(Slip Op. 02–15)

DA JIN (U.S.) TRADING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ABC COKE, ET AL., DEFENDANT-INTERVENORS

Court No. 02–00155

(Dated February 20, 2002)

ORDER

WALLACH, *Judge:* Upon consideration of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction and Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction; the Court having reviewed the pleadings and papers on file herein, and having heard oral argument on Wednesday, February 20, 2002, with Plaintiff Da Jin (U.S.) Trading Company, Inc., appearing by and through Jeffrey S. Neeley, Esq., Defendant, United States of America, appearing by and through Lucius B. Lau, Esq., and Defendant-Intervenors ABC Coke, et al., appearing by and through Roger B. Schagrin, Esq.; and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss be, and hereby is, GRANTED on the grounds that this court lacks subject matter jurisdiction to hear this case under 28 U.S.C. §1581(i), the only basis for jurisdiction asserted by Plaintiff in its Amended Complaint, since jurisdiction under 28 U.S.C. §1581(c) is or could have been available, *Norcal/Crosetti Foods, Inc. v. United States,* 963 F.2d 356, 359 (Fed. Cir. 1992); and on the grounds that Plaintiff has failed to exhaust its available administrative remedies, *Nippon Steel Corp. v. United States,* 219 F.3rd 1348 (Fed. Cir. 2000) and *Sandvik Steel Co. v. United States,* 164 F.3rd 596 (Fed. Cir. 1998); and it is further

ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order previously entered in this case in favor of Plaintiff and against Defendant be, and hereby is, dissolved, and it is further

ORDERED, ADJUDGED AND DECREED that all other pending motions in the above entitled matter be, and hereby are denied as moot; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff's Amended Complaint in the above entitled matter be, and hereby is, DISMISSED

(Slip Op. 02–16)

WINDMILL INTERNATIONAL PTE., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP. AND U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS

Court No. 98–10–02975

Plaintiff, Windmill International Pte., Ltd. ("Windmill"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") rescission of the antidumping duty administrative review entitled *Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review ("Rescission Notice"),* 63 Fed. Reg. 47,232 (Sept. 4, 1998). Specifically, Windmill contends that Commerce unlawfully rescinded the administrative review at issue after Commerce determined that there was no bona fide sale.

Held: Windmill's 56.2 motion is denied.

[Windmill's 56.2 motion is denied.]

(Dated February 21, 2002)

Windmill International Pte., Ltd. (Edward Young) for Windmill.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis,* Assistant Director, *Kenneth J. Guido,* Special Attorney, *Richard P. Schroeder* and *Michele D. Lynch);* of counsel: *Barbara Campbell Potter,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

Dewey Ballantine LLP, (Michael H. Stein, Bradford L. Ward and *Mel M. Negussie)* for Defendant-Intervenors.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, Windmill International Pte., Ltd. ("Windmill"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") rescission of the antidumping duty administrative review entitled *Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review ("Rescission Notice"),* 63 Fed. Reg. 47,232 (Sept. 4, 1998). Specifically, Windmill contends that Commerce unlawfully rescinded the administrative review at issue after Commerce determined that there was no bona fide sale.

BACKGROUND

This case concerns the antidumping duty order on cut-to-length carbon steel plate ("CSP") imported into the United States from Romania during the period of review ("POR") covering August 1, 1996, through July 31, 1997. Commerce initiated the subject review on September 25, 1997. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 62 Fed. Reg. 50,292

(Sept. 25, 1997).[1] On September 4, 1998, Commerce published the *Rescission Notice. See* 63 Fed. Reg. at 47,232. Windmill initiated the case at bar against Commerce on November 3, 1998, and on December 9, 1998, this Court granted the consent motion of Bethlehem Steel Corporation and U.S. Steel Group, a Unit of USX Corporation ("Domestic Producers") to enter as defendant-intervenors.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

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." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*'" *American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera,* 340 U.S. at 488)).

II. Chevron Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. ("Chevron"),* 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court]

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron,* 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States,* 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron,* the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron,* 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States,* 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States,* 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce's Determination That Windmill's Sale Was Not Bona Fide

A. Background

An antidumping duty is imposed upon imported merchandise when: (1) Commerce determines such merchandise is being dumped, that is, sold or likely to be sold in the United States at less than fair market value; and (2) the International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury as a result of such dumping. *See* 19 U.S.C. §§ 1673, 1677(34) (1994). In determining antidumping duties, Commerce is re-

quired to determine "the normal value[2] and export price[3] * * * of each entry of the subject merchandise." 19 U.S.C. § 1675(a)(2)(A) (1994).[4] "While the language of [section 1675(a)(2)(A)] appears to be all-inclusive, the Court has provided a limited exception which allows Commerce to 'exclude sales from United States Price in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive.'" *American Silicon Techs. v. United States ("American Silicon"),* 24 CIT ____, ____, 110 F. Supp. 2d 992, 995 (2000) (quoting *FAG U.K. Ltd. v. United States ("FAG U.K."),* 20 CIT 1277, 1281–82, 945 F. Supp. 260, 265 (1996)).

During the POR, Windmill shipped two sales to the United States for the purpose of initiating an administrative review that had a deadline of July 31, 1997. *See Rescission Notice,* 63 Fed. Reg. at 47,232. Windmill's first sale was a "test shipment" sent by ocean carrier to an unaffiliated United States purchaser.[5] *See id.* "When it became apparent in late July 1997 that [the first] sale would not enter U.S. [C]ustoms territory during the POR," Windmill and the same United States purchaser from the first sale negotiated a second sale which consisted of two CSPs that weighed 1.112 metric tons and entered United States Customs territory by air on the last day of the POR (that is, July 31, 1997). *Id.*

On July 24, 1998, Domestic Producers argued that Windmill's sale shipped by air to the unaffiliated United States purchaser was a non-bona fide sale and requested that Commerce rescind the administrative review. *See id.*

Commerce, in a letter dated August 13, 1998, explained to Windmill that its sale of the two CSPs weighing 1.112 metric tons was not a bona fide sale because:

> a. The cost of the air freight, customs fees, brokerage expenses, warehousing, and miscellaneous expenses (which were borne by the U.S. [purchaser], and not Windmill) was significantly greater than the total value of the sale.
>
> b. By Windmill's own admission, the decision to send the shipment by air, rather than by ocean, was based solely on the need to enter the merchandise into the United States before the end of the POR. There was no customer emergency or particular need for costly air shipment rather than the usual surface shipment.
>
> c. The quantity of the sale was atypical of that which Windmill normally sells to the U.S. [purchaser], which was a trading company and not an end-user.

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[2] Normal value ("NV") of the subject merchandise is defined as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994).

[3] Export price ("EP") means the "price at which the subject merchandise is first sold * * * by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser * * *." 19 U.S.C. § 1677a(a) (1994).

[4] To determine whether there is dumping, Commerce compares the price of the imported merchandise in the United States (that is, EP) to the NV for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b (1994).

[5] Windmill's "test shipment" sent by ocean carrier is not at issue in this case because it "entered U.S. [C]ustoms territory after the POR." *Rescission Notice,* 63 Fed. Reg. at 47,232; *see also* Domestic Producers' Resp. to Windmill's Rule 56.2 Mot. J. Agency R. ("Domestic Producers' Resp.") Ex. 3 (Windmill's Revised Section C Response to Commerce indicating that the sole entry during the POR consisted of two CSPs that weighed 1.112 metric tons).

d. The U.S. [purchaser's] purchase of the merchandise prior to receiving an order for it from a customer was atypical of its normal business practice.

e. The same legal counsel guided both Windmill and the U.S. [purchaser] through the sales process, and by [Windmill's] admission helped negotiate a price for the sale solely for the purpose of obtaining for Windmill a lower cash deposit rate. There is no evidence that any commercial factors that normally influence price negotiations played any role in setting the price for this sale.

f. The U.S. [purchaser] resold the merchandise at a substantial loss.

Rescission Notice, 63 Fed. Reg. at 47,233.

Commerce "found these factors significant in light of the fact that the grade [of the CSPs] involved in this sale was one of the cheapest and most common grades of steel." *Id.* Therefore, Commerce determined that the sale from Windmill to the United States purchaser was non-bona fide because it was commercially unreasonable and atypical of Windmill's and the United States purchaser's selling procedures. *See id.*

B. Contentions of the Parties

1. Windmill's Contentions

Windmill argues that Commerce created a "novel" and "opaque" legal standard when it determined that Windmill's sale was not bona fide because it "was not 'commercially reasonable' and * * * was atypical of Windmill's and the [United States purchaser's] normal business practices." Windmill's Br. Supp. Mot. J. Agency R. ("Windmill's Br.") at 20. In particular, Windmill contends that Commerce's commercial reasonableness standard to determine whether a sale is bona fide is unlawful because it gives Commerce discretion to exclude a test sale that is not in the "ordinary course of trade."[6] *See id.* at 22–25, 35–39. Moreover, Windmill argues that Commerce's application of the commercial reasonableness standard: (1) will result in permanent exclusion orders rather than remedial orders, *see* Windmill's Br. at 49; (2) does not recognize that "the antidumping order and the high cash deposit rate, in fact operate as the single most important commercial facts that an exporter and importer must deal with in exporting Romanian steel to the United States[,]" *id.* at 22; (3) ignores that "there is nothing commercially normal about any test shipment [because,] by definition it differs from the normal course of business [since] it is the first sale in what the respondent hopes to establish as a major new market[,]" *Rescission Notice,* 63 Fed. Reg. at 47,233; and (4) is an arbitrary and capricious standard that "violates the URAA's purpose of making antidumping procedures more

[6] Windmill argues that sales not in the ordinary course of trade can only be excluded from the NV calculation, and not from the United States price *(i.e.,* EP or constructed export price). *See* Windmill's Br. at 35–39.

Windmill also contends that changes in the trademark law indicate that "Congress knows the difference between 'bona fide' sales and sales 'in the ordinary course of trade'" and maintains that "[i]f Congress wanted * * * Commerce to have the discretion to exclude U.S. sales that were commercially unreasonable, it would have included the words 'in the ordinary course of trade' in the U.S. sales statutory language[]" just the way it did in the trademark law. Windmill's Br. at 43; *see id.* at 33, 39–45. The Court finds Windmill's argument too tenuous to entertain and does not infer that Congressional intent found in the trademark law could be automatically imported into the antidumping statute.

transparent." *Id.; see generally,* Windmill's Br. at 52–57. Windmill also points out that the dictionary definition of "bona fide" does not include "commercially reasonable" or "typical of normal business practices" language. *See* Windmill's Br. at 29–31.

Relying on *Chang Tieh Indus. Co. v. United States ("Chang Tieh"),* 17 CIT 1314, 1318–19, 840 F. Supp. 141, 146 (1993), Windmill maintains that the Court has established a bright-line standard whereby Commerce can exclude a sale as being non-bona fide only if it is fraudulent. *See id.* at 22–30. Windmill argues that the sale at issue was not fraudulent "because Windmill did not attempt to deceive [Commerce] by using an abnormally high price so as to obtain a low dumping margin[,]" Windmill's sale "was not a fictitious sale[,]" and "Windmill itself made a profit on the sale." *Id.* at 21. Windmill also argues that it is permissible to structure a sale to get a lower cash deposit rate.[7] *See id.* at 32. Windmill, therefore, contends that since its shipment was sold at a market price and arm's length, it is a bona fide sale. *See Rescission Notice,* 63 Fed. Reg. at 47,233.

In addition to the above arguments, Windmill attempts to rebut Commerce's findings. *See* Windmill's Br. at 57–65; *see also, Rescission Notice,* 63 Fed. Reg. at 47,233–34.

First, Windmill contends that it is irrelevant that the total value of the sale was less than the expenses borne by the United States purchaser (that is, freight, customs fees, brokerage expenses, warehousing and miscellaneous expenses) because "the terms of sale were ex-works, loaded on truck[,]" and "it [is] commercially reasonable for the U.S. [purchaser] to pay higher transportation costs in order to complete a test sale and to get the current cash deposit rate lowered." *Id.* at 47,233.

Second, Windmill argues that its shipment to the United States purchaser by air was not fraudulent and entailed "a commercial need * * * to have the sale enter U.S. [C]ustoms territory by July 31, 1997." *Id.* at 47,234.

Third, with regards to Commerce's determination that Windmill's sale was atypical of the quantity it normally sold to the United States purchaser and atypical of its normal business practices with the United States purchaser, Windmill maintains that since its shipment to the United States purchaser was a test shipment, "there is no 'typical quantity'" and "it is irrelevant whether the selling procedures were typical." *Id.*

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[7] The fact that the sale at issue was a single test sale to lower cash deposit rates is not a contested issue in this case. In its brief, Commerce states that such a purpose "does not make an otherwise valid sale not *bona fide.*" Def.'s Mem. Opp'n Pl.'s Mot. J. Agency R. ("Def.'s Mem.") at 17. Moreover, Commerce "recognizes that exporters may make only a single sale in order to establish their own antidumping duty rate, particularly where the 'all others' rate is high." *Rescission Notice,* 63 Fed. Reg. at 47,234.

Fourth, Windmill argues that Commerce is incorrect in its determination that "the same legal counsel [for Windmill and the United States purchaser] helped negotiate a price for the sale."[8] *Id.*

Finally, Windmill contends that the United States purchaser's selling of the product at a substantial loss to a subsequent buyer is irrelevant in determining whether Windmill's sale to the United States purchaser was bona fide because "[t]he antidumping statute allows [Commerce] to analyze the price of a sale of the subject merchandise between an exporter and the first unaffiliated U.S. [purchaser][;] * * * [i]t does not allow [Commerce] to conduct an antidumping review based on the sale price between an unaffiliated U.S. [purchaser] and the subsequent customer." Windmill's Br. at 61–62. Windmill, therefore, requests that Commerce's decision to rescind the administrative review at issue be reversed. *See id.* at 66.

2. Commerce's Contentions

Commerce responds that it properly exercised its discretion in rescinding the administrative review at issue when it "review[ed] the totality of the circumstances surround[ing] [Windmill's] sale" to determine that Windmill's sale was commercially unreasonable and therefore not bona fide. Def.'s Mem. at 12; *see also id.* at 10–16. In particular, Commerce maintains that *Chang Tieh,* 17 CIT at 1318–19, 840 F. Supp. at 146, and *PQ Corp. v. United States ("PQ Corp."),* 11 CIT 53, 55–58, 652 F. Supp. 724, 728–29 (1987), set forth the following criteria in determining whether a sale is bona fide:

> (i) the sale must be at arm's length, and have prices that are negotiated and not artificially set,
> (ii) the sale must be consistent with good business practices, and
> (iii) the sales procedures must be typical of the parties' normal business practice.

Def.'s Mem. at 11. Relying on this criteria and departmental precedent, Commerce contends that its commercial reasonableness standard is not

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[8] The record consists of conflicting statements as to how the price for Windmill's sale at issue was established. *See, e.g.,* Windmill's Br. Ex. 4 at 26 (showing that in Windmill's August 21, 1998, response letter to Commerce, Windmill notes that its employee in a March 25, 1998, letter to Commerce stated that "[s]ince Romanian steel is not imported into the US there is no true market guideline[;] I set the price based on two Russian prices quoted amongst steel trading friends at the time"); Def.'s Mem. Ex. 3 at 6 (showing that in Windmill's January 16, 1998, response to Commerce's supplemental questionnaire, Windmill stated that its employee "initiated price negotiations by soliciting [the United States purchaser's] offer on price for a specified quantity, which [the United States purchaser] issued and Windmill accepted"); Def.'s Mem. Ex. 2 at 5 (showing that in Windmill's March 3, 1998, responses to Commerce's supplemental questionnaire #2, Windmill states that the United States purchaser "accepted the price proposed by Windmill based on advice of counsel"); Def.'s Proprietary Ex. 2 (stating that the United States purchaser "was guided throughout this process by the advice of [one of plaintiff's] trade counsel"). Moreover, Windmill alleges that Commerce was to submit a document to the Court indicating that Windmill's trade "counsel did not negotiate the price between Windmill" and the United States purchaser. Windmill's Br. at 59; *see also id.* at n.3. The Court has not received such document from Commerce and will therefore consider the conflicting evidence regarding the pricing of Windmill's sale *in toto* when rendering its decision.

"new" and "opaque".[9] *See id.* at 13. Moreover, Commerce argues that Windmill's suggestion that non-bona fide is synonymous with fraudulent is incorrect. *See id.* at 16. Commerce asserts that "[a]lthough there can be no question that fraudulent sales are not *bona fide*, it does not necessarily follow that all non-fraudulent sales are *bona fide." Id.* at 13.

