U.S. Court of Appeals for the Federal Circuit

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., TRINA SOLAR (U.S.) INC., YINGLI GREEN ENERGY HOLDING COMPANY LIMITED, YINGLI GREEN ENERGY AMERICAS, INC., Plaintiffs-Appellants WUXI SUNTECH POWER CO., LTD., SUNTECH AMERICA, INC., SUNTECH ARIZONA, INC., Plaintiffs v. UNITED STATES INTERNATIONAL TRADE COMMISSION, SOLARWORLD AMERICAS, INC., Defendants-Appellees

Appeal No. 2016–1053

Appeal from the United States Court of International Trade in No. 1:13-cv-00014-RKE, Senior Judge Richard K. Eaton.

Decided: January 22, 2018

NEIL R. ELLIS, Sidley Austin LLP, Washington, DC, argued for plaintiffs-appellants.

MARY JANE ALVES, Office of the General Counsel, United States International Trade Commission, Washington, DC, argued for defendant-appellee United States International Trade Commission. Also represented by ANDREA C. CASSON, DOMINIC L. BIANCHI.

TIMOTHY C. BRIGHTBILL, Wiley Rein, LLP, Washington, DC, argued for defendant-appellee SolarWorld Americas, Inc. Also represented by TESSA V. CAPELOTO, LAURA EL-SABAAWI, USHA NEELAKANTAN.

Before TARANTO, PLAGER, and CHEN, *Circuit Judges.*

TARANTO, *Circuit Judge.*

Changzhou Trina Solar Energy Co., Ltd., and Yingli Green Energy Holding Company, Ltd., are Chinese producers of crystalline silicon photovoltaic cells, modules, laminates, and panels (CSPV products). Those products were imported into the United States and were the "subject imports" in the proceeding at issue here. Trina Solar (U.S.), Inc., and Yingli Green Energy Americas, Inc., imported the subject imports into the United States. The two producers and two importers—collectively, the Chinese Respondents—are appellants in this court.

On October 19, 2011, appellee SolarWorld Americas, Inc., filed petitions seeking imposition on the subject imports of antidumping duties under 19 U.S.C. §§ 1673–1673h and countervailing duties under 19 U.S.C. §§ 1671–1671h. The U.S. Department of Commerce eventually agreed with SolarWorld that the subject imports were being sold in the United States at less than its fair value and were being unfairly subsidized by the Chinese government. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules,*

from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 Fed. Reg. 63,791 (Oct. 17, 2012) (*Commerce Antidumping Duty Determination); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788 (Oct. 17, 2012) (*Commerce Countervailing Duty Determination*). The International Trade Commission, performing its role in the statutory process for imposition of duties, then determined that "an industry in the United States is materially injured by reason of imports of crystalline silicon photovoltaic ('CSPV') cells and modules from China that [Commerce] has determined are subsidized and sold in the United States at less than fair value." *Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190), USITC Pub. 4360, at 3 (Nov. 2012) (Final) (*ITC Final Decision); Crystalline Silicon Photovoltaic Cells and Modules from China*, 77 Fed. Reg. 72,884 (Dec. 6, 2012).

The Chinese Respondents appealed the Commission's determination to the United States Court of International Trade. As relevant here, they argued that the Commission had not properly found the required causal connection between the unfairly priced or subsidized imports and the weakened state of the domestic industry that it identified as "materially injured by reason of" the imports. The Court of International Trade rejected the challenge and sustained the Commission's determination. *Changzhou Trina Solar Energy Co., Ltd. v. U.S. Int'l Trade Comm'n*, 100 F. Supp. 3d 1314, 1331–32, 1349 (Ct. Int'l Trade 2015).

The Chinese Respondents timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5). We review the Commission's determination using the same standard as the Court of International Trade: we ask whether it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). We affirm.

I

Congress has directed the federal government, in defined circumstances, to impose antidumping duties on "foreign merchandise . . . being, or . . . likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1). Congress has likewise directed the government, in defined circumstances, to impose countervailing duties

on "merchandise imported, or sold (or likely to be sold) for importation, into the United States" for which "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export" of that merchandise. *Id*. § 1671(a)(1). This case involves a requirement of both regimes.

Each regime divides the authority to make the required judgments between Commerce and the Commission. Commerce determines the existence of the unfair pricing or subsidies—for antidumping duties, "whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value," *id*. § 1673d(a)(1); *see also id*. § 1673(1); for countervailing duties, "whether or not a countervailable subsidy is being provided with respect to the subject merchandise," *id*. § 1671d(a)(1); *see also id.* § 1671(a)(1). The Commission determines, for both kinds of duties, whether

> (A) an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise

for which Commerce has found unfair pricing or subsidies. *Id*. § 1673d(b)(1) (antidumping duty provision for final determination); *see id.* § 1671d(b)(1) (countervailing duty provision for final determination); *see also id.* §§ 1673(2), 1671(a)(2). For each of the antidumping and countervailing duty regimes, if both agencies answer their assigned questions affirmatively, Commerce issues the duty-imposing order. *See id.* §§ 1673d(c)(2), 1671d(c)(2); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002).

This case involves the Commission's determination that the domestic industry was, in the statutory phrase, "materially injured . . . by reason of imports" of the Chinese Respondents' merchandise. *See ITC Final Decision*, at 3 (finding that domestic industry was "materially injured by reason of" the subject imports). We have noted the two parts of such a finding: that there is "present material injury"; and that "the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States,* 132 F.3d 716, 719 (Fed. Cir. 1997). Congress has further specified that, "[i]n making determinations" under the material-injury provisions for both antidumping and countervailing duties,

> the Commission, in each case—
>
> (i) shall consider
>
> (I) the volume of imports of the subject merchandise,
>
> (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and
>
> (ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B); *see also id*. § 1677(7)(C)(i)–(iv) (directing Commission to consider enumerated topics).

