circuit precedent, and because that Court has resolved this issue, the court grants Defendant's Motion to Dismiss for the reasons explained below.

## II.
## Background

Between January 1997 and January 1999, Ford imported various automotive parts from Canada into the United States. One of these shipments entered the United States as Entry No. 231–2787386–9 on June 27, 1997.[2] Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts ("Undisputed Facts") 1. At the time of entry, Ford did not assert that the goods were eligible for duty-free treatment under NAFTA; instead, the merchandise entered under general duty rates, and Customs liquidated the goods as entered. Undisputed Facts 2. On May 13, 1998, Ford electronically filed post-entry Claim No. 3801–98–351253 and sought a refund under NAFTA pursuant to § 1520(d). Undisputed Facts 3. The claim did not include pertinent certificates of origin. Undisputed Facts 3. Ford submitted these certificates to Customs on November 5, 1998, over a year after the date of importation. Undisputed Facts 4. On March 27, 1999, Customs at the Port of Detroit denied Ford's claim, stating that "[t]he NAFTA Certificate of Origin was not furnished within one year of the date of importation." Pl. Br. Ex. 7 at 2. Ford subsequently filed Protest No. 3801–99–100369 to contest this denial, which Customs also denied on the same grounds. HQ 228654 at 6–8 (Aug. 29, 2002).

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[1] Ford asserts that the court has jurisdiction over this issue under either 28 U.S.C. § 1581(a) or 1581(i). Compl. ¶¶ 1–3.

[2] The parties agreed to use Entry No. 231–2787386–9 and associated Claim No. 3801–98–351235 as a representative claim to resolve the legal issue before the court. Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts 1.

## III.
## Standard of Review to Determine Subject Matter Jurisdiction

A fundamental question in any action before the Court is whether subject matter jurisdiction exists over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). The party invoking the Court's jurisdiction bears the burden of establishing it. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The court assumes that all undisputed facts are true and must draw all reasonable inferences in the plaintiff's favor when it decides a motion to dismiss based upon lack of subject matter jurisdiction. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

## IV.
## Discussion

Title 28 of the United States Code governs the jurisdiction of the Court. Section 1581(a) provides the Court with "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part." § 1581(a). Customs reviews a protest pursuant to 19 U.S.C. § 1515, and a condition precedent for the agency to exercise that authority is the filing of a protest by an aggrieved party under 19 U.S.C. § 1514.[3] § 1515(a). Customs must reach a "decision" on the protest before a party may sue under § 1581(a). *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994). Customs cannot address the merits of a protest, and therefore make a protestable decision, in the absence of a claim filed in accordance with law. *See Corrpro Cos., Inc. v. United States*, 433 F.3d 1360, 1365–66 (Fed. Cir. 2006) (citing *Xerox Corp. v. United States*, 423 F.3d 1356, 1363, 1365 (Fed. Cir. 2005)).

[3] Section 1514(a) sets forth the categories of Customs decisions that an aggrieved party may protest. Customs may review a protest challenging, *inter alia*, the classification and rate and amount of duties chargeable. § 1514(a). These categories are exclusive, "and if 'Customs' underlying decision does not relate to any of these seven categories, the court may not exercise § 1581(a) jurisdiction over an action contesting Customs' denial of a protest filed against that decision.'" *Am. Nat'l Fire Ins. Co. v. United States*, 30 CIT 931, 939–40, 441 F. Supp. 2d 1275, 1285 (2006) (quoting *Playhouse Imp. & Exp., Inc. v. United States*, 18 CIT 41, 44, 843 F. Supp. 716, 719 (1994)); *see also Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994).