Commerce also asserts that Windmill's argument that Commerce's commercial reasonableness standard is unlawful because it excluded Windmill's sale as being outside the ordinary course of trade "is based upon a misinterpretation of the law." Def.'s Mem. at 13. In particular, Commerce argues that

> [a]lthough the antidumping statute limits the calculation of foreign market value to "sales made in the ordinary course of trade," *Chang Tieh,* 840 F. Supp. at 145, it does not include similar limitations in its definition of U.S. price. The lack of this limiting language does not preclude [Commerce] from examining the conditions and practices normal in the trade under consideration with respect to the subject merchandise, *i.e.,* the ordinary course of trade, to determine whether or not a sale is *bona fide.*

Id. at 14.

Moreover, Commerce contends that its commercial reasonableness methodology will not result in permanent exclusion orders that will prevent new shippers from obtaining their own rates because "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." *Rescission Notice,* 63 Fed. Reg. at 47,234.

Commerce further points out that it did not determine whether Windmill's sale was at arm's length, but "found it dispositive that 'there is no evidence that any commercial factors that normally influence price negotiations played any role in setting the price for this sale.'" Def.'s Mem. at 18 (quoting *Rescission Notice,* 63 Fed. Reg. at 47,233). In particular, Commerce considered the conflicting record evidence on how Windmill's sale was priced, that is, Windmill's various submissions that: (1) the price was based on two Russian prices; (2) Windmill proposed the price based on the advice of its trade counsel; or (3) Windmill solicited a price from the United States purchaser. *See* Def.'s Mem. at 18–20. Commerce also stated that

> [t]he extraordinary high transportation costs incurred by the importer, combined with other expenses borne by the importer in connection with this sale and the fact that the merchandise was subsequently resold at a significant loss (excluding transportation and other costs) lead[s] [Commerce] to conclude that there is no ba-

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[9] In the *Rescission Notice,* Commerce provides an example to rebut Windmill's contention that its commercial reasonableness standard is new and opaque when it states that

> in *Manganese Metal from the Peoples' Republic of China,* 60 Fed. Reg. 56,045 (Nov. 6, 1995) * * * based on the timing of the single sale by one respondent relative to the filing of the petition, the price, which was significantly higher than the market price, and other commercially unusual facts about the transaction (these were proprietary), [Commerce] found that the sale was not bona fide and disregarded it.

63 Fed. Reg. at 47,234.

sis upon which it could be found that the sale was commercially reasonable.

Rescission Notice, 63 Fed. Reg. at 47,234.

Moreover, Commerce contends Windmill did not provide any commercial explanation as to why the United States purchaser incurred high air-freight costs in order to import the most common grade of steel plate. *See* Def.'s Mem. at 21–22.

Next, Commerce maintains that the sale between Windmill and the United States purchaser was atypical on the following grounds: (1) "six months prior to and subsequent to the sale [at issue], Windmill made sales [of different merchandise] to the same U.S. purchaser in quantities that were substantially larger than the test sale quantity," *id.* at 23; and (2) "the U.S. purchaser acted abnormally when it purchased the subject merchandise from Windmill without first having an order from a customer[,]" took possession of the merchandise and paid warehousing fees for two weeks, especially since the "U.S. purchaser 'functions as a trading company that does not take physical possession of the merchandise.'" *Id.* at 23–24 (quoting Def.'s Mem. Ex. 2 at 9). Therefore, Commerce concludes that Windmill's sale was not bona fide because it was not commercially reasonable and was atypical of the normal business practices between Windmill and the United States purchaser. *See* Def.'s Mem. at 25.

3. Domestic Producers' Contentions

Domestic Producers support Commerce's determination to rescind the administrative review at issue on the basis that Windmill's sale to the United States purchaser was not a bona fide sale. *See* Domestic Producers' Resp. at 8–22. Domestic Producers point out that Windmill's sale was: (1) not at arm's length because "Windmill and [the United States purchaser] artificially set the price for the sale * * * [when they] fixed a price and structured the arrangement to 'protect Windmill from legal attack in the present proceedings[,]" *id.* at 16, Ex. 5 at 6; (2) not a commercially reasonable transaction between Windmill and the United States purchaser because it was not "'consistent with good business practices' for the U.S. [purchaser] to purchase" the most common grade of steel and ship it by air only "to take a total loss on the transaction," that is, it was not good business practice for the United States purchaser to purchase products from Windmill without "'considerable savings,'" Domestic Producers' Resp. at 19 (quoting *PQ Corp.,* 11 CIT at 58, 652 F. Supp. at 729); and (3) atypical of the United States purchaser's normal business practice to: (a) order a small quantity of steel; (b) not have a particular order before ordering the steel from Windmill; and (c) pay for two weeks of warehousing after taking possession of the test shipment. *See* Domestic Producers' Resp. at 21–22.

Moreover, Domestic Producers maintain that Windmill's argument that non-bona fide is synonymous to fraud is incorrect because Windmill relies on a civil or criminal definition of fraud. *See id.* at 23–25.

C. Analysis

The Court disagrees with Windmill that Commerce is limited to finding a sale non-bona fide only if Commerce determines that sale is fraudulent.[10] Pursuant to 19 U.S.C. § 1675(a)(2)(A), Commerce is required to determine "the [NV] and [EP] * * * of each entry of the subject merchandise" when determining antidumping duties. However, this Court has held that "Commerce can * * * exclude sales from [United States price] in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive." *FAG U.K.*, 20 CIT at 1281–82; 945 F. Supp. at 265. Sales should be excluded only "in those limited situations in which [Commerce] finds that inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and U.S. sales." *Ipsco, Inc. v. United States,* 714 F. Supp. 1211, 1217, 13 CIT 402, 408 (1989), *rev'd in part on other grounds,* 965 F.2d 1056 (Fed. Cir. 1992); *see also Chang Tieh,* 17 CIT at 1318–19, 840 F. Supp. at 145–46 (exclusion of sales may be necessary to prevent a fraud on Commerce's proceedings); *PQ Corp.,* 11 CIT at 58, 652 F. Supp. at 729 ("U.S. [purchaser's] actions were consistent with good business practices of purchasing acceptable material at considerable savings"). Moreover, in *American Permac, Inc. v. United States,* the Court determined that:

> regular exclusion of sales not in the ordinary course of trade only occurs on the home-market-sales side of the price comparison. * * * It does not follow inexorably, however, that every U.S. sale of the merchandise under investigation must be included in every case. * * *
>
> The distinction is that while U.S. sales outside the ordinary course of trade ordinarily should be included (this may be the very cause of injury), a methodology is to be applied which accounts for sales which are unrepresentative and which do not lead to a fair price comparison.

16 CIT 41, 42, 783 F. Supp. 1421, 1423 (1992).

"Fair (apples to apples) comparison is the goal of the price comparisons required by the antidumping laws, as the courts have stated time and again." *Id.,* 16 CIT at 42, 783 F. Supp. at 1423 (citing *U.H.F.C. Co. v. United States,* 916 F.2d 689, 697 (Fed. Cir. 1990); *Smith-Corona v. United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *AOC Int'l, Inc. v. United States,* 13 CIT 716, 718, 721 F. Supp. 314, 317 (1989)).

Given Commerce's discretion in employing a methodology to exclude sales from the United States price that are unrepresentative or distortive, that is, non-bona fide ones, the Court must determine whether Commerce's actions in this case were reasonable. *See Peer Bearing Co. v. United States,* 2001 Ct. Intl. Trade. LEXIS 138, *46, Slip. Op. 01–125 (October 25, 2001) (quoting *Timken Co. v. United States,* 23 CIT 509,

[10] The Court does not dispute that a fraudulent sale is a non-bona fide sale. However, the Court does not agree with Windmill that a criminal or civil standard of fraud be applied in antidumping cases.

516, 59 F. Supp. 2d 1371, 1377 (1999)) ("'In the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'"); *see also Chevron,* 467 U.S. at 844–45.

During the POR, Commerce "review[ed] the totality of the circumstances surround[ing] [Windmill's] sale" (that is, *inter alia,* whether the sale was at arm's length, whether the sale was consistent with good business practices, whether the sale was typical of Windmill's and the United States purchaser's normal business practices) to determine whether Windmill's sale was commercially unreasonable and, therefore, not bona fide. Def.'s Mem. at 12; *see also* Def.'s Mem. at 10–16. Commerce applied its commercial reasonableness methodology and determined that Windmill's sale to the United States purchaser was a non-bona fide sale. *See Rescission Notice*, 63 Fed. Reg. at 47,234. Commerce's reasons for determining that Windmill's sale was non-bona fide included: (1) the fact that "[t]here [was] no evidence that any commercial factors that normally influence price negotiations played any role in setting the price for this sale"; (2) the extraordinary high air freight cost and other expenses incurred by the United States purchaser that were "significantly greater than the total value of the sale"; (3) the fact that "the decision to send [the most common grade of steel] by air * * * was based solely on the need to enter the merchandise into the United States before the end of the POR" and that there was no commercial need or emergency to ship the sale by air; (4) the atypical quantity of the sale; and (5) the fact that the United States purchaser's possession and warehousing of the shipment along with its failure to have an order before purchasing the shipment was atypical of the United States purchaser's normal business practice of being a trading company.[11] *Rescission Notice*, 63 Fed. Reg. at 47,233.

Reviewing the evidence *in toto,* the Court concludes that Commerce's application of its commercial reasonableness methodology, as well as Commerce's finding that Windmill's sale at issue was not bona fide, is reasonable, is supported by substantial evidence and is in accordance with law.

The Court further finds that Windmill's argument that Commerce's commercial reasonableness methodology will result in exclusion orders rather than remedial orders is without merit. The Court agrees with Commerce that "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." *Rescission Notice,* 63 Fed. Reg. at 47,234; *see, e.g., American Silicon,* 24 CIT at ____, 110 F. Supp. 2d at 998 (finding that one sale made by a foreign producer to a United States purchaser was bona fide because, *inter*

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[11] In its March 3, 1998, response to Commerce, Windmill states that the United States purchaser:

> functions as a trading company that does not take physical possession of the merchandise. Like other trading companies in this business, [the United States purchaser] either initiates contact with a potential buyer or responds to inquiries from potential buyers. Its function is similar to a broker or sales agent, and, therefore, it does not take physical possession of the merchandise.

Def.'s Mem. Ex. 2 at 9.

alia, (1) it was a shipment made to a new customer that was an end-user and the end-user, that is, the United States purchaser, did not resell "the merchandise at a loss"; (2) although there were high air freight costs involved, "Commerce observed that the shipment arrived a number of months prior to the end of the review period * * * and [the foreign producer] never requested this review, nor is there any evidence that it contemplated doing so"; (3) the "U.S. [purchaser] requested the mode of shipment and [the foreign producer] merely complied with its request"; (4) "the quantity purchased was consistent with this being a test sale"; and (5) "Commerce * * * found that 'the fact that the buyer did not issue a purchase order until after [the foreign producer] had shipped the subject merchandise [was] not such a significant deviation from typical commercial practice as to call into question, *inter alia,* the commercial reasonableness of the transaction.'" *Id.,* 24 CIT at ____, 110 F. Supp. 2d at 997, (quoting *Silicon Medal From Brazil: Notice of Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 6305, 6317 (Feb. 9, 1999)); *Rescission Notice,* 63 Fed. Reg. at 47,233 (stating that in the review at issue, Commerce "explained that it intended to review Windmill's first sale (if a review is requested) in the review of the period covering the date on which the sale entered U.S. [C]ustoms territory").

Accordingly, the Court sustains Commerce's decision to rescind the administrative review at issue.

CONCLUSION

Commerce's rescission of the antidumping duty administrative review entitled *Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review,* 63 Fed. Reg. 47,232 (Sept. 4, 1998) is affirmed. This case is dismissed.

(Slip Op. 02–17)

INTERNATIONAL BUSINESS MACHINES, CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–10–00625

[No interest awarded on Harbor Maintenance Tax refunds made under 28 U.S.C. § 1581(i)]

(Dated February 21, 2002)

Baker & McKenzie (Susan G. Braden, William D. Outman, II, Kevin M. O'Brien, Teresa A. Gleason and *Michael E. Murphy*) for plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Jeanne E. Davidson,* Deputy Director, *Todd M. Hughes,* Assistant Director, *Jeffrey A. Belkin,* Trial Attorney, Commercial Litigation Branch, Civil Division United States Department of Justice, for defendant.

FINAL ORDER

RESTANI, *Judge:* This Matter Was The Original Test Case regarding interest on Harbor Maintenance Tax refunds. Before the court is plaintiff's motion of February 4, 2001 to lift stay and enter judgment.

After the court's original judgment in favor of plaintiff herein, the Court of Appeals reversed the part of the judgment finding interest owing under the applicable statute. *See IBM v. United States,* 201 F.3d 1367 (Fed.Cir. 2000), *rev'g* 22 CIT 519 (Ct. Int'l Trade 1998), a*mended by* Errata dated June 9, 2000 (partial reversal substituted for remand). Plaintiff did not raise its constitutional arguments (which this court did not reach) in its response brief in the appeal. After mandate issued, plaintiff attempted to raise such issues here and defendant opposed the attempt. *See* Pl.'s Mem. Supp. Summ. J. at 3; Def.'s Resp. at 4–7; Pl.'s Reply at 12–16. The court stayed this case pending resolution of the constitutional issues in other cases. *See* Order dated June 4, 2001.

No party with a judgment for refund of Harbor Maintenance Taxes pursuant to 28 U.S.C.§1581(i) jurisdiction, and whose interest award depended on a favorable resolution of this action, asked the court to amend such judgment to reference a different test case prior to partial reversal in this matter, even though constitutional issues had not been placed squarely before the appellate court. Thus, this remains the test case for all such judgments, and the court finds that this matter should be completed at the earliest time possible.

The Court of Appeals did not remand this matter for the court to consider constitutional issues after plaintiff's sought reconsideration in the appellate court on such grounds. The appellate court simply reversed the interest award aspect of the judgment. *See IBM,* 201 F.3d at 1374–75 (subsequent errata amending conclusion to reverse "[t]he portion of the judgment of the Court of International Trade ordering interest pursuant to 28 U.S.C. § 2411 as owing on the principal amount adjudged."). Therefore, the court will not consider plaintiff's March, 2001 motion for

summary judgment further. If the appellate court intended this court to consider the issue, the court would deny any award of interest for the reasons stated in *Swisher Int'l, Inc. v. United States,* Slip Op. 01–144 (Ct. Int'l Trade Dec. 11, 2001).

If the Court of Appeals reverses *Swisher* or any other HMT interest case addressing constitutional claims, it is up to it to recall the mandate in this matter, if possible. This court may not amend the judgment of the appellate court.

Accordingly, plaintiff's motion of February 4, 2002, to lift stay and enter judgment is granted in part, plaintiff's motion for summary judgment for award of interest is denied and this matter is terminated.

(Slip Op. 02–18)

ELKEM METALS CO., AMERICAN ALLOYS, INC., APPLIED INDUSTRIAL MATERIALS CORP., AND CC METALS & ALLOYS, INC., PLAINTIFFS/PLAINTIFF-INTERVENORS, AND GLOBE METALLURGICAL, INC., PLAINTIFF-INTERVENOR *v.* UNITED STATES OF AMERICA, DEFENDANT, AND FERROATLANTICA DE VENEZUELA, GENERAL MOTORS CORP., ASSOCIAÇÃO BRASILEIRA DOS PRODUCTORES DE FERROLIGAS E DE SILICO METALICO, ET AL., AND RONLY HOLDINGS, LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 99–10–00628

Plaintiffs, domestic producers of ferrosilicon, moved for judgment upon agency record in action challenging United States International Trade Commission's ("ITC") reconsideration and reversal of final affirmative material injury determination. Plaintiffs claimed: (1) ITC did not possess authority to reconsider final affirmative material injury determination; and (2) if ITC possessed such authority, the reconsideration proceedings were improperly conducted because, among other reasons, ITC failed to hold hearing as provided in published procedures that were to govern such proceedings. ITC and defendant-intervenors argued: (1) ITC had inherent authority to reconsider original final affirmative material injury determination; and (2) ITC's reconsideration proceedings were properly conducted, in that the ITC was not required to conduct a hearing because Plaintiffs did not request one. The Court of International Trade, Eaton, J., held: (1) ITC had authority to reconsider final affirmative material injury determination; and (2) ITC failed to adhere to published procedures that were to govern its reconsideration proceedings; and, therefore, reconsideration proceedings were conducted in a manner not in accordance with law.

[Case remanded to ITC for further action consistent with this opinion.]

(Decided February 21, 2002)

Verner, Liipfert, Bernhard, McPherson and Hand (William D. Kramer); Eckert Seamans Cherin & Mellott, LLC (Dale Hershey and *Mary K. Austin),* for Plaintiff Elkem Metals Company.

Doepken, Keevican & Weiss (Gordon W. Schmidt), for Plaintiff American Alloys, Inc.

Altheimer & Gray (Theodore J. Low), for Plaintiff Applied Industrial Materials Corporation.