The language Congress used—injury "by reason of" specified conduct—is familiar in many legal contexts. Recently, the Supreme Court has repeatedly made explicit that, as a matter of settled ordinary legal meaning, the phrase requires, at a minimum, "but for" causation of the injury by the statutorily identified conduct. *See Burrage v. United States*, 134 S. Ct. 881, 889 (2014) ("the phrase, 'by reason of,' requires at least a showing of 'but for' causation") (citation omitted); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (reasoning that adverse action "because of" age in the Age Discrimination in Employment Act means "by reason of" age, which has a settled meaning, so that "[t]o establish a disparate-treatment claim under the plain language of the ADEA[], a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision"); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265–68 (1992) (reasoning that a statute permitting recovery for injuries suffered "by reason of" the defendant's violation "require[s] a showing that the defendant's violation . . . was," among other things, "a 'but for' cause of his injury"); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013); *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 652–55 (2008).

A number of courts of appeals have recognized, in various contexts, that the Supreme Court's precedents establish a strong default interpretation requiring but-for causation, at a minimum, when a statute uses "by reason of." *See, e.g., Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 168 (7th Cir. 2017) (referring to "indicia of Congress's intent to create 'but for' causation—words like 'because' or 'by reason of'"); *Torres v. S.G.E. Mgt., L.L.C.*, 838 F.3d 629, 636 (5th Cir. 2016) (noting that "[t]he Supreme Court requires plaintiffs to establish both but-for cause and 'proximate cause in order to show

injury "by reason of" a RICO violation'"); *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235–36 (4th Cir. 2016) (reasoning that there is no "meaningful textual difference between" the phrase "on the basis of" and the terms "because of, by reason of, or based on [] that the Supreme Court has explained connote 'but-for' causation") (internal quotation marks omitted); *Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 352 (5th Cir. 2014) (adopting the Supreme Court's reasoning in *Gross* to conclude that "the plain and ordinary meaning of the [Jury System Improvement Act's] use of 'by reason of' supports a but-for causation standard"); *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 34 (1st Cir. 2013) (following *Holmes*'s conclusion that RICO's "'by reason of' language contains both but-for causation and proximate causation requirements").

Although Congress may use legal terms in unusual ways in particular statutes, "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (internal quotation marks and citation omitted); *see Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016). We *see* nothing that would justify finding that Congress was departing from the Court-recognized ordinary meaning when it directed the Commission to determine the existence of material injury "by reason of" unfairly priced or subsidized imports in 19 U.S.C. §§ 1673d(b)(1) and 1671d(b)(1). In particular, when Congress further prescribed a set of topics that the Commission "shall consider," it did not change the "by reason of" standard of §§ 1673d(b) and 1671d(b): it merely identified topics that the Commission must consider "[i]n making determinations" under those "by reason of" provisions. 19 U.S.C. § 1677(7)(B). And it confirmed the maintenance of the "by reason of" standard when it added that the Commission may consider "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." *Id.* § 1677(7)(B)(ii). We have been pointed to nothing in the statute that overrides the Supreme Court's rulings that "by reason of" requires, at the least, but-for causation. At oral argument before this court, counsel for the Commission properly agreed that but-for causation is required—though *how* the standard applies may vary with the facts. Oral Arg. at 15:01–16:05.

This conclusion is consistent with our precedents, especially when read in light of the Supreme Court's recent clarification of the default meaning of "by reason of." In *Mittal Steel Point Lisas Ltd. v. United States*, for example, this court stressed the importance, though "not necessarily dispositive" character, of the inquiry into "whether the

subject imports are the 'but for' cause of the injury to the domestic industry"—which "requires the finder of fact to ask whether conditions would have been different for the domestic industry in the absence of dumping." 542 F.3d 867, 876 (Fed. Cir. 2008).[1] In support, the court pointed to the explanation in the 1994 Statement of Administrative Action (deemed "authoritative" by 19 U.S.C. § 3512(d)) that the Commission must "'ensure that it is not attributing injury from other sources to the subject imports.'" *Mittal*, 542 F.3d at 877 (quoting H.R. Doc. No. 103–316, vol. 1, at 851–52 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4184–85). The court summarized earlier cases that found Commission determinations lacking for insufficient analysis of "whether the domestic industry would have been better off if the dumped goods had been absent from the market." *Id.* at 876; *see id.* at 873–74, 877–79 (discussing *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006), and Gerald Metals, 132 F.3d at 722). At the same time, the court explained that this requirement "does not require the Commission to address the causation issue in any particular way." *Id*. at 878. Rather, the court recognized "the Commission's broad discretion with respect to its choice of methodology." *Id*. at 873.

This court's decision in *Swiff-Train Co. v. United States* is to the same effect. 793 F.3d 1355 (Fed. Cir. 2015). The court there accepted the importance of a "proper but-for analysis," which the court held the Commission had conducted when it "established cause-in-fact by identifying the injurious effect of subject imports on the domestic industry using the statutory factors, and then ensuring injury was not caused by factors other than subject imports." *Id.* at 1361. At the same time, the court reiterated propositions from earlier precedents—propositions that are consistent with a but-for causation requirement—that "the Commission need not isolate the injury caused by other factors from injury caused by unfair imports, nor demonstrate the subject imports are the 'principal' cause of injury." *Id.* at 1363 (internal quotation marks and citations omitted). More broadly, the court reiterated that "this court does not require use of any particular model or methodology," *id.* at 1361, including "an explicit counterfactual analysis," *id.* at 1362, to answer the prescribed causation question. *See also id.* at 1362–63.