Section 1520(d) states that a post-importation claim for a NAFTA refund is properly filed when an importer, "within 1 year after the date of importation, files . . . a claim that includes," inter alia, "copies of all applicable NAFTA Certificates of Origin." § 1520(d) (emphasis added); accord §§ 181.31 ("[T]he importer . . . may file a claim for a refund of any excess duties at any time within one year after the date of importation of the good in accordance with the procedures set forth in § 181.32 . . . ."), 181.32(b) ("A post-importation claim for a refund *shall be filed by presentation of," inter alia*, "a copy of each Certificate of Origin . . . pertaining to the good.") (emphasis added). Ford argues that it raised a proper claim by means of an electronic filing, even though the relevant certificates were not filed within one year after the date of importation. Pl. Br. 8. The court considers *Corrpro Cos., Inc.*, 433 F.3d 1360, and *Xerox Corp.*, 423 F.3d 1356, to be dispositive of the issue in this case. Plaintiff's attempts to distinguish them from the facts of this case are unavailing.

In *Xerox Corp*. an importer of several orders of electrostatic photocopiers and wire harnesses from Mexico did not make a claim for NAFTA treatment upon entry because it did not have the requisite certificates of origin as required by the regulations. When it did acquire them, the company made its duty-free entry claim pursuant to a protest under § 1514(a). Unfortunately, only one entry was still within the one-year claim period, and the other entries were denied duty-free treatment. The company then appealed to this Court, which held that the issue of NAFTA eligibility on those entries outside of the one-year claim period was never before Customs and that the Court had no jurisdiction to decide the matter of the denied protests. The Federal Circuit agreed and explained the NAFTA scheme with clear and detailed discussions of the treaty, the implementing statute, the legislative history, and the applicable regulations. *Xerox Corp.*, 423 F.3d at 1361–65. Pertinent here, the appeals court reiterated that § 1520(d) and § 181.31 reinforce the one-year time period for raising a NAFTA claim. *Id.* at 1362–63. Unfortunately for Plaintiff, the Federal Circuit also found that § 1520(d) unambiguously requires that any claim for NAFTA treatment made pursuant to that statute must include timely filed certificates of origin to be valid. *See Xerox Corp.*, 423 F.3d at 1361–63.

In *Corrpro Cos., Inc.*, the Federal Circuit followed its reasoning in *Xerox Corp.* in a case with similar facts. It said

> there is a protestable decision as to NAFTA eligibility that confers jurisdiction in the Court of International Trade under [§ 1581(a)] only when the importer has made a valid claim for NAFTA treatment, either at entry or within a year of entry, with

> a written declaration and Certificates of Origin presented in a timely fashion, and Customs has engaged in "some sort of decision-making process" expressly considering the merits of that claim.

*Corrpro Cos., Inc.*, 433 F.3d at 1365 (emphasis added) (quoting *Xerox Corp.*, 423 F.3d at 1363). It is undisputed that Ford did not request NAFTA eligibility at the time of entry. Moreover, Ford acknowledges that it submitted the documents over a year from the date the goods entered the United States. Therefore, Ford's claim for a NAFTA refund was invalid, and Customs could not have made a protestable decision to deny the company's request for preferential NAFTA treatment. § 1520(d); accord §§ 181.31–32; *see Corrpro Cos., Inc.*, 433 F.3d at 1366. Therefore, the court has no jurisdiction over Ford's claim under § 1581(a).

Ford also claims that the Court has jurisdiction over its claim under § 1581(i). The Court may not exercise jurisdiction pursuant to § 1581(i) where jurisdiction "is or could have been available" under another subsection of § 1581. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (quotations & citation omitted). Because Ford could have brought the case under § 1581(a) if it had filed a valid claim and Customs denied its requested relief on the merits, the company cannot show that the relief provided under that subsection would have been manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). The Court therefore has no jurisdiction over this claim under § 1581(i).

Finally, because the court finds that it does not have subject matter jurisdiction over Entry No. 231–2787386–9, Ford's remaining claims on this entry are moot.

## V.
## Conclusion

For the reasons discussed herein, Defendant's Motion to Dismiss is granted. The previously scheduled oral argument of February 17, 2010, is hereby adjourned.

Dated: January 12, 2010
New York, New York

*/s/ Judith M. Barzilay*
JUDITH M. BARZILAY, JUDGE