Arent Fox Kintner Plotkin & Kahn, PLLC (Stephen L. Gibson, George R. Kucik, and *Nada S. Sulaiman),* for Plaintiff CC Metals and Alloys, Inc.

Dangel & Fine, LLP (Edward T. Dangel, III, Michael K. Mattchen, and *Jonathan L. Glover),* for Plaintiff-Intervenor Globe Metallurgical, Inc.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Marc A. Bernstein),* for Defendant.

Kaye, Scholer, Fierman, Hays & Handler, LLP (Julie C. Mendoza, Donald B. Cameron, R. Will Planert, and *Margaret E. Scicluna),* for Defendant-Intervenor Ferroatlantica de Venezuela.

Hogan & Hartson LLP (Mark S. McConnell and *Jonathan J. Engler),* for Defendant-Intervenor General Motors Corporation.

Dorsey & Whitney LLP (Philippe M. Bruno and *Kevin B. Bedell),* for Defendant-Intervenors Associação Brasileira dos Productores de Ferroligas e de Silico Metalico, Companhia Brasileira Carbureto de Calcio-CBCC, Companhia de Ferroligas de Bahia-FERBASA, Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais-Minasligas.

Aitken Irvin Berlin & Vrooman, LLP (Bruce Aitken and *Virginie Lecaillon),* for Defendant-Intervenors Ronly Holdings, Ltd., Cheliubinski Electrometalurgical Works, Kuznetsk Ferroalloy Works, Stakhanov Ferroalloy Works, and Zaporozhye Ferroalloy Works.

OPINION AND ORDER

EATON, *Judge:* Before the court are the motions of plaintiffs Elkem Metals Company, American Alloys, Inc., Applied Industrial Materials Corporation ("AIMCOR"), and CC Metals and Alloys, Inc. ("CCMA"), and plaintiff-intervenor Globe Metallurgical, Inc. ("Globe") (collectively "Plaintiffs"), for judgment upon the agency record pursuant to USCIT R. 56.2. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(ii). For the reasons set forth below, the court remands this case to the United States International Trade Commission ("ITC") for further action consistent with this opinion.

BACKGROUND

Plaintiffs challenge the ITC's reconsideration and reversal of its final affirmative material injury determinations in antidumping investigations Nos. 731–TA–566–570 and 731–TA–641 (Final) covering ferrosilicon[1] from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela and countervailing duty investigation No. 303–TA–23 (Final) covering ferrosilicon from Venezuela ("Final Determination").

In 1993 and 1994, shortly after the United States International Trade Administration found that ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela was being sold in the United States at less than fair value, and that the Venezuelan government was subsidizing ferrosilicon sales, the ITC determined that such sales were causing material injury to the ferrosilicon industry in the United States. It then issued the Final Determination, the reconsideration and reversal of which is the subject of this dispute. Based on the Final Determination, the United States Department of Commerce ("Commerce") issued antidumping orders against ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, and a countervailing duty order against ferrosilicon from Venezuela. *See Antidumping Duty Order: Ferrosilicon From the People's Republic of China,* 58 Fed. Reg. 13,448 (Mar.

[1] Ferrosilicon is an iron alloy used in the production of steel and cast iron. *See Ferrosilicon from Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. 51,097, 51,097 (Sept. 21, 1999).

11, 1993); *Final Affirmative Countervailing Duty Determination: Ferrosilicon From Venezuela; and Countervailing Duty Order for Certain Ferrosilicon From Venezuela,* 58 Fed. Reg. 27,539 (May 10, 1993), *amended by* 58 Fed. Reg. 36,394 (July 7, 1993); *Antidumping Duty Orders: Ferrosilicon From Venezuela and the Russian Federation,* 58 Fed. Reg. 34,243 (June 24, 1993); *Antidumping Duty Orders: Ferrosilicon From Kazakhstan and Ukraine,* 58 Fed. Reg. 18,079 (Apr. 7, 1993), *amended by* 60 Fed. Reg. 64,018 (Dec. 13, 1995); *Antidumping Duty Order: Ferrosilicon From Brazil,* 59 Fed. Reg. 11,769 (Mar. 14, 1994).

The imposition of these orders remained unchallenged until 1998, when certain Brazilian ferrosilicon producers petitioned the ITC to institute a review of the Final Determination relating to ferrosilicon from that country. The petition alleged that a, then, recently disclosed price-fixing conspiracy among some domestic manufacturers, and its consequent distortion of the price data presented to the ITC during its original material injury investigations, constituted "changed circumstances" sufficient to warrant review pursuant to 19 U.S.C. § 1675(b). *See Ferrosilicon From Brazil, China, Kazakstan [sic], Russia, Ukraine, and Venezuela,* 63 Fed. Reg. 27,747 (May 20, 1998). On July 28, 1998, the ITC instituted the requested changed circumstances review and, further, self-initiated changed circumstances reviews of the other related final affirmative material injury determinations—i.e., those pertaining to ferrosilicon from China, Kazakhstan, Russia, Ukraine, and Venezuela. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela,* 63 Fed. Reg. 40,314 (July 28, 1998).

In May 1999, the ITC suspended these changed circumstances reviews and gave notice of its intention to "reconsider" its Final Determination. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. 28,212 (May 25, 1999) *("Notice"); see also* USITC Pub. 3218, at 6 (Aug. 1999) (stating that "reconsideration was a more appropriate procedure for review of the original determinations"). The *Notice* stated:

> The [ITC] * * * has suspended the [changed circumstances reviews] and is instituting proceedings in which it will reconsider its [Final Determination].
>
> For further information concerning the conduct of this reconsideration and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, C, and D (19 CFR part 207).

Notice, 64 Fed. Reg. at 28,212.

Further, the *Notice* alerted interested parties that the record from the changed circumstances reviews would "be incorporated into the record of the[] reconsideration proceedings" ("Reconsideration Proceedings"). In addition, the *Notice* stated:

> Each Party can submit comments, including new factual information * * * limited to the issues of (a) the price-fixing conspiracy, or

> other anticompetitive conduct relating to the original periods of investigation, and (b) any possible material misrepresentations or material omissions, by any entity that provided information or argument in the original investigations, concerning: (1) the conspiracy or other anticompetitive conduct or (2) any other matter.

See Notice, 64 Fed. Reg. at 28,213.

Thereafter, the ITC reversed and vacated its Final Determination, and issued a negative injury determination as to the original investigations. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. 47,865 (Sept. 1, 1999) ("Reconsideration Determination"); *see generally* USITC Pub. 3218, at 1. As part of this Reconsideration Determination, the ITC concluded that it need not examine whether the alleged price-fixing conspiracy actually distorted the domestic ferrosilicon prices at issue in the original investigations. *See* USITC Pub. 3218, at 23–24 ("[The ITC] cannot conclude what, if any, of the representations made by the domestic producers on pricing and market conditions are sufficiently credible to rely on. Consequently, in our reconsideration determinations we have taken adverse inferences against these firms and used the facts otherwise available, as authorized by the statute and case law.").[2] As a result, the ITC concluded that, during the period under review in the original investigations, the domestic ferrosilicon industry "in the United States [was] neither materially injured nor threatened with material injury by reason of imports of ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela that have been found by * * * Commerce to be sold at less than fair value and imports of ferrosilicon that * * * Commerce has found [were] subsidized by the Government of Venezuela." *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. 51,097, 51,098 (Sept. 21, 1999); *see also* USITC Pub. 3218, at 4.

In accordance with the ITC's Reconsideration Determination, Commerce "rescinded" the antidumping and countervailing duty orders covering the subject imports. *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. at 51,098. In conjunction with this rescission, Commerce terminated all related administrative reviews, *see id.,* and instructed the United States Customs Service to liquidate all unliquidated entries.[3] *See id.* at 51,099.

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[2] On this point, the ITC stated:

> The discussion [here] demonstrates that * * * each [party] withheld or misrepresented essential information directly relevant to the Commission's statutory mandate: whether the domestic industry is materially injured by reason of subject imports. By such conduct, these producers significantly impeded, undermined, and compromised the integrity of the Commission's investigations.
>
> The Commission's governing statute provides that "whenever a party * * * refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the Commission shall] use the best information otherwise available." This provision enables the Commission * * * to avoid "rewarding the uncooperative and recalcitrant party for its failure to supply requested information * * *."

See USITC Pub. 3218, at 21 (footnotes omitted).

[3] Excepted from these instructions were all entries of ferrosilicon from Venezuela, which were, and remain, the subject of a previously granted preliminary injunction. *See AIMCOR v. United States,* 23 CIT ____, 83 F. Supp. 2d 1293 (1999).

Subsequently, Plaintiffs brought separate suits challenging the actions of the ITC, and these suits were consolidated. This consolidated action is currently before the court,[4] and in it Plaintiffs raise both procedural and substantive issues. At this time, however, the court need only address two procedural issues: (1) whether the ITC had the authority to reconsider its Final Determination; and (2) if the ITC possessed such authority, whether the Reconsideration Proceedings were improperly conducted because, among other reasons, the ITC failed to hold a hearing as provided for in the procedures that it published as those that would govern the Reconsideration Proceedings.

The ITC and defendant-intervenors Ferroatlantica de Venezuela ("Ferroven"), General Motors Corporation ("GM"), Associação Brasileira dos Productores de Ferroligas e de Silico Metalico, Companhia Brasileira Carbureto de Calcio-CBCC, Companhia de Ferroligas de Bahia-FERBASA, Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais-Minasligas; and Ronly Holdings, Ltd., Cheliubinski Electrometalurgical Works, Kuznetsk Ferroalloy Works, Stakhanov Ferroalloy Works, and Zaporozhye Ferroalloy Works (collectively "Defendants") argue that: (1) the ITC had the inherent authority to reconsider its Final Determination; and (2) the Reconsideration Proceedings were properly conducted, in that the ITC was not required to conduct a hearing because Plaintiffs did not request one.

STANDARD OF REVIEW

The court, when reviewing final determinations made pursuant to 19 U.S.C. § 1516a(a)(2)(B)(ii), will hold unlawful those agency determinations, findings or conclusions that are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (citations omitted)); *Inland Steel Indus., Inc. v. United States,* 188 F.3d 1349, 1359 (Fed. Cir. 1999); *Hoogovens Staal, BV v. United States,* 24 CIT ____, ____, 86 F. Supp. 2d 1317, 1323 (2000) ("[I]n reviewing agency determinations the court declines to reweigh or reinterpret the evidence of record." (citation omitted)); *see also Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938) ("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." (citations omitted)).

DISCUSSION

I. Authority to Reconsider

In considering the issue of the ITC's power to reconsider the Final Determination, two questions need to be examined: first, does the ITC

[4] The separate suits against Commerce were also consolidated under Consol. Court No. 99–10–00660. This action is stayed pending resolution of the merits of the case at bar.

have the authority to reconsider a final determination; and second, in the event that it possesses such authority, does it extend to a reconsideration taken approximately four and one-half years after such final determination was rendered?

As to the first question, Plaintiffs claim that the ITC did not have the authority to reconsider the Final Determination, because the ITC is "'entirely a creature of statute [and] [a]ny authority delegated or granted to [it] * * * is necessarily limited to the terms of the delegating statute.'" (CCMA's Mem. Supp. Mot. J. Agency R. at 8–9 (alteration in original) (quoting *Sealed Air Corp. v. United States Int'l Trade Comm'n,* 645 F.2d 976, 993 (C.C.P.A. 1981).) This being the case Plaintiffs argue, since "Congress[] fail[ed] to grant the ITC reconsideration authority in antidumping investigations * * * affirmative injury determinations in antidumping proceedings cannot be reconsidered by the ITC * * *." *(Id.* at 9.)

Defendants, on the other hand, argue that administrative agencies in general, and the ITC in particular, have the inherent authority to institute reconsideration proceedings so as "to vindicate the integrity of the administrative process." (ITC's Mem. Opp'n to Mot. J. Agency R. at 13.) In addition, Defendants argue that the antidumping statute does not "preclude reconsiderations under appropriate circumstances." (Ferroven's Mem. Opp'n to Mot. J. Agency R. at 13 (citation omitted).)

The court agrees with Defendants. It is indeed the general rule that federal agencies have the power to reconsider their final determinations. *Trujillo v. Gen. Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." (citation omitted)); *Prieto v. United States,* 655 F. Supp. 1187, 1191 (D.D.C. 1987) ("There can be no dispute that administrative agencies have inherent power to reconsider their own decisions * * *." (citations omitted)); *accord Bookman v. United States,* 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[I]t may be imperative for [agencies] to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict. * * * [Therefore,] '[e]very tribunal, judicial or administrative, has [the] power to correct its own errors or otherwise appropriately to modify its judgment[s] * * *.'" (citation omitted)).

Plaintiffs contend, however, that this inherent authority to reconsider final decisions is limited to adjudicative rather than investigatory agencies (CCMA's Mem. Supp. Mot. J. Agency R. at 10) and that because the ITC's "proceedings are not 'adjudicative[]'" it, therefore, "has no 'equitable' powers when acting in its investigative capacity." *Id.* Indeed, in *Grupo Indus. Camesa v. United States,* 18 CIT 461, 463, 853 F. Supp. 440, 443 (1994), *aff'd,* 85 F.3d 1577 (Fed. Cir. 1996), this court held, *inter alia,* that Congress intended the ITC's "hearing[s] to be non-adjudicative in nature." However, while the ITC is usually characterized as an investigatory rather than an adjudicative agency, this court in later deci-

sions has found that the ITC renders its final determinations in a quasi-adjudicative manner. *See Fujian Mach. & Equip. & Exp. Corp. v. United States,* 25 CIT ____, ____, Slip Op. 01–120, at 10 (Sept. 28, 2001) ("The proceedings in an antidumping investigation or administrative review constitute a very strange creature in the taxonomy of modern American administrative law. [Although] Congress has stated that such proceedings are 'investigatory' rather than adjudicatory * * * the Court of International Trade * * * has observed that in substance they are quasi-adjudicatory." (citation omitted)).[5] In fact, courts have explicitly found the ITC to have the authority to reconsider its final determinations. *See Borlem S.A.—Empreedimentos Industriais v. United States,* 913 F.2d 933, 938–39 (Fed. Cir. 1990) (finding Court of International Trade has the authority to order ITC, on remand, to reconsider a prior determination where such decision was based on erroneous data); *see also Alberta Gas Chems., Ltd. v. Celanese Corp.,* 650 F.2d 9, 12–14 (2d Cir. 1981) ("This universally accepted rule [that Federal Courts possess the authority to reconsider their final decisions] has been applied to proceedings before federal administrative agencies. * * * We find no reason, therefore, not to give the [ITC] the opportunity to resolve in the first instance the major issues in this litigation." (citation omitted)). A finding that the ITC has the authority to reconsider a final determination is particularly appropriate where after-discovered fraud is alleged.[6] *See Alberta Gas Chems., Ltd.,* 650 F.2d at 13 ("It is hard to imagine a clearer case for [the ITC] exercising this inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding.").

Here, the Final Determination was predicated on, what the ITC later described as, "serious material misrepresentations and omissions [Plaintiffs] made during the original investigations on the key issue of ferrosilicon pricing." (ITC's Mem. Opp'n to Mot. J. Agency R. at 5.) According to the ITC's brief, during the changed circumstances reviews, it learned "that individuals from the domestic ferrosilicon industry who provided information * * * in [the] original investigations were either involved in or personally aware of the price-fixing conspiracy" that overlapped a substantial portion of the original investigation period. *(Id.)* Since "[t]hese [individuals] testified and submitted information * * * asserting that the ferrosilicon market was driven by intense price competition" *(id.)* it seems, therefore, to "make[] good sense," *see Alberta*

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[5] *Compare Pesquera Mares Australes Ltda. v. United States,* 266 F.2d 1372 (Fed. Cir. 2001) ("In short, Commerce's antidumping determinations are 'adjudication[s] that produce * * * rulings for which deference [under Chevron] is claimed.'" (citation omitted)); *but see Nippon Steel Corp. v. United States,* Slip Op. 01–154, at 6 n.4 (Dec. 31, 2001) (finding antidumping proceedings investigative because their "basic core findings must be made without regard to the claims of the parties, *ex parte* factual submissions are permitted, there is no administrative law judge, and there is no formal record prior to the final determination." (emphasis in original)).

[6] The court in *Alberta Gas Chems., Ltd.* relied on *Hazel-Atlas Glass Co. v. Harford-Empire Co.,* 322 U.S. 238, 244 (1944), where the Supreme Court stated, in discussing the inherent power of federal courts to reconsider their final judgments, "there has existed * * * a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." Although *Hazel* dealt with a federal court's inherent authority to reconsider final judgments *Alberta Gas Chems., Ltd.,* extended this reasoning to cover federal agencies. *Alberta Gas Chems., Ltd.,* 650 F.2d at 12–13 ("This universally accepted rule has been applied to federal agencies. * * * Under these circumstances, it makes good sense to allow the [ITC] to determine initially whether there was perjury and if there was, whether the perjury affected the result before the [ITC].").