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[1] *Mittal*'s statement that but-for causation is "not necessarily dispositive," 542 F.3d at 876, is in accord with the fact that the Supreme Court decisions cited above state that but-for causation is a *necessary* requirement—not that it is always sufficient. Often, "proximate causation" is also required, over and above but-for causation. *See, e.g., Holmes*, 503 U.S. at 268; *Torres*, 838 F.3d at 638; *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d at 34.

In short, the statutory language, Supreme Court precedent, our precedent, and precedent from other circuits together support the conclusion that but-for causation is required under the "by reason of" standards of 19 U.S.C. §§ 1673d(b)(1) and 1671d(b)(1), while *how* the standard is best applied in particular circumstances may vary with the facts. The Commission may use a variety of methods of analysis for applying the standard to the myriad factual situations that may be presented. When facts such as the significant market presence of price-competitive non-subject imports are present, the Commission, to meet its obligation to "examine the relevant data and articulate a satisfactory explanation for its action," must engage in "additional" analysis, beyond what may suffice in the absence of such inquiry-complicating facts relevant to whether, considering other contributors, the subject imports account for material harm to the domestic industry. *Bratsk*, 444 F.3d at 1373, 1375. But the recognition that different facts call for different amounts of explanation in applying the statutory standard does not mean that the standard is different in different cases, any more than does the recognition of methodological discretion in applying the standard. The standard, requiring but-for causation, remains the same. *Cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535 (2008) (characterizing as "obviously indefensible" the "proposition that a standard different from the statutory" standard applies in a subset of cases covered by the standard). The substance of the Commission's analysis, not the specific formulation employed, determines whether the Commission has adequately answered the question of but-for causation on the particular facts in the matter before it.

II

In this case, the Chinese Respondents contend that the Commission did not adequately address the question of but-for causation. They argue, in particular, that the Commission failed to make findings, supported by substantial evidence, that the domestic industry would have been materially better off than it was during the period of investigation (POI) if the subject imports had not been introduced into the market. We reject that challenge. In substance, the Commission made that determination and had an adequate basis for doing so.[2]

[2] The period of investigation for the Commission was January 2009 through June 2012. *ITC Final Decision*, at 9 n.63. Shorter segments of that period are recited as the periods addressed in Commerce's determinations. *Commerce Antidumping Duty Determination*, 77 Fed. Reg. at 63,792; *Commerce Countervailing Duty Determination*, 77 Fed. Reg. at 63,788. The Chinese Respondents make nothing of that difference in their arguments to this court.

The Commission found "that there is a causal nexus between subject imports and the poor condition of the domestic industry and that the domestic industry is materially injured by reason of subject imports." *ITC Final Decision,* at 38. It relied on findings it summarized as follows:

> [T]he picture emerges of a domestic industry (1) with a steadily declining market share despite phenomenal demand growth, (2) that has lost market share due primarily to the significant and increasing volume of subject imports from China, (3) that has faced significant underselling by subject imports from China and depressed and suppressed prices, (4) that consistently lost money throughout the POI despite the tremendous demand growth and significant cost reductions, (5) that by the end of the POI experienced declines even in many of the performance indicators that previously had shown some improvement, and (6) that reported recognizing asset write-offs and/or costs related to the closure of production facilities, revalued inventories, and/or asset impairments.

Id.

Despite those findings, the Chinese Respondents argue that the Commission did not adequately address but-for causation because it insufficiently accounted for three facts about the marketplace in the POI—January 2009 to June 2012. One was the pressure CSPV sellers faced to lower their prices to meet the price at which utilities could buy natural gas for power generation—so-called "grid parity."[3] A second was the decline in government subsidies for solar-energy products, making it harder for sellers to offer low prices. The third was the increase in demand in the utility segment of the market, compared to other market segments.

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[3] The Commission described "the goal for CSPV products to attain grid parity, which largely means matching the levelized cost of natural-gas-generated electricity provided to the grid during peak periods, as discussed above." *ITC Final Decision*, at 34. The Commission earlier explained:

> Electricity providers using renewable energy sources seek to achieve "grid parity" with other sources of electricity (the point at which the levelized cost of electricity generated from renewable sources equals the cost of conventional electricity from the grid). The levelized cost of electricity varies by region, by time of the day, and by availability of other electricity sources. During periods of non-peak electricity demand in the United States, only lowest-cost "baseload" generators (traditionally coal and nuclear plants) will be able to sell electricity to the grid, whereas during peak electricity demand periods, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid. For peak periods, natural-gas generated electricity sets the levelized cost of electricity that CSPV solar systems and other renewable systems must seek to meet, especially for sales to the utility segment.

Id. at 21–22 (internal references omitted).

The Chinese Respondents argue that, given the difficulties those facts posed for the domestic industry, the domestic industry would have been materially as badly off (in the POI) even had there been no unfairly priced and subsidized subject imports. More precisely, they argue that the Commission gave inadequate attention to whether the unfairly priced and subsidized subject imports were a but-for cause of any "material injury." Given the statutory definition of "material injury" as "harm which is not inconsequential, immaterial, or unimportant," 19 U.S.C. § 1677(7)(A), the question is whether the Commission found, with adequate reasons and substantial-evidence support, that the difference between the state of the domestic industry as it actually was in the POI and the state of the domestic industry as it would have been without the subject imports was more than inconsequential, immaterial, or unimportant.

We conclude that the Commission so found and had a sufficient basis for so finding. The Commission's summary, quoted above, rested on detailed findings about demand conditions and the business cycle in the domestic market, the roles of conventional and renewable sources of electricity, government incentives and regulations at federal, state, and local levels, domestic consumption trends, market segments, who was supplying the domestic market, what happened to prices and market shares during the POI, and the ways in which "the domestic industry's financial performance was very poor and deteriorating." *ITC Final Decision,* at 35; *id.* at 21–38. The findings rested on various types of evidence, including the answers to questionnaires addressed to market participants such as purchasers. *Id.* at 30, 32.

The Commission found declining prices of the CSPV products and significant loss of market share to subject imports, despite increasing demand for the products. *Id.* at 31–33, 36–37. And the Commission attributed a material portion of the adverse effects on the domestic industry to the subject imports. It found that "domestic producers lost sales and revenues due to competition from low-priced subject imports" and that "significant underselling of the domestic like product by subject imports from China . . . enabled subject importers to gain market share at the expense of the domestic industry." *Id.* at 33. And it characterized the "very poor and deteriorating" condition of the domestic industry as being "because of the significant volume and adverse price effects of subject imports." *Id.* at 35.

More specifically, the Commission addressed the three facts highlighted by the Chinese Respondents here, and it found that those facts did not account for the domestic industry's woes. Thus, the Commission recognized "there may have been additional factors

exerting downward pricing pressure on CSPV products," but it found "that subject imports were a significant cause of the decline in prices of CSPV products during the POI." *Id.* at 33–34. It found that "the impetus toward grid parity fails to explain the significant underselling by subject imports demonstrated on this record." *Id.* at 34. It recognized the fluctuation of domestic government subsidies during the POI, but it found that, "during much of the POI, the overall mix of incentives was very favorable and stimulated demand substantially" and "a number of incentives remained available" even at the end of the POI. *Id.* at 34–35. It recognized that sales to utilities were "the fastest growing U.S. market segment," *id.* at 32, but it found that "the domestic industry's declining market share was not limited to the utility segment"—"due to consistent and substantial underselling by subject imports, the domestic industry also lost market share in the residential and non-residential segments of the U.S. market, and non-subject imports also lost market share to increasing volumes of low-priced subject imports," *id.* at 37 (internal references omitted). *See also Changzhou Trina Solar Energy Co.*, 100 F. Supp. 3d at 1335–48 (recounting Commission analysis in detail).

The Commission determined:

> We find that the factors Respondents cite, all of which would have affected both the domestic like product and subject imports from China, *do not individually or collectively account for* the substantial margins of underselling by subject imports, the accelerating decline in prices in the U.S. market during the POI, the inability of the domestic industry to price its products at levels that would permit the recovery of its costs during a period of very significant demand growth, or the pace at which subject imports captured additional shares of this growing market at the domestic industry's expense throughout the POI. In sum, the significant and growing volume of low-priced subject imports from China competed directly with the domestic like product, was sold in the same channels of distribution to the same segments of the U.S. market, and undersold the domestic like product at significant margins, causing domestic producers to lose revenue and market share and leading to significant depression and suppression of the domestic industry's prices.

ITC Final Decision, at 35 (emphasis added). By determining that the facts highlighted by the Chinese Respondents did not account for (materially) all of the domestic industry's weakening during the POI, the Commission in substance made the required determination of but-for causation. And its explanation, relying on concrete evidence

that we *see* no basis for deeming insufficient under the substantial-evidence test, was adequate to support the finding.

III

For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

GLYCINE & MORE, INC., Plaintiff-Appellee v. UNITED STATES, Defendant GEO SPECIALTY CHEMICALS, INC., Defendant-Appellant

Appeal No. 2017–1312

Appeal from the United States Court of International Trade in No. 1:13-cv-00167-TCS, Chief Judge Timothy C. Stanceu.

Decided: January 23, 2018

RONALD MARK WISLA, Kutak Rock LLP, Washington, DC, argued for plaintiff-appellee. Also represented by LIZBETH ROBIN LEVINSON.

DAVID M. SCHWARTZ, Thompson Hine LLP, Washington, DC, argued for defendant-appellant.

Before MOORE, PLAGER, and CHEN, *Circuit Judges.*

PLAGER, *Circuit Judge*.

This case turns on an important principle in administrative law, involving a basic tenet of the Administrative Procedure Act (hereafter "APA"), to which the defendant agency, the Department of Commerce, is subject. *See generally* 5 U.S.C. §§ 551 *et seq*. The question presented is—can an agency regulation, previously adopted by formal notice-and-comment rulemaking procedure pursuant to the APA, be amended by a guidance document that is not so enacted? The case comes to us on appeal from a decision of the United States Court of International Trade ("CIT").

Defendant-appellant GEO Specialty Chemicals, Inc. ("GEO") appeals the CIT's judgment. That judgment affirmed a decision by the United States Department of Commerce ("Commerce").[1] Commerce's decision, on remand from an earlier CIT order, extended the deadline for plaintiff-appellee Glycine & More, Inc. ("Glycine & More") to withdraw a request for an administrative review of an antidumping order, accepted the withdrawal, and rescinded the review.

Commerce made its decision under protest. The CIT in a prior order had invalidated Commerce's change of methodology for evaluating such time-extending petitions, announced in a "Notice," and ordered Commerce to re-evaluate its original denial of the withdrawal request pursuant to the court's understanding of the governing regulation, 19 C.F.R. § 351.213(d)(1).