Gas Chems., Ltd., 650 F.2d at 12, that the ITC examine whether the data relied on in making its Final Determination was either false or misleading. Thus, the court finds that the ITC possessed the authority to reconsider the Final Determination.[7]

Having determined that the ITC had the power to reconsider its Final Determination, the court addresses the question of whether too much time passed from the issuance of the Final Determination to the date the ITC initiated its Reconsideration Proceedings. Plaintiffs argue that the "ITC did not [conduct its Reconsideration Proceedings] within a reasonable time after it knew or should have known of the [price-fixing conspiracy] convictions." (CCMA's Mem. Supp. Mot. J. Agency R. at 16.) The ITC, however, argues that it "initiated [the Reconsideration] [P]roceedings promptly after information about the misrepresentations and omissions in the original investigation was presented to it * * *." (ITC's Mem. Opp'n to Mot. J. Agency R. at 16.)

The question presented to the court, then, is whether the four and one-half year period of time that elapsed between the Final Determination and commencement of the Reconsideration Proceedings was reasonable. *See Belville Mining Co. v. United States,* 999 F.2d 989, 997 (6th Cir. 1993) ("Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision." (citations omitted)). Under the facts presented here, the court finds that the Reconsideration Proceedings were held within a reasonable time. In accordance with its statutes and its regulations, the ITC does not monitor subsequent developments as they pertain to a particular final determination. After rendering a final affirmative determination, the ITC publishes its findings in the Federal Register and communicates them to Commerce, which then issues an appropriate order. The ITC, therefore, was under no obligation to monitor the domestic ferrosilicon industry subsequent to rendering its Final Determination; nor is it reasonable to expect that the ITC should have done so of its own accord. The statutory scheme governing an antidumping or countervailing duty final affirmative determination provides, however, for various kinds of reviews—e.g., changed circumstances reviews and five-year reviews—that allow interested parties to bring relevant developments to the ITC's attention. Thus, allegations of fraud, of the kind made here, would necessarily come to the ITC's attention, if at all, at a time somewhat remote from the original investigations. Indeed, in this case, the evidence of the purported fraud came to light during the course of changed circumstances reviews. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela,* 63 Fed. Reg. at 40,314. Thereafter, the ITC acted promptly, by suspending the changed circumstances reviews, and initi-

[7] In finding that the ITC had the authority to reconsider the Final Determination, the court need not, and does not, make any findings with respect to the allegations of material misrepresentations or omissions themselves.

ating the Reconsideration Proceedings. *See Notice,* 64 Fed. Reg. at 21,812. On this point the ITC has stated:

> During the changed circumstances review, the Commission received extensive information and argument regarding the price-fixing conspiracy and its implications for the Commission's determinations. After considering the information and argument, the Commission determined that reconsideration was a more appropriate procedure for review of the original determinations. * * * Thus, on May 21, 1999, the Commission suspended the changed circumstances review and instituted a reconsideration of the original determinations.

USITC Pub. 3218, at 5–6 (footnote omitted). Thus, the ITC took action soon after it possessed information it believed substantiated the allegations concerning the price-fixing conspiracy. Therefore, even though the period of time that elapsed between the Final Determination and the commencement of the Reconsideration Proceedings was substantial, it was not unreasonable.

II. Adherence to Procedures

In their briefs, Plaintiffs contend that, in deciding whether they were entitled to a hearing during the course of the Reconsideration Proceedings, the court must address the issue of whether the ITC violated their constitutional due process rights. In support of their contention, Plaintiffs argue that due process required that they be granted an evidentiary hearing because "an opportunity to be heard was central to the fact-finding process." (Globe's Mem. Supp. Mot. J. Agency R. at 23.) And, that "[i]n taking the 'extraordinary step' of * * * instituting a reconsideration proceeding * * * the ITC should have recognized that its inquiry had changed from the conventional economic investigative ambit to [a] historical fact-finding [procedure.]" *(Id.* at 24.) Defendants, for their part, contend that Plaintiffs' constitutionally protected interests were not violated in the Reconsideration Proceedings, because "[a] prerequisite for due process protection is [that Plaintiffs have] some interest worthy of protect[ion]." (GM's Mem. Opp'n to Mot. J. Agency R. at 23 (citation omitted).)

While both Plaintiffs and the ITC couch their arguments, at least in part, in constitutional terms, the issue of whether Plaintiffs' constitutional due process rights were violated need not be addressed to decide the questions presented. *See Transcom, Inc. v. United States,* 182 F.3d 876, 879–80 (Fed. Cir. 1999) ("[W]e need not address [Plaintiff]'s argument that the * * * administrative reviews violated [Plaintiff]'s rights under the due process clause of the Fifth Amendment to the Constitution, because we hold that Commerce's conduct in this case violated Commerce's statutory and regulatory notice obligations in connection with the administrative reviews." (citation omitted)); *see also NEC Corp. v. United States,* 21 CIT 933, 946, 978 F. Supp. 314, 326–27 (1997) (quoting *Norwegian Nitrogen Prods. Co. v. United States,* 288 U.S. 294, 321 (1933)). The court, therefore, need not consider the proposed consti-

tutional issues if the matters in question can be settled by reference to statute. *Transcom, Inc.,* 182 F.3d at 879–80. To reach this determination, however, the court must examine whether Plaintiffs were afforded a proceeding conducted in accordance with: (1) the provisions of the *Notice;* and (2) the ITC's governing law, and the regulations promulgated thereunder. *NEC Corp.,* 21 CIT at 946, 978 F. Supp. at 326–27.

As to Plaintiffs' argument that the Reconsideration Proceedings were improperly conducted because they were not afforded a hearing, Defendants argue that Plaintiffs "did not request * * * any additional hearing during [the R]econsideration [P]roceeding[s]" and, therefore, it was not required to conduct one. (ITC's Mem. Opp'n to Mot. J. Agency R. at 5, 29.) In support of its argument, the ITC relies on subsection 1677c of title 19, which states: "[T]he * * * Commission shall * * * hold a hearing in the course of an investigation *upon the request of any party* to the investigation before making a final determination under section 1671d or 1673d of this title." 19 U.S.C. § 1677c(a)(1) (1988) (emphasis added). The statute cited by Defendants, however, does not end the matter. The ITC was bound to conduct the Reconsideration Proceedings not only in accordance with its statutes, but also in accordance with the regulations referred to in the *Notice.* That the ITC was required to give notice to interested parties regarding how the Reconsideration Proceedings would be conducted is well settled. *See, e.g., Am. Lamb Co. v. United States,* 785 F.2d 994 (Fed. Cir. 1986). It is equally well settled that once it gave notice as to how the Reconsideration Proceedings would be conducted, the ITC was required to actually conduct those proceedings in accordance therewith. *See PPG Indus., Inc. v. United States,* 13 CIT 183, 190 n.4, 708 F. Supp. 1327, 1332 n.4 (1989) ("[A]n agency's failure to follow its own rules and procedures is fatal to action." (citation omitted)). In addition, the ITC was obligated to notify interested parties of any change in the manner in which these proceedings would be conducted. *See Gen. Elec. Co. v. United States,* 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner * * *." (citation omitted)).

Here, while the ITC styled its proceedings as a reconsideration, it had no statutory or regulatory guidance as to how the proceedings were to be conducted.[8] (Oral Arg. Tr. 9/05/01, at 119.) Under these circumstances, it was not unreasonable for the ITC to rely on existing regulations and, thus, it notified interested parties to look to "the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts, A, C, and D (19 CFR part 207)." *Notice,* 64

[8] *See Ferrosilicon from Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela,* 64 Fed. Reg. at 51,098 ("The ITC's action in these cases is unique and there is no statutory provision which explicitly provides for the manner in which the Department should rescind these orders. * * * In this instance, therefore, rescission of the[se] ferrosilicon orders from the dates of issuance is the legal equivalent of the action required to be taken by the Department under sections 705(c)(2) and 735(c)(2).").

Fed. Reg. at 28,212. By doing so, the ITC informed interested parties that were entitled to rely on the provisions of subsection 207.23(a), which state, in relevant part, "[t]he Commission shall hold a hearing concerning an investigation before making a final determination * * *." 19 C.F.R. § 207.23 (1993). Thus, the ITC gave notice "with ascertainable certainty," *Gen. Elec. Co.,* 53 F.3d at 1329, that there would be a hearing prior to a final determination being rendered, thereby creating an obligation on its part to provide such hearing. *See Mercer v. Dep't of Health and Human Servs.,* 772 F.2d 856, 859 (Fed. Cir. 1985) ("Where the agency has adopted a procedure that provides for a predecision hearing the denial of [this] predecision hearing is clear error.").

Rather than doing so, however, the ITC concluded no new hearings would be held. Instead, the ITC included in the record a January 22, 1993 hearing conducted in connection with the original investigation leading to its Final Determination, *see* USITC Pub. 2606, App. B, and, further, incorporated into the record a second hearing conducted on April 13, 1999, during the changed circumstances reviews. (ITC's Mem. Opp'n to Mot. J. Agency R. at 28.) Each hearing was held before the ITC gave notice that it had suspended the changed circumstances reviews and instituted the Reconsideration Proceedings.[9] These hearings, however, were not sufficient to fulfill the ITC's commitments. Although the ITC may not have been required by statute to grant a hearing during the course of the Reconsideration Proceedings, by directing interested parties to the regulations cited in the *Notice* it created an obligation to do so. *See Mercer,* 772 F.2d at 859. In addition, by citing these regulations in the *Notice,* the ITC obliged itself to conduct the Reconsideration Proceedings in every particular in accordance with those regulations. Thus, Plaintiffs were entitled not only to a hearing, they were also entitled to all of the other benefits of the "Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts, A, C, and D (19 CFR part 207)[]" *Notice,* 64 Fed. Reg. at 28,212, including adequate notice, pre-hearing briefing and post-hearing briefing. *See* 19 C.F.R. § 207.20(b) ("Upon receipt of notice from the administrating authority of an affirmative preliminary determination [or] notice of an affirmative final determination * * * the Commission shall publish in the Federal Register notice of its investigation to reach a final determination * * *."); 19 C.F.R. § 207.22 ("Each party may submit to the Commission, no later than a date specified in the notice of investigation, a prehearing brief."); 19 C.F.R. § 207.23(a) ("The Commission shall hold a hearing concerning an investigation before making a final determination * * *."); 19 C.F.R. § 207.24 ("Any party may file a posthearing brief concerning the information adduced at or after the hearing with the Secretary within a time specified in the notice of investigation or by the presiding official at the hearing.").

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[9] This is particularly significant as to Globe for, although Globe was party to the proceedings leading to the Final Determination, it did not participate in the changed circumstances reviews. *Notice,* 64 Fed. Reg. at 28,212; *(see also* ITC's Mem. Opp'n to Mot. J. Agency R. at 27.)

Finally, as to the ITC's contention that it need not examine whether the alleged price-fixing conspiracy actually distorted the domestic ferrosilicon prices at issue in the original investigations, should evidence with respect thereto be presented during the course of the further proceedings on remand, the ITC shall consider such evidence as it would consider any other evidence on the record. *See* 19 U.S.C. § 1677e (1988).

CONCLUSION

For the reasons set forth above, the court finds that, while the ITC had the authority to reconsider its Final Determination, it failed to adhere to the procedures that it published as those that would govern its Reconsideration Proceedings. The Reconsideration Proceedings were, thus, conducted in a manner not in accordance with law and, therefore, the Reconsideration Determination is remanded to the ITC for further action consistent with this opinion. The parties shall consult, and propose an order governing timing of the remand proceedings no later than March 4, 2002.

(Slip Op. 02–19)

SWISHER INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–03–00322

[No interest on interest awarded on Harbor Maintenance Tax refund made under 28 U.S.C. § 1581(i). Post-summons interest awarded on refund made under 28 U.S.C. § 1581(a)]

(Dated February 21, 2002)

McKenna & Cuneo, L.L.P. (Peter Buck Feller, Daniel G. Jarcho, and *Joseph F. Dennin)* for plaintiff Swisher.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes,* and *Jeffrey A. Belkin), Richard McManus* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

AMENDED JUDGMENT

RESTANI, *Judge:* Plaintiff, Swisher International, Inc., has paid Harbor Maintenance Tax in the amount of $27,307.95. $10,341.59 of the principal amount has been refunded previously pursuant to a January 8, 1999 judgment entered under 28 U.S.C. § 1581(i) jurisdiction. $16,966.36 remains outstanding. The court's denial of jurisdiction under 28 U.S.C. § 1581(a), which would have overcome statute of limitations issues, was overruled on appeal. *See Swisher Int'l, Inc. v. United States,* 205 F.3d 1358, 1364 (Fed. Cir.2000), *cert. denied,* 581 U.S. 1036 (2000). Refund is now to be made of the full principal, but the amount of interest owed remains in dispute.

The Federal Circuit Court of Appeals has stated that post-summons interest is due under 28 U.S.C. § 2644 in HMT cases arising under § 1581(a). *See IBM Corp. v. United States,* 201 F.3d 1367, 1374 (Fed Cir. 2000). Although IBM was a case brought under 28 U.S.C. § 1581(i), not (a), the parties are in agreement that post-summons interest is owed under 28 U.S.C. § 2644 on claims brought under 28 U.S.C. § 1581(a). Plaintiff, therefore, is entitled to collect post-summons interest from the date of summons to the date of refund on the outstanding principal of $16,966.36.

Plaintiff filed its complaint under both 28 U.S.C. § 1581(a) and (i), but plaintiff accepted payment of the $10,341.59, which was awarded under 1581(i) jurisdiction. Plaintiff specifically did not appeal this award, *see* Notice of Appeal filed January 26, 1999 ("Plaintiff does not appeal the award of $10,341.59 * * *"), and, therefore, did not preserve its claim for interest on the award under § 2644 based on § 1581(a) jurisdiction. *See Durango Associates, Inc., v. Reflange, Inc.,* 912 F.2d 1423 (Fed. Cir. 1990) (citing *C.A. May Marine Supply Co. v. Brunswick Corp.,* 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) (holding that where the appellant specifies a judgment or a part thereof, appellate court "has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal.")). Accordingly, interest is not owed on said prior award.[1]

Plaintiff argues that, in addition to the remaining principal and post-summons interest payable under § 2644, plaintiff is also entitled, under 28 U.S.C. § 1961 (post-judgment interest), to interest upon the original unpaid 1999 interest awarded on a 28 U.S.C. § 1581(i) theory, payment of which was stayed pending *IBM*.

As the holding of *IBM* effectively negated the award of prejudgment interest in the original § 1581(i) judgment under which the $10,341.59 was paid, there is no outstanding award of interest in 1999 upon which interest may run. The statement as to § 2644 post-summons in *IBM,* though obviously correct, was *dicta. See id.,* 201 F.3d at 1374. *IBM* did not deal with the award of interest on a case brought under 28 U.S.C. § 1581(a). Accordingly, post-judgment interest on unpaid interest is not awarded under 28 U.S.C. § 1961, and 28 U.S.C. § 2644 provides all that is due as interest.

It is therefore ORDERED that:

(1) Judgment is entered for plaintiff in the amount of $ 16,966.36, plus interest on that principal, calculated from the date of the summons pursuant to 28 U.S.C. § 2644.

(2) Pursuant to the reasoning here and the court's opinion in this case dated December 11, 2001, Slip-Op. 01–144, plaintiff is entitled to no other award of interest.

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[1] It appears that there also was no appeal as to a small portion of the agreed to principal amount, but as principal is agreed between the parties and there was no prior settlement and payment by the government of this amount, the court declines to analyze the issue of appellate jurisdiction in this regard.

(Slip Op. 02–20)

AMMEX, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 99–01–00013

[Order to Show Cause; Denied.]

(Decided February 22, 2002)

Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel), for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin),* for Defendant.

OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* Plaintiff, Ammex, Inc. ("Ammex"), moves this court for an Order to Show Cause Why Defendant Should Not be Held in Contempt, pursuant to Rules 7(e) and 63 of the Rules of this Court. Specifically, Ammex seeks to require defendant, the United States of America (the "Government"), to explain why Customs' revocation of Ammex's authorization to sell duty-free fuel is not in contempt of this court's order and judgment of August 25, 2000. Ammex, Inc.'s Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt ("Ammex's Motion") at 1. Familiarity with the court's August 25, 2000 order and decision in *Ammex, Inc. v. United States,* 116 F. Supp. 2d 1269 (CIT 2000) *("Ammex I"),* is presumed.