Identifying more fully the parties to this litigation may be helpful since their roles evolve as the case develops. The proceedings before Commerce at issue were requested by two parties. One of those two parties was Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding Mantong"), a Chinese producer and exporter of glycine. The other

[1] When the context requires, the term "Commerce" refers as well to the Secretary of that department or the Secretary's designee.

party was GEO Specialty Chemicals, Inc. ("GEO"), the defendant-appellant, a U.S. producer of glycine. A third party, plaintiff-appellee Glycine & More, filed a notice of appearance in the proceedings and participated in the review. Glycine & More is a U.S. importer of glycine manufactured by Baoding Mantong and an affiliate of Baoding Mantong.

Though the United States is listed as a party defendant, and despite the fact that what is at issue is the Commerce Department's understanding of its own regulations, neither Commerce nor the United States government have participated in the appeal.

On appeal, GEO argues that the first CIT decision in the case forced Commerce to adopt an erroneous interpretation of its regulation and thus forced Commerce in its later decision to reach an erroneous result. Glycine & More argues to uphold the decisions of the CIT. For the reasons we shall explain, we agree with the CIT's action and affirm its judgment.

BACKGROUND

Administrative Reviews Initiated by Request

Under the law, Commerce may determine whether foreign merchandise is being sold or is likely to be sold in the United States at less than its fair value. *See* 19 U.S.C. §§ 1673, 1677. The International Trade Commission ("ITC") separately determines whether an industry in the United States is materially injured or threatened with material injury by the import, sales, or likelihood of sales of that foreign merchandise. *Id.* When the ITC has so determined, Commerce then issues what is called an antidumping order, and imposes a special duty on the import of such products. *See id.*

If Commerce thereafter receives a request for an administrative review of a previously issued antidumping duty order, Commerce must conduct such a review at least once during each 12-month period beginning on the anniversary date of the publication of the antidumping duty order. *See* 19 U.S.C. § 1675(a)(1). Although Congress in the governing legislation required that Commerce engage in such a review if properly requested, Congress did not provide for the situation at hand—how Commerce should proceed if a request, once made, is withdrawn.

To address this scenario, the Commerce Department proposed and adopted a regulation. In the adopted regulation, Commerce set forth rules for evaluating timely and untimely withdrawals:

> (d) Rescission of administrative review—(1) Withdrawal of request for review. The Secretary will rescind an administrative

> review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

19 C.F.R. § 351.213(d)(1); *see also id.* § 351.102(b)(44) (defining "Secretary" as "the Secretary of Commerce or a designee").

In 2012 Baoding Mantong and GEO each requested review of an antidumping order that Commerce had imposed on imports of glycine from the People's Republic of China. Later, just at the end of the 90-day period after Commerce had published notice that it was initiating a review, GEO filed a notice of withdrawal of its petition for review. Shortly thereafter, Baoding Mantong filed its notice of withdrawal of its request for review, accompanied by a request for extension of time to file its withdrawal; the notice of withdrawal was filed after the 90-day period provided in the regulation had expired.

Under the final sentence in the regulation, "[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d)(1). In response to the Baoding Mantong notice and request, the Secretary declined to extend the 90-day time limit for a withdrawal, thus causing the notice of withdrawal to be ineffective.

That final sentence had remained unchanged since the publication of predecessor rules years earlier, and upon which the current rule, § 351.213(d)(1), was based. Further, as we shall explain, Commerce's understanding and application of that regulatory sentence remained essentially consistent over the years—until 2011.

In 2011, Commerce announced in a published guidance document a view of that sentence that dramatically changed its meaning.[2] The question raised in this appeal is whether the Secretary's refusal, pursuant to the 2011 guidance document, to extend the time limit was legally proper. Was it made consistent with the requirements set forth in the governing regulation, specifically with the criterion in the final sentence of that regulation?

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[2] "Guidance" or "guidance document" is a frequently-used term to describe an agency's instructions published informally, that is without formal notice and comment rulemaking pursuant to 5 U.S.C. § 553(b)(A) of the APA. It encompasses what are termed general statements of policy and interpretive rules. The extent to which such guidance is or should be binding, and on which agency constituencies, is a matter of some difficulty—see, e.g., Administrative Conference of the United States ("ACUS"), Recommendation 2017–5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,728, 61,734 (Dec. 29, 2017), addressed specifically to general policy statements; *see* the discussion at n.3, below, regarding interpretive rules. *See also* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (2017), a thorough and exhaustive study based on empirical data as well as legal analyses, commissioned by ACUS.

History of 19 C.F.R. § 351.213(d)(1)

The current regulation was published as a Final Rule in 1997. However, as proposed in 1996, the regulation did not allow for untimely withdrawals. Instead, the proposed regulation only allowed for *timely* withdrawals—and even that was discretionary:

> (d) Rescission of administrative review. (1) Withdrawal of request for review. The Secretary *may* rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request not later than 90 days after the date of publication of notice of initiation of the requested review.

Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7308, 7365 (emphasis added) (proposed Feb. 27, 1996).

The omission of any language allowing for untimely withdrawals in the proposed regulation was a puzzle. 19 C.F.R. Part 351 was, in part, a consolidation of existing regulations. *See id.* at 7308 (discussing consolidation in context of proposed rule). *See also* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,296 (May 19, 1997) (discussing consolidation in context of final rule). Both of those then-existing regulations included identical language allowing for untimely withdrawals: "The Secretary may extend this [90-day] time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. §§ 353.22(a)(5), 355.22(a)(3) (1995).

The omission of this language in the newly proposed rule was even more puzzling in light of Commerce's statement, when proposing § 351.213, that "certain changes are worth noting," but no mention was made of this particular change. *See* Antidumping Duties; Countervailing Duties, 61 Fed. Reg. at 7317. Instead, Commerce merely stated that "Paragraph (d) deals with the rescission (previously referred to as 'termination') of administrative reviews, and clarifies that the Department may rescind a review that the Secretary self-initiated or in which there are no entries, exports, or sales to be reviewed." *Id.*

In adopting its Final Rule, however, Commerce returned the missing sentence. It explained that it added the language allowing untimely withdrawals in response to comments and in light of former §§ 353.22 and 355.22:

> Commenting on proposed § 351.213(d)(1) and its 90-day limit on withdrawals of a request for a review, one commenter suggested that the provision be modified so as to allow the Department to rescind an administrative review after the 90-day period has expired if (1) the party that initially requested the review with-

> draws its request, and (2) no other party objects to the rescission within a reasonable period of time. According to the commenter, such a rule would avoid the burden and expense of completing reviews that none of the parties want.
>
> We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects.
>
> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition we have added a new sentence, taken from 19 C.F.R. §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

62 Fed. Reg. at 27,317.

A similar explanation for giving the Secretary the discretion to extend the 90-day deadline in appropriate cases was given when the sentence was added to the earlier antidumping regulation, again during the notice-and-comment process:

> Department's Position [in response to comments]: . . . We recognize the importance to the party submitting the request for review of knowing the final results of the immediately preceding review, if any. Therefore, we are modifying paragraph (a) to permit the party that submits a request to withdraw the request under certain conditions. If a relevant review has not been completed before the end of the anniversary month during which the new request is submitted, the party that submitted the new request may withdraw it not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend the time limit if it is reasonable to do so.

Antidumping Duties, 54 Fed. Reg. 12,742, 12,755 (Mar. 28, 1989). *See also* a similar explanation in the context of allowing untimely with-

drawals in former 19 C.F.R. § 355.22(a)(3), Countervailing Duties, 53 Fed. Reg. 52,306, 52,328 (Dec. 27, 1988).

Commerce's 2011 Notice

The history of § 351.213(d)(1) thus establishes Commerce's understanding of the circumstances under which it would be reasonable to extend a deadline for filing a withdrawal. The criteria for what would be a reasonable ground for extension reflects concerns for not wasting departmental resources, for giving parties an opportunity to know the results of prior administrative reviews when applicable, and for not conducting undesired reviews, among other considerations.

Despite this record, in August 2011 Commerce published what it denominated as a "Notice" in which it dramatically changed its approach to the extension provision in § 351.213(d)(1):

> Pursuant to section 351.213(d)(1) of the Department's regulations, a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2011, the Department will not consider extending the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.
>
> The Department is providing this notice on its Web site, as well as in its "Opportunity to Request Administrative Review" notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 76 Fed. Reg. 45,773, 45,773 (Aug. 1, 2011) (the "2011 Notice").

Commerce did not make clear whether this "Notice" was intended as a statement of general policy or as an interpretive rule. *See* n.2, above. Though statements of general policy are understood to be

non-binding, *id.*, there is some authority for the proposition that interpretive rules should be treated differently.[3]

Commerce did make clear that this change was to be global in nature, applicable to all future requests for an extension of time to withdraw a previously-filed request for review. Thereafter, parties seeking untimely withdrawals would no longer be able to get an extension based on what might be reasonable under the circumstances in light of the concerns previously identified and employed by Commerce. Instead, they would have to demonstrate the existence of an "extraordinary circumstance" warranting an extension. Commerce applied this change in its approach to the administrative review in this case, which forms the basis for this appeal.

This Appeal

This appeal stems from Commerce's 1995 antidumping duty order on glycine from the People's Republic of China, *see* Antidumping Duty Order: Glycine from the People's Republic of China, 60 Fed. Reg. 16,116 (Mar. 29, 1995), under which Commerce had imposed specified duties on imports of Chinese glycine. On March 1, 2012, Commerce notified interested parties of the opportunity to request an administrative review of that order for the period from March 1, 2011 through February 29, 2012. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 77 Fed. Reg. 12,559 (Mar. 1, 2012).

In announcing the opportunity to request review, Commerce repeated the language of its 2011 Notice, explaining that, if a party requested review, Commerce did not intend to extend the 90-day period for withdrawal unless the requestor demonstrated an extraordinary circumstance that prevented it from submitting a timely withdrawal request.

On March 30, 2012, GEO and Baoding Mantong separately requested an administrative review. On April 30, 2012, Commerce published notice that it had initiated an administrative review, and in that notice, Commerce again stated it did not intend to extend the 90-day period for withdrawal absent a party demonstrating an extraordinary circumstance. *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 77 Fed. Reg. 25,401 (Apr. 30, 2012). On July 10, 2012, Commerce selected Baoding Mantong as one of two mandatory respondents and issued a questionnaire to the company.

[3] See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, Admin. L. Rev. (forthcoming 2018), manuscript July 21, 2017, exhaustively reviewing the authorities and urging that interpretive rules be accorded no more weight than an agency's general policy statements. Available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2958267.

On July 30, 2012, GEO submitted what was determined to be its timely withdrawal.[4] On August 7, 2012—after the 90-day period had ended—Baoding Mantong asked Commerce for an extension of the 90-day period in which to file its withdrawal, and an extension of the deadline for its questionnaire response. Baoding Mantong claimed that extraordinary circumstances existed and asserted that it learned of GEO's withdrawal only after the 90-day period expired.

Baoding Mantong explained that it did not withdraw before learning of GEO's withdrawal because, if GEO had not withdrawn, then its withdrawal would have had no effect. Baoding Mantong further explained that good reason existed for permitting an extension of time, because Commerce would be able to preserve its resources since Baoding had not yet submitted its questionnaire.