II

BACKGROUND

Ammex operates a duty-free store at the Ambassador Bridge between Detroit, Michigan and Windsor, Canada. In a letter dated January 24, 1994, Ammex requested approval to sell gasoline and diesel fuel on a duty-free basis. Letter from Barbeau to Morandini of 1/24/94 (Ex. 6 to Ammex's Memorandum of Law in Support of Ammex, Inc.'s Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt ("Ammex's Memo")). On February 12, 1998, the United States Customs Service ("Customs") ruled that gasoline and diesel fuel could not be sold on a duty-free basis from Ammex's facility. U.S. Customs Service Headquarters Ruling ("HQ") 227385, February 12, 1998. This ruling reaffirmed a 1994 headquarters ruling which found that activities of duty-free stores should not be extended to cover "unidentifiable fungibles," such as gasoline and diesel fuel, when sold on a retail basis. HQ 225287, June 7, 1994. "[I]n both HQ 227385 and 225287, Customs accepted the requestor's assertion that the merchandise under consideration was duty-free but, * * * determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse." *Customs Bulletin and Decisions,* Vol. 35, No. 25, June 20, 2001, at 296.

In *Ammex I,* Ammex challenged the above Customs rulings. This court found that "Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel." *Ammex I,* 116 F. Supp. 2d at 1275–76. This court accordingly entered a judgment setting aside HQ 227385 and "ORDERED ADJUDGED AND DECREED that 19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Id.* at 1276.

On September 5, 2000, in accordance with the court's decision, Customs issued a letter to Ammex granting its request to expand its "Class 9 duty free warehouse operation to include the gasoline and diesel fuel tanks located at [Ammex's] facility." Letter from Ryan to Levesque of 9/5/00 (Ex. 2 to Ammex's Memo) ("September 5 letter").

On October 23, 2002, Ammex wrote to Customs seeking a letter to certify that the fuel sold at Ammex's duty-free store was exempt from taxes. Letter from Levesque to Ryan of 10/23/00 (Ex. 1 to "Durant Declaration" of Defendant's Opposition to Plaintiff's Motion to Show Cause Why Defendant Should Not be Held in Contempt) ("October 23 letter"). Customs forwarded Ammex's request to the Internal Revenue Service ("IRS"). On January 8, 2001, the IRS issued an informational letter stating that section 4081 of the Internal Revenue Code (the "Tax Code") (26 U.S.C. § 4081) imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel for consumption, use, or warehousing. Durant Declaration ¶8.

Based on the IRS letter, Customs determined that it could not lawfully permit Ammex to sell gasoline and diesel fuel duty-free. On June 20, 2001, Customs issued a notice proposing to revoke the September 5 letter. *Customs Bulletin and Decisions,* Vol. 35, No. 25, June 20, 2001. On November 21, 2001, after a notice and comment period, Customs advised that it was "revoking a ruling letter pertaining to gasoline and diesel fuel from a [sic] class 9 bonded warehouses and revoking any treatment previously accorded by the Customs Service to substantially identical transactions." *Id.,* Vol. 35, No. 47 (November 21, 2001) at 5 *("Revocation Decision").* Customs announced that the revocation would become effective on January 21, 2002. *Id.* Ammex thereafter filed its Motion to Show Cause Why Defendant Should Not be Held in Contempt.

III

STANDARD

To establish that a party is liable for civil contempt a plaintiff must prove three elements: "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order." *Roe v. Operation Rescue,* 54 F.3d 133, 137 (3d Cir. 1995). Civil contempt must be proven by clear and convincing evidence, *Glaxo, Inc. v. Novopharm, Ltd.,* 110 F.3d 1562, 1572 (Fed. Cir. 1997), and a court cannot hold a party in contempt if there is a "fair ground of doubt as to the wrongfulness of the [party's] actions," *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1173 (Fed. Cir. 1986).

IV

ARGUMENTS

Ammex argues that Customs' revocation is "plainly inconsistent with this Court's Order permitting the sale of duty-free gasoline and diesel fuel from a duty-free sales enterprise." Ammex's Memo at 3. Ammex requests, among other things, that this court issue an order to show cause why Customs' revocation is not in contempt of this court's judgment of August 25, 2000 and determine that section 4081 of the Tax Code, as it applies to entries into Class 9 bonded warehouses, is unconstitutional.

"The agency decision challenged in *Ammex I* was based exclusively on a perceived 'unidentifiable fungibles' exception to the statute relating to bonded warehouses, particularly Class 9 bonded warehouses, and the holding in *Ammex I* was simply that that decision, as memorialized in HQ 225287 and affirmed in HQ 227385, was contrary to law." Defendant's Opposition to Plaintiff's Motion for an Order to Show Cause Why Defendant Should not be Held in Contempt ("Defendant's Opposition") at 8. The Government argues, "Neither the challenged ruling letters nor this Court's holding addressed or involved any other potential basis for prohibiting the duty-free sale of gasoline and diesel fuel, including whether the fuel which Ammex intended to sell is encompassed by the statutory definition of 'duty-free merchandise.'" *Id.* Because the issues presently raised by Ammex's motion "are not relevant to a determination of whether Customs' revocation decision violates the *Ammex I* decision," *id.* at 17, the Government argues that this court should decline to consider them.

V

ANALYSIS

A

JURISDICTION TO ENTERTAIN PRESENT CHALLENGE

The United States Court of International Trade, like all Federal courts established under Article III of the Constitution, is a court of limited jurisdiction. *United States v. Gold Mountain Coffee, Ltd.,* 8 C.I.T. 247, 248, 597 F. Supp. 510, 513 (1984). The party asserting jurisdiction "has the burden of proving that jurisdiction in this court is proper." *Id.* at 249. Jurisdiction for this court to entertain the challenge in *Ammex I* fell under 28 U.S.C. § 1581(i), which provides the court with jurisdiction over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for revenue from imports or tonnage, tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue or administration and enforcement with respect to these matters." 28 U.S.C. § 1581(i). Ammex now argues that this court "possesses jurisdiction to hear this motion by virtue of the Court's jurisdiction over the underlying proceeding in this case." Plaintiff's Memo at 3 (citing *United States v. Hanover Ins. Co.,* 82 F.3d 1052, 1054 (Fed. Cir. 1996) ("[T]he Court of

International Trade has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments.")).

Were Customs' revocation an attempt to attack or evade *Ammex I* and the court's August 25, 2000 judgment, then no doubt this court could readily exercise jurisdiction over such behavior under its inherent enforcement powers and as an extension of its jurisdiction to hear Ammex's original complaint in *Ammex I*. However, the issue underlying Ammex's Complaint in the present motion is distinct from the issue raised in *Ammex I*. While both issues call upon the court to determine the validity of Customs' refusal to allow Ammex to sell fuel from its duty-free store, the stated bases for Customs' refusal to allow Ammex's sales differ in each case.

Ammex's contention that "there can be no dispute that the transaction and matter at issue in this second action are the same as the first—the matter now, as before, is Ammex's right to sell gasoline and diesel fuel duty-free from its duty-free store in Detroit, Michigan," Plaintiff's Memo at 16, is specious. Ammex states the issue too broadly. The issue in *Ammex I* was not simply whether Ammex is entitled "to sell gasoline and diesel fuel from its duty-free store in Detroit, Michigan." *Id.* Rather, the court was called upon to consider whether *the explanation* Customs provided for denying Ammex's request to sell gasoline and diesel fuel duty-free was arbitrary, capricious, or contrary to law.

The Government more accurately states the case thus:

> The only issue that the Court had to decide in *[Ammex I]* was whether the denial of Ammex's proposal to sell gasoline and diesel fuel free of duty at its duty-free store in Detroit, Michigan, *for the reasons provided in HQ 225287 and then affirmed in HQ 227385*, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Based on the nature of the complaint, the Court was constrained to consider only that stated basis for the challenged decision and review only the agency's record underlying its decision."

Defendant's Opposition at 4 (emphasis added).

This court accordingly reviewed Customs' stated reason for denying Ammex's request to sell duty-free fuel, namely, its rationale that such fuel falls under an "unidentifiable fungibles" exception to merchandise that can lawfully be entered and withdrawn for exportation from duty-free stores. Customs reasoned that, because duty-free merchandise purchased in the United States, if reimported, had to be declared and the duties and taxes paid, the lack of any practical means of enforcing this requirement with respect to unidentifiable fuel in gas tanks rendered the sale of duty-free fuel contrary to law.

In resolving the issue raised in *Ammex I,* the court stated, "§ 1557(a)(1) is dispositive of Plaintiff's claim." *Ammex I,* 116 F. Supp. 2d at 1275. "On its face, the plain language of § 1557(a)(1) shows Congress' intent that there be only two restrictions on the type of dutiable merchandise that may be stored or withdrawn from a bonded ware-

house: (1) perishable articles and (2) explosive substances other than firecrackers." *Id.* at 1273. This court determined that diesel fuel and gasoline did not fall within either of these exceptions, and thus it was error for the government to read into the governing statute "an exception beyond those specifically stated in § 1557(a)(1)." *Id.* at 1275. "In view of 1557(a)(1)'s instruction that 'any merchandise subject to duty' may be entered and withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385." *Id.*

Implicit in both parties' briefings in *Ammex I* and the court's opinion was the presumption that the gasoline and diesel fuel at issue qualified as "duty-free merchandise" within the meaning of 19 U.S.C. § 1555(b)(8)(E). Neither party questioned this assumption, and because neither party raised a challenge, the court did not consider or rule on such an issue. Because of subsequent events, however, the issue has arisen as to whether gasoline and diesel fuel can qualify as "duty-free merchandise" under 19 U.S.C. § 1555(b)(8)(E), in light of information from the IRS that such fuel may be subject to tax and therefore unable to qualify as "duty-free merchandise" under the statutory definition.

"[F]or the Court to consider Ammex's Motion, it must also consider whether the federal excise tax issue now framed by Customs was directly or indirectly part and parcel of *Ammex I."* Reply of Ammex, Inc. In Support of its Motion for Order to Show Cause ("Ammex's Reply") at 12. Revelations by Ammex at oral argument confirm that the issue now raised was neither part and parcel, nor conclusively determined in *Ammex I.* Ammex previously maintained that this court's decision in *Ammex I* foreclosed all issues relevant to Customs' denial of Ammex's right to sell gasoline and diesel fuel duty-free, yet Ammex's October 23, 2000 letter to Customs states the following:

> Subsequent to the decision by the U.S. Court of International Trade, Ammex has commenced the sale of tax and duty free gasoline and diesel fuel, following U.S. Customs requirements and procedures. In conjunction with this operation, Ammex requires a letter from U.S. Customs stating that there are no taxes due at the time of bonded entry into the U.S. of gasoline and diesel fuel.

October 23 letter. Ammex explained at oral argument that the October 23 letter was an attempt by Ammex to obtain, and use in unrelated litigation, a certification from Customs that excise taxes were not applicable to certain fuel sold by Ammex. However, in addition, because it shows that Ammex itself would not rely on *Ammex I* on the excise tax question, the letter now serves to foreclose Ammex's *res judicata* and contempt arguments.

Having determined that the issue of federal taxes as applied to gasoline and diesel fuel and the concurrent consideration of whether such application preempts such fuel from qualifying as "duty-free merchandise" was neither part nor parcel of *Ammex I,* Ammex's Motion cannot be considered by the court under the present procedural posture. Am-

mex's Motion asks the court "to interpret § 1555(b)(8)(E) of Title 19–a Customs statute." Ammex's Reply at 12–13. This constitutes a new matter, one which was not contemplated in *Ammex I.* It therefore cannot be said that the revocation constitutes an attack on the court's prior judgment or order in this case. While the court does possess inherent power to determine the effect of its judgments and protect against attempts to attack or evade those judgments, in this case, the issue before the court is not encompassed by the prior order.

Customs did not violate this court's order in *Ammex I* by either determining, based on newly acquired information, that the fuel Ammex desires to sell can not qualify as "duty-free merchandise," and its subsequent revocation of Ammex's entitlement to sell gasoline and diesel fuel from its duty-free store, does not violate the decision in *Ammex I.* Ammex is entitled to challenge the basis for Customs' decision to revoke its September 5 letter. If, however, Ammex wishes to challenge this new, distinct basis for Customs' disallowance of Ammex's sale of gasoline and diesel fuel from its duty-free store, Ammex must raise this issue anew in the proper procedural manner. It cannot, as the Government contends, "thwart proper procedure and bootstrap a new grievance onto a dispute that has already been resolved." Defendant's Opposition at 20.

B

RES JUDICATA ARGUMENT

Ammex also argues that Customs' "attempt to relitigate the matter of Ammex's duty-free fuel sales with a previously-available argument is precluded under the long-standing doctrine of *res judicata,"* a term "used broadly to refer to concepts of merger, bar, and direct and collateral estoppel [i.e., issue preclusion]." Plaintiff's Memo at 15. Two "major limitations" to such preclusion, however, are (1) "a requirement that at the time of the first litigation the parties be able to foresee the later litigation that came to present the same issue" and "a requirement that the issue have played an important role in the abstract hierarchy of legal rules controlling the first or the second litigation." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4424 at 226–227 (1981); *see also Hyman v. Regenstein,* 258 F.2d 502, 510–11, cert. denied, 79 S.Ct. 589, 359 U.S. 913, 3 L.Ed.2d 575 (5th Cir. 1958) ("[C]ollateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation."). The court finds that the narrow tax issue now raised was too far outside the ambit of the *Ammex I* proceedings either to be foreseeable or to play a crucial role in the final judgment of that case. Issue preclusion should thus not operate to bar either party from raising this issue in the correct procedural posture.

VI

CONCLUSION

For the foregoing reasons, Ammex's Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt is denied.

(Slip Op. 02–21)

BOEN HARDWOOD FLOORING, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–08–02006

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment granted. Judgment entered for Defendant.]

(Decided February 25, 2002)

Galvin & Mlawski (John J. Galvin), Attorney, for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General, *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, *Barbara S. Williams,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Yelena Slepak,* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* Plaintiff Boen Hardwood Flooring, Inc. ("Plaintiff" or "Boen") challenges the denial of its protest, filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (1994), against the liquidation of the subject merchandise.[1] Defendant United States Customs Service ("Defendant" or "Customs") classified Plaintiff's merchandise under heading 4412 of the Harmonized Tariff Schedule of the United States (1995) ("HTSUS"), as "[p]lywood, veneered panels, and similar laminated wood." Plaintiff contends that the subject merchandise should be liquidated under subheading 4409.20.25, HTSUS, as "[n]onconiferous [w]ood flooring." *See* Pl.'s Statement of Material Facts Not in Issue at 2 ("Pl.'s Statement of Facts").

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs' classification is subject to *de novo* review by this Court pursuant to 28 U.S.C. § 2640 (1994). This action is before the Court on cross motions for summary judgment made by Plaintiff and Defendant pursuant to USCIT Rule 56. The Court finds, for the reasons discussed below, that the subject merchandise is properly classified under heading 4412, HTSUS, as a "veneered panel" and grants summary judgment for the defendant.

UNDISPUTED FACTS

The subject merchandise consists of hardwood flooring made up of three layers of wood in which the grain of the middle layer is perpendicu-

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[1] Liquidation constitutes the appraisal of the value of imported merchandise and determination of the appropriate classification and rate of duty. *See* 19 U.S.C. § 1500 (1994); 19 C.F.R. § 159 (2001).

lar to the grain of the two outer layers. *See* Pl.'s Statement of Facts at 4–5; Def.'s Resp. to Pl.'s Statement of Material Facts ¶¶ 18–21 (Def.'s Resp. to Pl.'s Statement of Facts"). The three layers of the flooring are glued together. *See* Def.'s Statement of Undisputed Facts ¶ 3; Pl.'s Statement of Facts at 6. Without acknowledging it by explicit agreement, both parties to this action do agree that the subject merchandise has been "laminated."[2] *See* Pl.'s Statement of Facts at 6 (stating that the layered stock from which the merchandise is produced is "glu[ed] under pressure"); Def.'s Statement of Undisputed Facts ¶ 3 (stating that the top and bottom layers of the flooring are glued to the middle layer); Def.'s Mem. Supp. Cross Mot. Summ. J. and Opp'n Pl.'s Mot. Summ. J. at 14–15 ("Def.'s Mem.") (arguing that the merchandise meets the definition of "laminated" and therefore is properly classifiable as "similar laminated wood"), 18 (arguing that the subject merchandise is "highly processed * * * by lamination"); *see also* Dep. of Thomas L. Goss at 29 (stating that a hydraulic press is used to "put[] pressure and heat down on the [flooring layers] to press [them] together and to get the glue to bond"); Boen Marketing Material, *Transform Your World with Boen Hardwood,* Collective Ex. A at Specification Suggestions—Materials (stating that "Boen Longstrip shall be laminated construction"); *Boen Hardwood Flooring Floating Floor System Installation Guide,* Def.'s Ex. 1, (describing the merchandise as "three ply laminate").

The flooring is continuously shaped with tongue and groove along its edges and ends, *see* Pl.'s Statement of Facts at 7; Def.'s Mem. at 2, and comes in a standard size of 5 1/2 inches wide, 7 feet 2 5/8 inches long, and approximately 5/8 inch thick.[3] *See* Pl.'s Statement of Facts at 4; Def.'s Resp. to Pl.'s Statement of Facts ¶ 17. The top layer of the flooring is composed of strips of hardwood measuring approximately 1/8 inch thick and 2 3/4 inches wide. *See* Pl.'s Statement of Facts at 5; Def.'s Resp. to Pl.'s Statement of Facts ¶ 21. The center layer is composed of softwood[4] strips or slats measuring approximately one inch wide and 1/4 inch thick.[5] These softwood strips are laid next to each other with their grain

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[2] "Laminate" means "[t]o bond together two or more pieces of wood to make a single piece, using adhesive and pressure." *Terms of the Trade* 192–93 (4th ed. 2000). *See also Webster's II New Riverside University Dictionary* 674 (1988) ("Webster's") (defining "laminate" as "[t]o make by uniting several layers").

[3] The parties disagree as to the thickness of the subject merchandise. Plaintiff asserts that it measures 5/8 (or 20/32) inch thick, *see* Pl.'s Statement of Facts at 4, while defendant asserts that the flooring measures 19/32 inch, a difference of 1/32 inch. Def.'s Resp. to Pl.'s Statement of Facts ¶ 17. The two sample pieces presented to the Court measure approximately 9/16 (or 18/32) and 19/32 inch thick. These discrepancies in the total thickness of the samples do not present a material issue of fact in this action.

[4] Plaintiff states that this layer is composed of milled pine slats. *See* Pl.'s Statement of Facts at 5; Pl.'s Mem. Supp. Mot. Summ. J. at 1–2 ("Pl.'s Mem."). Defendant points out that Plaintiff stated in its deposition that the layer is composed of Norwegian spruce. *See* Def.'s Resp. to Pl.'s Statement of Facts ¶ 20; *see also* Dep. of Thomas L. Goss at 22. Defendant asserts that it lacks information sufficient to form a belief regarding the type of wood used in the center layer. Def.'s Resp. to Pl.'s Statement of Facts ¶¶ 20–21. As both pine and spruce are softwoods, *see* U.S. Department of Agriculture, Forest Service, Forest Products Laboratory, *Wood Handbook: Wood as an Engineering Material* 1–2, Table 1–1, 1–10—1–16 (1999) *("Wood Handbook"),* the Court finds that the distinction is immaterial for the purpose of this action.

[5] The measurements of the strips forming the center layer have been found by the parties and by this Court to vary slightly among the samples. In its brief, Plaintiff asserted that the center strips measure 7/8 inch to 1 inch wide and 1/2 inch thick. *See* Pl.'s Statement of Facts at 5–6; Pl.'s Mem. at 1–2. Defendant asserts that the center strips in its sample of the merchandise measure 1 1/16 inch wide and 5/16 inch thick. *See* Def.'s Mem. at 2. The center strips in the Court's samples of the merchandise measure approximately 1 1/8 inch wide and 1/4 inch thick. The differences in the measurements of the center layer do not present a material issue of fact.

perpendicular to the grain of the two outer layers of the flooring. *See* Pl.'s Statement of Facts at 5; Def.'s Resp. to Pl.'s Statement of Facts ¶ 20. The bottom layer of the flooring is composed of spruce strips, 1/8 inch thick and 2 1/4 to 2 3/4 inches wide. *See* Pl.'s Statement of Facts at 4; Def.'s Resp. to Pl.'s Statement of Facts ¶ 19. The grain of the spruce pieces is perpendicular to the grain of the softwood center layer and parallel to the grain of the top hardwood layer. *See* Pl.'s Statement of Facts at 5; Def.'s Resp. to Pl.'s Statement of Facts ¶ 20.

PARTIES' ARGUMENTS

Plaintiff argues that the imported hardwood flooring in question should be classified within heading 4409, HTSUS, "[w]ood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed," and further, under subheading 4409.20.25, HTSUS, "[n]onconiferous [w]ood flooring." Plaintiff contends that the subject merchandise is properly classifiable under heading 4409, HTSUS, because under prior tariff acts, both wooden flooring and laminated wood, when produced in dimensions found in nature, were classified as lumber products not further manufactured than sawed, planed, tongued, and grooved, rather than as more advanced items. *See* Pl.'s Mem. at 14. Plaintiff asserts that the subject merchandise is not classifiable as plywood, veneered panels, or laminated wood because it does not meet the definitions of these items. *See* Pl.'s Reply to Def.'s Resp. Opp'n Pl.'s Mot. Summ. J. and Resp. Opp'n Def.'s Cross Mot. Summ. J. at 4–13 ("Pl.'s Reply"). Further, Plaintiff argues that even if the subject merchandise were "[p]lywood, veneered panels, or similar laminated wood," it would have the essential character of an item of heading 4409, HTSUS, and be classifiable thereunder according to the Harmonized Commodity Description and Coding System Explanatory Notes (1st ed. 1986) ("Explanatory Notes") for heading 4412, HTSUS. *See* Pl.'s Reply at 13–18.

Defendant asserts that the flooring is properly classified under heading 4412, HTSUS, which describes "[p]lywood, veneered panels, or similar laminated wood," and argues that the flooring meets the definition of plywood. Defendant argues in the alternative that even if the flooring were not classifiable as plywood it still fits the definitions of "veneered panels" and "similar laminated wood." Def.'s Mem. at 5. Defendant asserts that the flooring is excluded from heading 4409, HTSUS, by the terms of the headings and the Explanatory Notes, *id.* at 15–17; that cases decided under the TSUS and earlier Tariff Acts are not controlling due to the change in statutory language and legislative intent, *id.* at 18–20; and that the cases do not support the classification of the subject merchandise under heading 4409, HTSUS. *Id.* at 21–26.

STANDARD OF REVIEW

Summary judgment is appropriate where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* USCIT Rule 56(d); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A dispute is genuine "if the evidence is such that [the trier of fact] could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

The Court employs a two-step process in analyzing a customs classification. "[F]irst, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States,* 112 F.3d 488, 491 (Fed. Cir. 1997)). Interpretation of the tariff classification terms is a question of law, while application of the terms to the merchandise at issue is a question of fact. *See id.* Summary judgment is appropriate when the dispute involves only the proper tariff classification for the subject merchandise, not the nature of the merchandise itself. *See id.* Where there is a dispute about the nature of the subject merchandise, there exists a genuine issue of material fact and a trial is warranted.

In the instant case, the parties agree that the subject merchandise is flooring consisting of a hardwood layer and two softwood layers, glued together with the grains of the pieces forming the center layer laid perpendicular to the grains of the pieces forming the two outer layers. As the parties agree to the essential nature and material characteristics[6] of the merchandise, and disagree only as to its proper classification under the HTSUS, summary judgment of the classification issue is appropriate.

DISCUSSION

The HTSUS consists of (1) the General Notes; (2) the General Rules of Interpretation ("GRI"); (3) the Additional U.S. Rules of Interpretation; (4) sections I through XXII (encompassing chapters 1 through 99, including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (5) the Chemical Appendix. Classification of goods under the HTSUS is governed by the General Rules of Interpretation ("GRI"). *See Carl Zeiss, Inc. v. United States,* 195 F.3d 1375, 1379 (Fed. Cir. 1999); *Orlando Food Corp. v. United States,* 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 states that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1; *see also Orlando Food Corp.,* 140 F.3d at 1440. Goods that cannot be classified solely by reference to GRI 1 must be classified by reference to the succeeding GRIs in numerical order. Furthermore, "[a]bsent contrary

[6] As noted above, the disagreements as to the composition and measurements of the center layer, *see supra* notes 4–5, are not material such that they may preclude summary judgment.

legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc.,* 195 F.3d at 1379 (internal citation omitted).

The Court may also refer to the Explanatory Notes, which constitute the World Customs Organization's official interpretation of the HTSUS. *See Baxter Healthcare Corp. of Puerto Rico v. United States,* 22 CIT 82, 89 n.4, 998 F. Supp. 1133, 1140 n.4 (1998). Although the Explanatory Notes are not legally binding, they are useful in ascertaining the correct classification of the merchandise in question. *See Rollerblade, Inc. v. United States,* 112 F.3d 481, 486 n. 3 (Fed. Cir. 1997) (stating that the Explanatory Notes are "intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings") (citing *Mita Copystar Am. v. United States,* 21 F.3d 1079, 1082 (Fed. Cir. 1994)); *Lonza, Inc. v. United States,* 46 F.3d 1098, 1109 (Fed. Cir. 1995) ("While the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting the HTS[US] subheadings.").

Determining which heading provides the most appropriate classification of merchandise requires close textual analysis of the language of the headings and the accompanying explanatory notes. The General Explanatory Notes to Chapter 44, HTSUS, indicate that the chapter covers "unmanufactured wood, semifinished products of wood and, in general, articles of wood." Explanatory Notes at 622. The headings of Chapter 44 are arranged so that less processed items appear earlier in the chapter, while items that have been subjected to further manufacturing appear later. *See generally* Chapter 44, HTSUS; *see also* U.S. Customs Service Headquarters Ruling ("HQ") 963396 (Mar. 28, 2000) ("Chapter 44, HTSUS * * * is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter."); HQ 963655 (Feb. 3, 2000); HQ 961208 (June 1, 1999); HQ 962715 (June 1, 1999). The General Explanatory Notes explain that items covered by Chapter 44 may be "grouped broadly" in four general categories, including "(2) [s]awn, chipped, sliced, peeled, planed, sanded, end-jointed, e.g., finger-jointed * * * and continuously shaped wood (headings 44.07 to 44.09)," and "(3) [p]article board and similar board, fibreboard, laminated wood and densified wood (headings 44.10 to 44.13)."[7] Explanatory Notes at 622. These broad categories separate laminated products from products that are merely shaped.

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[7] The four general categories listed in the General Explanatory Notes to Chapter 44 read as follows:

(1) Wood in the rough (as felled, split, roughly squared, debarked, etc.) and fuel wood, wood waste and scrap, sawdust, wood in chips or particles; hoopwood, poles, piles, pickets, stakes, etc.; wood charcoal; wood wool and wood flour; railway or tramway sleepers (generally headings 44.01 to 44.06). However, the Chapter *excludes* wood, in chips, in shavings, crushed, ground, or powdered, of a kind used primarily in perfumery, in pharmacy, or for insecticidal, fungicidal, or similar purposes *(heading 12.11)* and wood, in chips, in shavings, ground or powdered, of a kind used primarily in dyeing or in tanning *(heading 14.04).*

(2) Sawn, chipped, sliced, peeled, planed, sanded, end-jointed, e.g., finger-jointed (i.e., jointed by a process whereby shorter pieces of wood are glued together end to end, with joints resembling interlaced fingers, in order to obtain a greater length of wood) and continuously shaped wood (headings 44.07 to 44.09).

(3) Particle board and similar board, fibreboard, laminated wood and densified wood (headings 44.10 to 44.13).

(4) Articles of wood *(except* certain kinds specified in Note 1 to this Chapter and which, together with others, are referred to in the Explanatory Notes to particular headings below) (headings 44.14 to 44.21).

Explanatory Notes at 622.

I. Heading 4409, HTSUS

As noted, heading 4409, HTSUS, covers "[w]ood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded, or the like) along any of its edges or faces, whether or not planed, sanded, or finger-jointed." The Explanatory Note for heading 4409, HTSUS, states that

> [t]his heading covers timber, particularly in the form of boards, planks, etc., which, after sawing or squaring, has been continuously shaped along any of its edges or faces either to facilitate subsequent assembly or to obtain the mouldings or beadings described in Item (4) below, whether or not planed, sanded, or end-jointed, e.g. finger-jointed.

Explanatory Notes at 629.

The subject merchandise fits the description in heading 4409, HTSUS, of "[w]ood * * * continuously shaped * * * along any of its edges or faces, whether or not planed [or] sanded." It is shaped along its edges and ends, and is fitted with tongue and groove in order to facilitate its assembly as flooring. *See* Dep. of Thomas L. Goss at 35; Pl.'s Statement of Facts at 4, 7; Def.'s Resp. to Pl.'s Statement of Facts ¶ 17; Def.'s Mem. at 2. The initial terms used by the Explanatory Note, however, "timber, particularly in the form of boards, planks, etc.," indicate that heading 4409, HTSUS, contemplates wood material that is less processed than the subject merchandise. Explanatory Notes at 629.

"Timber" is defined in relevant part as "[w]ood as a building material: lumber"[8] or "[a] dressed piece of wood, esp. a beam in a structure," *Webster's* at 1210; "[w]ood used for building, carpentry, or joinery," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 2033; "wood, whether growing or cut, especially when suitable for use in construction and carpentry," *Harcourt; see also Terms of the Trade* at 342 (defining timber as "[a] size classification of lumber that includes pieces that are at least five inches in their smallest dimension"); Corkhill, *The Complete Dictionary of Wood* at 583–84 (defining timber as "[w]ood suitable for building and structural purposes * * *. The term is generally used in a wider sense and includes all kinds and forms of wood, especially when in bulk. * * * Usually the term implies stuff of large section.")

"Board" is defined as "[a] piece of lumber whose dimensions are less than 2 inches (5 centimeters) thick and between 4 and 12 inches (10 and 30 centimeters) wide," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 246; "[a] long flat slab of sawed lumber: *plank*" or "[a] flat

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[8] Lumber is defined as "[t]imber sawed into standardized structural members, as boards or planks," *Webster's* at 708; "[a] wood product manufactured from logs by sawing, resawing and, usually, planing, with all four sides sawn. ('Timber' is used in place of 'lumber' in many countries.)," *Terms of the Trade* at 205; "[l]ogs that have been sawed and prepared for market," *McGraw-Hill Dictionary of Scientific and Technical Terms* 1177 (Sybil P. Parker ed., 5th ed. 1994); "a collective term for wood that has been sawed into appropriate sizes for building and other uses," *Harcourt Academic Press Dictionary of Science and Technology, available at* http://www.harcourt.com/dictionary ("Harcourt"); "[a]n American term for converted wood; also for felled trees prepared for the sawmill. Timber split or sawn for use in building." Thomas Corkhill, *The Complete Dictionary of Wood* 317 (1979).

piece of rigid material, as wood adapted for a special use," *Webster's* at 185; "[a]pplied to converted *softwoods* over 4 in. wide and less than 2 in. thick, and to *hardwoods of* any width and up to 1¼ in. thick." Corkhill, *The Complete Dictionary of Wood* at 50. *But cf. Terms of the Trade* at 36–37 (defining "board" as "[a] piece of lumber less than two inches in nominal thickness and one inch or more in width," but also as "[a] generic term used to describe various composite panels such as oriented strand board, waferboard, fiberboard, etc.," and as "[p]aperboard"); *Harcourt* (defining "board" as "a long, flat, rectangular piece of cut wood that is relatively wide in comparison to its thickness," but also as "a composition material fabricated in large sheets; for example, plasterboard or fiberboard").

Finally, "plank" is defined as "[a] heavy board with thickness of 2–4 inches (5–10 centimeters) and a width of at least 8 inches (20 centimeters)," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 1520; "1. a long, flat piece of wood that is thicker than a board. 2. lumber formed into such pieces," *Harcourt;* "[a] piece of lumber two or more inches thick and six or more inches wide, designed to be laid flat as part of a load-bearing surface, such as a bridge deck," *Terms of the Trade* at 250; "[a] piece of lumber cut thicker than a board," *Webster's* at 899; "[s]quare sawn softwood 2 to 6 in. thick and 11 in. or more in width. There is considerable difference in the limits in different markets. A plank in hardwood is from 1½ in. x 9 in. and 8 ft. upwards in length." Corkhill, *The Complete Dictionary of Wood* at 412.

While two definitions of the term "board" recognize a more general meaning, *see Terms of the Trade* at 37; *Harcourt,* the other definitions of "timber," "lumber," "board," and "plank" strongly suggest that these terms refer to relatively unprocessed single-layer wood pieces, cut and shaped by the sawmill for use in carpentry and construction, rather than to composite panels. The subject merchandise is distinct from such wood products, as it has been not only sawn and shaped, but layered, laminated, and finished into a final product.

Plaintiff relies on cases decided under the TSUS and prior Tariff Acts to argue that continuously shaped wooden flooring and glued stock, or wooden boards or planks made by gluing pieces of wood together, have been consistently treated as if they had been shaped only. In these cases, the lamination and assembly operations performed on the boards at issue were held not to constitute a further manufacturing process or to result in a product that was further advanced than boards which had been only shaped, such as planed, tongued, grooved. Under the present tariff schedules, such treatment would allow laminated products to be classified under heading 4409, HTSUS.