On August 22, 2012, Commerce informed Baoding Mantong that Commerce was considering its request, and that it did not have to respond to Commerce's questionnaire. Subsequently, Commerce informed Baoding Mantong that it was rejecting its untimely withdrawal because Baoding Mantong had not demonstrated an extraordinary circumstance warranting an extension of the 90-day period. Commerce also instructed Baoding Mantong to respond to Commerce's questionnaire. Baoding Mantong responded in a letter dated October 18, 2012 and filed on October 19, 2012, informing Commerce that it would not participate in the administrative review or respond to the questionnaire.[5]

On December 6, 2012, Commerce published its Preliminary Results and proposed assigning Baoding Mantong a 453.79% dumping duty margin based on facts otherwise available on the record and an adverse inference due to Baoding Mantong's refusal to respond to Commerce's questionnaire. *See* Glycine from the People's Republic of China: Preliminary Results, 77 Fed. Reg. 72,817 (Dec. 6, 2012).[6]

On December 17, 2012, Glycine & More entered an appearance before Commerce and objected to Commerce's rejection of Baoding Mantong's request to withdraw and the dumping duty margin.

On April 8, 2013, Commerce published its Final Results, assigning the same dumping margin to Baoding Mantong based on its Preliminary Results. In its related Issues and Decision Memorandum, Com-

[4] The 90-day period ended on July 29, 2012, but because this was a Sunday, Commerce deemed GEO's withdrawal timely.

[5] On October 18, 2012, Commerce published the final results of a *prior* (2010–2011) administrative review of the 1995 antidumping order and assigned Baoding Mantong a dumping margin of 453.79% for the period from March 1, 2010 through February 28, 2011. *See* Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 77 Fed. Reg. 64,100, 64,101 (Oct. 18, 2012).

[6] Commerce based the 453.79% rate on the prior (2010–2011) administrative review, *see* J.A. 351, however, the rate has since been modified.

merce rejected the assertion that its interpretation and application of § 351.213(d)(1) had been inconsistent. Commerce noted that, "[i]n the past, extending the 90-day deadline depended on a variety of factors, such as whether the Department had devoted significant time or resources to the review and the stage of the review." J.A. 663. However, Commerce explained that it had "clarified" the deadline in its 2011 Notice to provide parties with "'additional certainty'" and "[t]o enhance certainty and fairness." *Id.*

Commerce rejected the argument that Baoding Mantong had demonstrated an extraordinary circumstance and observed that Baoding Mantong had likely stopped participating in the review after learning of the results of the prior (2010–2011) administrative review, which were published one day before Baoding Mantong's notice ending its participation was filed. Commerce further noted that the parties knew of the preliminary and revised preliminary results of the prior (2010–2011) administrative review before the 90-day period ended.

Proceedings Before the CIT

On April 26, 2013, Glycine & More filed a complaint with the CIT and eventually moved for judgment on the agency record, arguing, inter alia, that Commerce had violated its own regulation concerning the 90-day time limit. Commerce and GEO opposed Glycine & More's motion for judgment.

The CIT issued its opinion on November 3, 2015. In that opinion the CIT concluded that Commerce's interpretation of its own regulation was unreasonable and that Commerce's rejection of Baoding Mantong's untimely withdrawal was improper.

The CIT conducted a lengthy review of the relevant regulatory history and determined that Commerce's 2011 Notice, requiring an "extraordinary circumstance" in the context of untimely withdrawals, did not control because it defeated the original purpose of the regulation. The CIT determined that Commerce's interpretation of § 351.213(d)(1) was unreasonable as applied.

The CIT observed that Baoding Mantong had not learned of the final results of the prior administrative review until after the 90-day deadline. The CIT also explained that, because Baoding Mantong had sought withdrawal before submitting its questionnaire response, there was no evidentiary basis from which Commerce could have concluded that it had spent considerable time and resources on the review. The CIT remanded for Commerce to re-decide whether Baoding Mantong's extension should be granted.

In its remand, the CIT required that Commerce "reach a new decision that does not apply the interpretation of [§ 351.213(d)(1)] adopted in 2011, which is unreasonable for the reasons the [CIT] has identified, and instead applies an interpretation that *is* reasonable and, in particular, is consistent with the purpose of the regulation, as stated by Commerce upon promulgation in 1989 and maintained upon re-promulgation in 1997." *Glycine & More, Inc. v. United States*, 107 F. Supp. 3d 1356, 1370 (Ct. Int'l Trade 2015).

The CIT instructed Commerce to consider the circumstances including that Baoding Mantong's request occurred only days after the 90-day deadline expired; that the review was in an early stage with no questionnaire response being submitted; that Baoding Mantong could not have known the final results of the prior review; and that all parties who had requested the review wanted it rescinded. The CIT stated that it "envisions that it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce." *Id.*

The CIT further stated that it "appears likely" that only a decision allowing an extension of the 90-day period and rescinding the administrative review "could fulfill the stated purpose of § 351.213(d)(1). For although this regulation grants [Commerce] discretion over whether to extend the 90-day period, the compelling circumstances giving rise to this case, when viewed according to the purpose of the regulation, would call into question any decision on remand reinstating the previous, challenged decision to deny the extension." *Id.*

Commerce's Decision on Remand

After remand, in February 2016, Commerce filed its Redetermination Pursuant to Court Remand Order ("Redetermination Decision"). In that Redetermination, Commerce stated its intent to extend—under protest—the deadline for Baoding Mantong to withdraw and rescind the review, because Commerce could not find any "new and compelling circumstance" justifying denial.