Plaintiff's reliance on these cases, however, is misplaced. The cases indicate that glued stock was treatable as lumber, not further manufactured or advanced than sawed, planed, and tongued and grooved, when (1) the laminated piece was of a size obtainable in nature as one piece in

the same species of wood, and (2) the gluing operations were performed in order to obtain a larger piece of wood from smaller pieces.

In *B.A. McKenzie & Co., Inc. v. United States,* 39 Cust. Ct. 52 (1957), wood intended for making drawer sides was available in one-piece stock, which was a solid piece of wood, and in two-piece stock, which was a piece of wood made by dovetailing and gluing together two smaller pieces. Both the one-piece and two-piece stock were of the same size. The court decided that the two-piece or glued stock was not further manufactured or advanced than the one-piece stock. The dovetailing and gluing operations simply created a larger piece of wood from smaller pieces, and did not change the character of the wood as lumber, or a material from which to make finished articles. The Treasury Department later promulgated a notice adopting the principle of the *McKenzie* decision by stating that glued stock of a size obtainable in nature was to be treated as lumber. *T.D. 54595, 93 Treas. Dec. 204, 205* (1958) (stating that "glued stock, including jointed and glued stock" may be recognized as lumber if "of a length, width, and thickness which is recognized in the trade as lumber if of one-piece material").

In *Border Brokerage Co. v. United States,* 52 Cust. Ct. 204 (1964), as in the *McKenzie* case, the court concluded that one-piece and two-piece wood stock of the same size and intended for the same purpose were both classifiable as not further manufactured than planed, tongued and grooved. The two-piece stock was assembled through lamination and bullnosing (a planing process) from smaller pieces of wood for the purpose of creating a larger piece. Similarly, the court in *D.B. Frampton & Co. v. United States,* 60 Cust. Ct. 4 (1968), held that laminated or assembled wood planks which were of a size obtainable in nature as a solid piece of wood of the same species were classifiable as having not been further manufactured than planed, tongued, and grooved. Laminating or assembling operations could be performed without being held to advance the condition of the wood when the purpose of the lamination or assembly was to obtain a larger piece of wood, but one of a size that could still be obtained by cutting a natural log. *See also C.B. Smith Co. v. United States,* 64 Cust. Ct. 278 (1970) (Glued hardwood, whether edge-glued, end-glued, or face-glued, was classifiable as lumber if it met the size requirements of the tariff code. The size specifications were adopted in an effort to classify glued stock that is similar to lumber in use and performance separately from dimension stock, which has different applications than lumber.); *Pacific Hardwood Sales Co. v. United States,* 64 Cust. Ct. 68 (1970) (Wood for making drawer sides, produced by edge-gluing numerous smaller strips of wood, was dimension stock not classifiable as lumber because it did not meet the size requirements of the tariff code for classification as lumber. The court acknowledged that the adoption of the size requirements was rooted in the similarity of glued stock of certain dimensions to lumber in its performance and use.); *cf. Clarence S. Holmes, A/C Best Products Mfg. Co. v. United States,* 44 Cust. Ct. 111 (1960) (Maple boards wider than 9 inches, produced by

edge-gluing narrower maple pieces, were held not classifiable under the same tariff heading as solid maple lumber pieces because solid maple pieces are not produced in widths over nine inches. The glued maple lumber was classified under a heading covering wood that had been further manufactured than lumber but was not yet a finished article.); *P.W. Drittler v. United States,* 52 Cust. Ct. 227, Abstract No. 68213 (1964) (Boards measuring 24 inches wide and eight feet long, made by edge-gluing ten strips of yellow birch, were further manufactured than sawed, planed, and tongued and grooved. The court declined to follow *McKenzie* on the grounds that the boards in question were of a size not normally obtainable in nature. The court classified them under a heading covering wood that had been further manufactured than lumber but was not yet a finished article.).

The holdings of these cases rested on the principle that the glued stock was "no different in essential character and use from the 1-piece material, which was classifiable as sawed lumber, not further manufactured than planed, and tongued, and grooved." *Clarence S. Holmes, A/C Best Products Mfg. Co.,* 44 Cust. Ct. at 113. These cases involved neither layered products nor gluing operations intended to create a product of greater strength or durability. In the instant case, the purpose of assembling and gluing together separate pieces of wood is not merely to obtain a board of a different size that is otherwise similar in performance and use to a solid board. Rather, the purpose is to obtain a wood flooring product that is superior in strength, durability, and resistance to warping to flooring made of single-layer shaped boards. *See* Dep. of Thomas L. Goss at 36–38 (stating that the use of hardwood for the top layer of the flooring provides durability, while the layered construction and placement of the grains at right angles provides stability, resistance to warping, and strength in the flooring); Def.'s Statement of Facts ¶ 5; Pl.'s Resp. to Def.'s Statement of Undisputed Facts ¶ 5. This purpose is not contemplated within the reasoning of the cases that treated assembled and laminated wood products as no more advanced than shaped wood.

In an alternative argument, Plaintiff asserts that the Explanatory Note for heading 4412, HTSUS, and Chapter Note 4, Chapter 44, HTSUS, require the subject merchandise to be classified under heading 4409, HTSUS. Explanatory Note 44.12 states that

> the products of this heading may be worked to form the shapes provided for in heading 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation provided it does not give them the character of articles of other headings.

Explanatory Notes at 633.

Chapter Note 4 states that

> [p]roducts of heading No. 44.10, 44.11 or 44.12 may be worked to form the shapes provided for in respect of the goods of heading No. 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular or submitted to any other operation pro-

vided it does not give them the character of articles of other headings.

Chapter Note 4, Chapter 44, HTSUS.

Plaintiff argues that even if the five-layer stock from which the subject merchandise is produced were classifiable under heading 4412, HTSUS, the subject merchandise itself "has been so far advanced as to dedicate it solely for use as flooring." Pl.'s Reply at 16. Plaintiff appears to suggest that because the merchandise is fully manufactured into wood flooring and is usable only for that purpose, it has the character of an article of another heading, namely heading 4409, HTSUS, which contains a subheading listing "[w]ood flooring." Plaintiff claims, therefore, that under the Explanatory Note and Chapter Note 4, classification under heading 4412, HTSUS, is precluded.

This approach is flawed, however, because it characterizes the merchandise as an article of another heading by referring to the subheadings. The Chapter Note and the Explanatory Note speak of "articles of other *headings.*" Chapter Note 4, Chapter 44, HTSUS; Explanatory Notes at 633 (emphasis supplied). The suggested characterization, "wood flooring," does not appear in heading 4409, HTSUS; rather, it is a *subheading* listed under heading 4409. Heading 4409, HTSUS, mentions only shaping operations, and it is clear from the Chapter Note and Explanatory Note that merchandise falling under heading 4412, HTSUS, may have been subjected to any of these shaping operations.

Finally, heading 4409, HTSUS, addresses only shaping and planing operations, while heading 4412, HTSUS, encompasses products which have been subjected to lamination operations as well as shaping processes. Heading 4409, HTSUS, therefore does not provide a complete and accurate description of the subject merchandise.

II. Heading 4412, HTSUS.

As noted earlier, heading 4412, HTSUS, covers "[p]lywood, veneered panels and similar laminated wood," and the General Explanatory Notes to Chapter 44 indicate that items covered by heading 4412, HTSUS, may have been subjected also to the processes that characterize the items of heading 4409, HTSUS. Explanatory Notes at 622. This is reiterated in Explanatory Note 44.12, which states that "[t]he products of this heading may be worked to form the shapes provided for in heading 44.09 * * * *provided* it does not give them the character of articles of other headings." *Id.* at 633 (emphasis supplied). Therefore, items falling within heading 4412, HTSUS, may have been continuously shaped or otherwise worked according to heading 4409, HTSUS, in addition to having been laminated or glued in accordance with heading 4412, HTSUS.

A. The Subject Merchandise is Not Plywood

"Plywood" is defined as "[a] flat panel made up of a number of thin sheets, or veneers, of wood in which the grain direction of each ply, or layer, is at right angles to the one adjacent to it. The veneer sheets are

united, under pressure, by a bonding agent," *Terms of the Trade* at 252;[9] "[a] structural material consisting of layers of wood glued tightly together, [usually] with the grains of adjoining layers at right angles to each other," *Webster's* at 906; "[a] material composed of thin sheets of wood glued together, with the grains of adjacent sheets oriented at right angles to each other," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 1531; "thin sheets of wood glued together, with the grain of each consecutive piece positioned at a right angle to the preceding one to give strength and prevent warping; widely used in construction," *Harcourt;* "manufactured board composed of an odd number of thin sheets of wood glued together under pressure with grains of the successive layers at right angles," *The Columbia Encyclopedia* at 2173; a "composite wood panel made of three or more layers glued together with the grain of adjoining plies at right angles to each other. Thin panels are built up of veneer (thin sheet wood) exclusively. For thicker panels, sawed lumber often is used as the centre ply, or core, the product being called lumber-core plywood." *The New Encyclopedia Britannica* vol. 9 at 532 (1986).

The definitions indicate that "plywood" is composed of thin layers of wood glued together with the grains of adjacent layers at right angles. Furthermore, the HTSUS specifies that each component layer may be no thicker than 6 mm. Heading 4412, HTSUS, defines plywood as "consisting solely of sheets of wood, each ply not exceeding 6 mm. in thickness." Heading 4408, HTSUS, covers "[v]eneer sheets and sheets for plywood (whether or not spliced) and other wood sawn lengthwise, sliced or peeled" and specifies that they may be "of a thickness not exceeding 6 mm." In addition, the Explanatory Note for heading 4408, HTSUS, indicates that both veneer sheets and plywood sheets "may be spliced (i.e., taped, stitched or glued together edge to edge to make larger sheets for use in plywood and similar laminated wood.)."

The subject merchandise consists of layers of wood glued together with the grains of adjoining layers at right angles. The hardwood top layer of the flooring and the bottom spruce layer are each approximately

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[9] As "plywood" tends to be defined in terms of "veneers" or "sheets," definition of those terms is also necessary. Definitions of "veneer" include "[w]ood peeled, sawn, or sliced into sheets of a given constant thickness and combined with glue to produce plywood or laminated-veneer lumber," *Terms of the Trade* at 360; "1. A thin layer of material, as wood or plastic, bonded to and used for covering a [usually] inferior material. 2. Any of the thin layers glued together in manufacturing plywood," *Webster's* at 1280; "[a] thin sheet of wood of uniform thickness used for facing furniture or, when bonded, used to make plywood," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 2126; "1. a thin layer of material, especially a thin sheet of expensive wood laid over a base of cheaper wood in order to improve the outward appearance of the cheaper wood. * * * 3. any of the layers that compose a sheet of plywood," *Harcourt;* "thin leaf of wood applied with glue to a panel or frame of solid wood. * * * [T]he modern machine-cut sheets are rarely thicker than 1/32 in. * * * Plywood and beams or planks of compounded woods are developed by a veneering process." *The Columbia Encyclopedia* 2870 (5th ed. 1993).

"Sheet" is defined as "1. The same as a panel; 'a sheet of particleboard.' 2. A sheet of paper," *Terms of the Trade* at 298 (See text at p. 26, *infra,* for definitions of "panel."); "[a] material in a configuration similar to a film except that its thickness is greater than 0.25 millimeter. * * * A portion of a surface such that it is possible to travel continuously between any two points on it without leaving the surface," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 1809 (This dictionary defines "film" at page 753 as "[a] flat section of material that is extremely thin in comparison to its other dimensions and has a nominal maximum thickness of about 250 micrometers and a lower limit of thickness of about 25 micrometers."); "2. A broad, thin, [usually] rectangular piece of material, as paper, metal, glass, or wood. 3. A broad, flat, continuous surface or expanse <a *sheet* of ice>," *Webster's* at 1073; "*Textiles.* [A] large, rectangular piece of cotton, linen, or other material used as a bed covering. *Materials.* [A] similar broad, thin piece of some other material, such as paper, glass, or metal." *Harcourt.*

1/8 inch or 3.175 mm. thick.[10] The center layer of the flooring is approximately 1/4 inch or 6.35 mm. thick, exceeding the thickness limit of 6 mm. indicated by the HTSUS for veneer or plywood sheets. As the center layer does not meet the thickness requirement for plywood sheets under the HTSUS, the flooring cannot be considered plywood.[11]

B. The Subject Merchandise Is A Veneered Panel

The Explanatory Note for heading 4412, HTSUS, defines "veneered panels" as "panels consisting of a thin veneer of wood affixed to a base, usually of inferior wood, by glueing under pressure." Explanatory Notes at 633. The definitions cited above indicate that a "veneer" is a thin layer of wood (or other material) having a continuous surface and a uniform thickness, and which is extremely thin in relation to its breadth. *See* definitions of "veneer" and "sheet," *supra* note 9. Under the HTSUS, veneer is no thicker than 6 mm. and veneer sheets and plywood sheets "may be spliced (i.e., taped, stitched or glued together edge to edge to make larger sheets for use in plywood and similar laminated wood)." Explanatory Notes at 628.

"Panel" is defined as "[a] flat, usually rectangular piece forming a raised, recessed, or framed part of the surface in which it is set," *The American Heritage Dictionary of the English Language* 1307 (3rd ed. 1996); "[a] flat, [usually] rectangular piece forming a part of a surface in which it is set and being raised, recessed, or framed," *Webster's* at 849; "2. A sheet of material held in a frame. 3. A distinct, usually rectangular, raised or sunken part of a construction surface or a material," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 1437; *"Building Engineering.* 1. [A] distinct section or portion of a wall, ceiling, door, or other construction surface, usually a flat, rectangular area that is raised above or sunk below the surrounding area * * *. *Materials.* [A] manufactured sheet of wood-based product that is available in standard sizes," *Harcourt;* "(1) a thin usually rectangular board set in a frame (as in a door) (2) a usually sunken or raised section of a surface set off by a margin (3) a flat usually rectangular piece of construction material (as plywood or precast masonry) made to form part of a surface," *Merriam-Webster's Collegiate Dictionary, available at http://www.m-w.com*; "[a] sheet of plywood, [oriented strand board], particleboard, or other similar product, usually of a standard size, such as 4x8 feet." *Terms of the Trade* at 239.

"Base" is defined as "1. The lowest or bottom part. 2. A supporting layer or part: *foundation," Webster's* at 155; "[f]oundation or part upon which an object or instrument rests," *McGraw-Hill Dictionary of Scientific and Technical Terms* at 195; *"Engineering.* [T]he lower part of a structure, especially one upon which an instrument rests or to which it

[10] To convert inches to millimeters, multiply the measurement in inches by 25.4. *See Terms of the Trade* at 419 (charting metric conversions).

[11] As the measurements of the center layer of the subject merchandise determine that it cannot be classified as "plywood" under the HTSUS, the Court does not reach the issue of whether the center layer of the flooring could meet the definitions of "veneer" or "sheet."

is attached. *Building Engineering*. [T]he lowermost part of a wall or other building member," *Harcourt;* "[t]he lowest member of anything," Corkhill, The C*omplete Dictionary of Wood* at 30.

Applying the definitions and the Explanatory Notes for headings 4412 and 4408, HTSUS, a veneered panel consists of a layer of wood of uniform thickness of 6 mm. or less, which may be spliced or otherwise attached at the edges to make a larger piece, laminated onto a foundation of an inferior wood (or other material), and manufactured in flat, rectangular, distinct sections, most likely of a standardized size.

In the instant case, the hardwood top layer of the flooring meets the definition of veneer. The hardwood layer is made up of separate pieces of wood bonded together at the edges to form a continuous surface and has a constant thickness of approximately 3.175 mm. The veneer is bonded to a base of inferior softwood, which forms the foundation of the flooring.[12] *See* Pl.'s Mem. at 1–3; Dep. of Thomas L. Goss at 35–36; Def.'s Mem. at 13–14.

Determining whether the pieces of flooring constitute "panels" requires further analysis. The flooring pieces fit those definitions that describe a "panel" as a standardized, wood-based product used as a construction material. *See Harcourt; Terms of the Trade* at 239; *Merriam-Webster's Collegiate Dictionary.* The flooring pieces also meet the more general definitions of "panel" in that they are flat, rectangular, manufactured in distinct sections of a standard size, and form parts of a larger surface into which they are set. However, the flooring may not meet the element found in some definitions that suggests that panels are raised, recessed, or framed.[13]

The term "panel" as used in the HTSUS, however, does not necessarily refer to "raised, recessed, or framed" portions of a surface. The General Explanatory Notes to Chapter 44 discuss the classification of "building panels" used as "structural element[s] in roofing, wall or floor applications." Explanatory Notes at 622. The Explanatory Notes to heading 4418, HTSUS, explain that "cellular wood panels" are similar to blockboard and battenboard and are used in partitions, doors, and sometimes in furniture; these Explanatory Notes also discuss "parquet strips, etc., assembled into panels or tiles," which may be tongued and grooved to facilitate assembly. *Id.* at 637. The Explanatory Notes for heading 4412, HTSUS, use the term "panel" to discuss plywood, veneered panels, blockboard, laminboard, battenboard, and parquet floor-

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[12] "Inferior" is a relative term, since different woods are suitable for different purposes. *See generally Wood Handbook* Ch. 1. Generally, softwoods offer less hardness and durability than hardwoods. *See id*. at 1–2; *see also* Dep. of Thomas L. Goss at 35–36. As hardness and durability are desirable qualities in flooring, softwoods may be considered inferior to hardwoods in the manufacture of flooring. *See, e.g.,* Dep. of Thomas L. Goss at 35–36 (stating that a benefit of using hardwood as the top layer of flooring is its greater durability); World Floor Covering Association, *at* http://www.wfca.org (indicating in comparisons of different floor coverings that greater durability is a desirable quality).