At the same time, Commerce made clear its grounds for protest: Commerce asserted that the CIT's decision unfairly and improperly 'nullified' Commerce's "wide discretion" under § 351.213(d)(1). Commerce explained that it did not read the regulatory histories of the final rules in 1989 and 1997 as limiting Commerce's discretion to account for instances in which parties were seeking to know the final results of an immediately preceding review. Commerce emphasized

that, in its view, the purpose of the regulation was to grant Commerce maximum discretion in determining whether to extend the 90-day period.

Further Proceedings Before the CIT

In October 2016, the CIT issued a judgment and opinion affirming Commerce's Redetermination Decision, granting Glycine & More's CIT Rule 56.2 motion for judgment on the agency record, and ordering that Commerce take the necessary steps to rescind the administrative review with respect to Baoding Mantong.

The CIT, however, emphasized that it was not affirming all of Commerce's statements in its decision, because Commerce had misinterpreted the CIT's prior decision. In particular, the CIT explained that it did not nullify Commerce's discretion, and that Commerce did not have to grant untimely requests merely because the requestor did not know the final results of an immediately preceding review. Instead, the CIT explained that, by way of example, Commerce might deny such a request if it had already expended considerable time and resources in the review at issue and the requestor sought withdrawal after concluding the results were not likely to be favorable—even if the requestor had not learned the results of the immediately preceding review.

Appeal to this Court

GEO appeals and argues that the CIT failed to give proper deference to Commerce's interpretation of its own regulation in 19 C.F.R. § 351.213(d)(1). GEO also argues that the CIT improperly directed Commerce's findings on remand, while precluding Commerce from explaining or clarifying its own interpretation. As noted, neither Commerce nor the United States join the appeal.

We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's grant of judgment upon the administrative record without deference, except that we review the CIT's factual determinations for clear error. *See Ammex, Inc. v. United States*, 419 F.3d 1342, 1344 (Fed. Cir. 2005). We review the CIT's legal determinations without deference. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1379 (Fed. Cir. 2008).

When construing an agency regulation as a matter of law, we use basically the same rules we would use in construing a statute. *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). We examine the regulation's language to ascertain its plain meaning. *Id.*

We may also consider the language of related regulations. *Id.* When the regulation is unambiguous, "it is the duty of the courts to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision." *Tesoro Haw. Corp. v. United States*, 405 F.3d 1339, 1347 (Fed. Cir. 2005) (quoting *Gibson v. United States*, 194 U.S. 182, 185 (1904)). If "the plain meaning of the regulation is clear, no further inquiry is required into agency interpretations or the regulatory history to determine its meaning." *Roberto*, 440 F.3d at 1350.

On the other hand, if the regulation is deemed to be ambiguous, then an agency's interpretation of its own regulation may be entitled to judicial deference, generally described as *Auer* or *Skidmore* deference, referring to the decisions that articulated the particular type of interpretive deference owed an agency by the courts. In this case, GEO argues that the CIT, by failing to give the agency's understanding of its own regulation proper deference, erred in its first decision, an error that necessarily infected its second decision.

Before addressing the question of how wide is the agency's discretion in interpreting its own regulations, discussed at length by the appellant; and before addressing the consequent question of how much and what kind of deference is owed the agency, a question which further implicates the history of the sentence in § 351.213(d)(1), discussed at length by the CIT in its opinions—there is a predicate question: is this 2011 Notice ambiguous?

The answer is no. As we have discussed, there is no question about what Commerce intended by its 2011 Notice—the explanation given in the Notice leaves little room for doubt—and its application to this appellant indicates a straightforward understanding and decision-process. And as the record establishes, this understanding changes significantly what the original enactment of the sentence was intended to do, and how it was applied, as demonstrated by the history of the sentence itself.

In short, the meaning of the 2011 Notice is plain, and the difference between what the sentence at issue meant before and after the Notice is equally plain. Before the Notice, the regulation was understood to provide the Secretary with wide discretion, to use judgment regarding the facts and circumstances presented, and to apply a reasonableness test in making the decision whether to extend the deadline for filing a withdrawal notice. After the 2011 Notice, only "extraordinary circumstances" would do, and the Secretary's discretion was to be applied narrowly to the case, and only when an applicant for extension could prove such extraordinary circumstances exist. Thus, the Notice represented an incompatible departure from the clear

meaning of the regulation. It was not simply an interpretive statement regarding an ambiguity in the regulation or a general statement of policy.

Assuming Commerce wished to rewrite the regulation in this manner, could it do so in this way? The answer is no. Because the regulation's meaning is clear, no deference is warranted. Deferring to Commerce's position "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (unambiguous regulation could not be rewritten by agency under guise of interpreting regulation and judiciary owed no deference to agency interpretation). If Commerce wished to rewrite or amend the regulation, such a regulation intended to have the force of law must be adopted with notice-and-comment rulemaking, which was absent here. *See id*. at 587–88.

Since the 2011 Notice was intended to effectively rewrite the substantive meaning of the regulation without going through the necessary notice-and-comment rulemaking, it has no legal standing, and thus provides no basis upon which the Secretary could make his decision. That was the ruling made by the CIT, and it is correct.

The CIT required the Secretary to re-make the decision about the extension of time, applying the criteria contained in the only legally applicable standard, the one set out in § 351.213(d)(1). Applying that standard, the Secretary granted the extension, and Baoding Mantong's request for review was effectively withdrawn. Commerce's protest of the CIT order is unavailing, as is GEO's support for it.

CONCLUSION

For the foregoing reasons, the judgment of the CIT is affirmed.

AFFIRMED