[13] The Court does not decide whether flooring or any other wood product is raised, recessed, or framed. Rather, the Court decides only that the term "panel" may be used to refer to materials that are not necessarily raised, recessed, or framed in their final applications.

ing.[14] *Id.* at 632–33. Plywood, blockboard, laminboard, and battenboard are commonly produced in distinct, standardized sections for use in carpentry and as structural materials in construction. *See, e.g.,* Caleb Hornbostel, *Construction Materials: Types, Uses and Applications* 955–61 (2d ed. 1991) (discussing the characteristics and uses of various types of plywood, including "construction and industrial plywood" used in structural applications. The book refers to these products in terms of "panels."); *Encyclopedia Brittanica,* vol. 9 at 532 (stating that "[w]herever a material is required to cover large areas with a light but strong and rigid sheeting, plywood may be used; for example in cabinetmaking, for [furniture], in housebuilding, for walls, ceilings, floors, * * * in coachbuilding, for trucks, vans, and trailers, in shipbuilding * * * for shipping and storage chests and cases"); Food and Agriculture Organization of the United Nations, *Unasylva: World Consultation on the Use of Wood in Housing: An International Review of Forestry and Forest Products,* vol. 25, § 3, "Wood Products and Their Use in Construction," *available at* http://www.fao.org/docrep/c3848e/c3848e05.htm (stating that laminboard and blockboard are "used the same way in construction as thick plywood" and that "[t]heir major uses are in structural flooring, shelving, free-standing partitions and doors or sides in cabinets"). Many of these wood products would not be "raised, recessed, or framed" in the surfaces in which they are set. Similarly, parquet flooring pieces are set together to form a floor, and need not be individually raised, recessed, or framed in relation to each other.

Finally, government, wood industry, and building sources and publications also indicate that the term "panel" may refer to building components that are not necessarily raised, recessed, or framed in their ultimate use. *See, e.g. Wood Handbook* at 1–3 ("The most vigorously growing wood-based industries are those that * * * produce various types of engineered panels such as plywood, particleboard, strandboard, veneer lumber, paper, paperboard, and fiberboard products."), 10–1 (discussing use of wood composites in "structural and nonstructural applications in product lines ranging from panels for interior covering purposes to panels for exterior uses and in furniture and support structures in many different types of buildings"), 10–5 (listing plywood, oriented strandboard, particleboard, and other items as "frequently used panel products" and stating that certain "wood-based panels can be used for construction applications such as sheathing for roofs, subflooring, and walls"), 10–6 (describing plywood, usable as a construction material, as "a flat panel"); APA, The Engineered Wood Association, *Performance Rated Panels, at* http://www.apawood.org (discussing performance

[14] The Explanatory Note for heading 4412, HTSUS, states that in the case of plywood, placing the successive layers at right angles "gives the panels greater strength and * * * reduces warping." Explanatory Notes at 632. In discussing veneered panels, the Explanatory Note uses the term "panel" almost interchangeably with the term "base" in stating that "[w]ood veneered on to a base other than wood (e.g. panels of plastics) is also classified here * * *." *Id.* at 633. Finally, in discussing similar laminated wood, the Explanatory Note describes blockboard, laminboard, and battenboard as having a thick core surfaced with outer plies, and states that "[p]anels of this kind are very rigid and strong and can be used without framing or backing." *Id.* Thus the term "panel" is used here to refer to construction materials that need not be "raised, recessed, or framed."

standards for wood-based products such as plywood and oriented strandboard, referred to as "panels," in various construction applications); Francis D. K. Ching, *Building Construction Illustrated* 4.11, 12.5 (1991) (discussing characteristics and structural uses of "plywood panels" and other "wood panel products"); Food and Agriculture Organization of the United Nations, *Yearbook of Forest Products,* Definitions, *available at* http://www.fao.org/waicent/faostat/forestry/products.htm (categorizing plywood, including "core plywood" such as blockboard, laminboard, and battenboard, as "wood based panels"); United Nations Economic Commission for Europe, Timber Database, *Forest and Forest Industries Country Fact Sheets, available at* http://www.unece.org/trade/timber/tim-fact.htm (categorizing plywood, including core plywood such as blockboard, laminboard, and battenboard, as "wood based panels").

Thus, the term "panel" as used in heading 4412, HTSUS, and in the additional sources cited refers to engineered wood products manufactured in standardized sections for use as building and carpentry material. Such panels would not necessarily be "raised, recessed, or framed."

Accordingly, we conclude that the subject merchandise is a "panel" as the term is used in the HTSUS. Each piece of flooring is manufactured in a standardized size and designed to be set into the larger surface as a section of a complete floor. *See* Boen Marketing Brochure, *Bring the Beauty of Wood Inside,* Collective Ex. A (describing each layer of Boen hardwood flooring as "5-1/2″ wide and approximately 7′ 2-5/8″ long"); Boen Marketing Material, *Transform Your World With Boen Hardwood,* Collective Ex. A (stating that "[e]ach Boen Longstrip is 5-1/2″ wide and approximately 7′ 2-5/8″ long" and that the standardized measurements, as well as the tonguing and grooving along the edges, result in easier installation).

Thus, the subject merchandise is a "veneered panel" within the meaning of heading 4412, HTSUS, and is properly classifiable thereunder.

(Slip Op. 02–22)

HEARTLAND BY-PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND UNITED STATES BEET SUGAR ASSOCIATION, DEFENDANT-INTERVENOR

Court No. 99–09–00590

[Plaintiff's Motion for Entry of Judgment denied and Case Dismissed.]

(Decided February 26, 2002)

Mayer, Brown, Rowe & Maw, (Simeon M. Kriesberg), Andrew A. Nicely, Eldad Z. Malamuth, and *Serko & Simon, David Serko, Daniel J. Gluck, Jerome L. Hanifin* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice *(Aimee Lee); Karen P. Binder,* Office of Assistant Chief Counsel, International Trade Litigation, Customs Service, *(Yelena Slepak)* and *Allan Martin*, Associate Chief Counsel, Customs Service, *(Ellen Daly),* of counsel, for Defendant.

Wilmer, Cutler & Pickering, (Lewis J. Liman), Rick A. Bierschbach, for Defendant-Intervenor.

American Association of Exporters and Importers, (John P. Simpson, President) Amicus Curiae.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This case is one of first impression for two important issues. First, the court is asked to determine the scope of its jurisdiction under 28 U.S.C. § 1581(h)(1994), review of pre-importation rulings. Second, the court is asked to interpret the application of the 60 day grace period provided by 19 U.S.C. § 1625(c)(1999) to an importer when a ruling by the United States Customs Service ("Customs") changes the tariff treatment of imported merchandise.

The court has before it a motion for Entry of Judgment on behalf of Heartland By-Products, Inc. ("Heartland"). *See Mem. of Points and Authorities in Supp. of Pl.'s Mot. for Entry of J.* (December 13, 2001) ("Pl.'s Br."). This motion comes as a consequence of the disposition by the Court of Appeals for the Federal Circuit of an earlier decision by this court. *Heartland By-Products, Inc. v. United States,* 264 F.3d 1126 (Fed. Cir. 2001). The original complaint challenged a revocation ruling by the Customs Service which would have increased the tariff duty owed on Heartland's primary import 10,000 percent. *Revocation of Ruling Letter & Treatment Relating to Tariff Classification of Certain Sugar Syrups,* 33 Cust. Bull. No. 35/36 at 41 (Sept. 8, 1999)("Revocation"). This court considered the original case on an expedited basis and held the Revocation contrary to law. *Heartland By-Products, Inc. v. United States*, 23 C.I.T. 754, 74 F. Supp. 2d 1324 (1999). That decision was reversed by the Court of Appeals for the Federal Circuit after a two year interval.

In the meantime, Plaintiff imported thousands of entries relying on this court's decision. The Customs Service liquidated those entries, in

some cases prior to the date the appeals court announced its decision. *Pl.'s Br.* at 1. In response to Customs' actions, Plaintiff filed protests with Customs and asked this court to enter a judgment, pursuant to 19 U.S.C. § 1625(c), specifying the time of application for the higher duty rate to be 60 days after the decision of the Court of Appeals became final. Plaintiff also challenges Customs' authority to liquidate entries at the higher duty rate prior to the time when the Federal Circuit issued its mandate. Defendant responds that the court lacks jurisdiction over liquidation of the entries because the original case was brought under 28 U.S.C. § 1581(h) which is limited to pre-importation review. Defendant also claims that the 60 day notice period provided by 19 U.S.C. § 1625(c) expired in 1999.

The court finds that 28 U.S.C. § 1581(h) does confer subject matter jurisdiction on this court to consider issues applicable to actual entries, which were the contemplated entries considered when the court first took jurisdiction. The court, however, declines to exercise this jurisdiction at this point, to permit issues of fact to be resolved at the administrative level regarding the status of the entries, the rates of final liquidation and whether the Customs Service properly extended any of the entries. In addition, deferring adjudication of the application of 19 U.S.C. § 1625(c) will allow the court to consider the full scope of relief requested by Plaintiff.

II. PROCEDURAL HISTORY

The Plaintiff is a sugar refiner that imports sugar syrup from Canada and refines the syrup into liquid sucrose. Prior to beginning business operations, Heartland sought an advance ruling from Customs to determine the imported product's classification and duty rate under the Harmonized Tariff Schedule of the United States ("HSTUS"). *New York Ruling Letter* 810328. Based upon this ruling Heartland, in 1997, began importing the syrup into the United States for refining.

Customs Headquarters published a notice of proposed revocation of the *New York Ruling Letter in Customs Bulletin* Volume 33, No. 22/23 dated June 9, 1999, after domestic trade associations, the United States Cane Sugar Refiners' Association, the United States Beet Sugar Association and their member companies filed a petition under 19 U.S.C. § 1516 and/or 19 U.S.C. § 1625 seeking reclassification of Heartland's sugar product. *Heartland*, 74 F. Supp. 2d at 1328. On September 8, 1999, Customs issued a final notice revoking the *New York Ruling*. In the absence of any other action the Revocation would have taken effect November 8, 1999, under 19 U.S.C. § 1625(c), which provides that, "[t]he

final ruling or decision shall become effective 60 days after its date of publication."[1]

In light of the 60 day effective date this court heard Heartland's challenge to the Revocation on an expedited schedule. The court took jurisdiction under 28 U.S.C. § 1581(h), which allows for actions to be heard prior to importation of the goods involved only if, "the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review." On October 19, 1999, this court issued an opinion and order finding the Revocation to be contrary to law. Because the court was able to reach a decision before the 60 day time limit elapsed, any application of the Revocation was prohibited. No preliminary injunction was necessary to limit Customs' behavior, because the court's decision resting on § 1581(h) jurisdiction applied to all prospective entries contemplated by the ruling. These two factors, the expedited review and jurisdiction under § 1581(h), frame the issues currently before the court.[2]

On August 30, 2001, the Court of Appeals for the Federal Circuit issued a decision reversing this court's decision. On December 11, 2001, the Federal Circuit issued its mandate formally relinquishing it of jurisdiction of the case and returning jurisdiction to this court for any further action, including entry of judgment. At some point between the announcement of the decision and the mandate, Customs commenced to liquidate or reliquidate entries, liquidation of which may have been extended pending conclusion of judicial consideration.[3] Under normal circumstances entry of judgment by this court is a routine ministerial act; however, Plaintiff has raised two serious questions. First, after the revocation ruling was upheld by the Federal Circuit at what point may Customs apply the higher rate of duty? Second, may Customs begin liquidating entries before this court issues an entry of judgment upon receipt of the Federal Circuit mandate?

III. DISCUSSION

Plaintiff makes several appeals for relief with its motion for entry of judgment. The essential point to all of the claims is that any application of the Revocation must apply to entries, not liquidations, made some-

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[1] The full text of 19 U.S.C. § 1625(c) reads:

(c) **Modification and revocation**
A proposed interpretive ruling or decision which would—
(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

[2] The full text of 28 U.S.C. § 1581(h) reads:

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

[3] Whether the entries at issue in this motion were properly extended is not certain. *See Oral Arg. Tr.* at 8, 36.

time after December 11, 2001, when the appeal decision became final. Specifically, Heartland argues:

> 1) 19 U.S.C. § 1625(c) expressly requires that importers be provided with 60 days advance notice of change to any interpretive ruling that has been in effect for 60 days or more.
> 2) That it is improper to apply the upheld Revocation retroactively to entries imported after publication of the Revocation, but prior to the Federal Circuit's decision.
> 3) This court can delay the effective date of the Revocation by a reasonable period even in the absence of a statute requiring a notice period.
> 4) Retroactive application of the Revocation to Heartland is prevented by Customs' regulations.
> 5) The court should supplement the 60 day notice period with an additional period of time, so as to restore Heartland to a position it would have had absent Customs' acting prematurely.

Defendant contends that the court cannot rule on the questions presented by Plaintiff for three jurisdictional reasons. First, Defendant claims that, because the original case was brought under 28 U.S.C. § 1581(h), there are no "designated entries which were before this Court" and that subsection (h) is applicable only to "prospective entries." *Def.'s Opp. to Pl.'s Mot. for Entry of J.* at 11 (January 7, 2002) ("Def.'s Br."). Second, consideration of the § 1625(c) issue is beyond the scope of the mandate. *Id.* at 16. Third, Defendant claims that for the Plaintiff to sustain its claim of improper liquidation it must re-establish jurisdiction under § 1581(h) or (i). *Id.* at 9. Defendant contends the facts could not support that jurisdiction, therefore, the case must be dismissed to be brought under § 1581(a), after a protest has been filed by the importer and denied by Customs.

The court begins its analysis with Defendant's first point directly relating to the specific jurisdiction of this court under § 1581(h). The court rests its analysis on the history of § 1581(h) and its context within general federal law and customs law, and concludes that it does confer jurisdiction on this court to adjudicate entries that come before it pursuant to § 1581(h). To do otherwise would render subsection (h) meaningless as an avenue of relief (*See* 28 U.S.C. § 2643(c)(1)) and unconstitutional as an advisory opinion. The jurisdictional analysis distills into three questions. Who and what are subject to the court's jurisdiction in this matter, and how long does that jurisdiction last?

A. What is properly before this court?

To understand the scope and authority conferred on this court by § 1581(h) it is necessary to place it in context. This context includes the Customs Courts Act of 1980 ("1980 Act"), which for the first time provided for declaratory judgment power by the Court of International Trade, the history of declaratory judgments in American law and the long-standing rules of Customs law in the United States. *See* Pub. L. No. 96–417, 94 Stat. 1727 (1980).

1980 Act: The United States Customs Court formerly constituted under Article I became an Article III court in 1956. 28 U.S.C. § 251. However, even after 1956 the court remained limited in its remedial power and scope of jurisdiction relative to general jurisdiction district courts. The 1980 Act instituted dramatic changes in the power and procedures of the court, and reflecting such, changed the name from the United States Customs Court to the United States Court of International Trade. Prior to 1980, the court's lack of full remedial powers often created jurisdictional nightmares, where Plaintiffs could not have their case adequately considered by any single court, and so found themselves without an adequate remedy before the Customs Court and without the right to adjudicate before general jurisdiction district courts. The House Report to the 1980 Act discussed the problem at length.

> With the growth in international trade, the number of suits in the district courts and subsequent dismissals for want of jurisdiction have increased. Congress is greatly concerned that numerous individuals and firms, who believe they possess real grievances, are expending significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case.
>
> H.R. 7540 corrects these inequities by revising the statutes to clarify the present status, jurisdiction and powers of the Customs Court. The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals. This comprehensive system will ensure greater efficiency in judicial resources and uniformity in the judicial decision making process.
>
> The bill also assures aggrieved parties better access to judicial review of a civil action arising out of an import transaction. Such access is not presently assured due to jurisdictional conflicts caused by the ill-defined division of jurisdiction between the Customs Court and the federal district courts. Most importantly, H.R. 7540 perfects the status of the Customs Court by providing it with all the necessary remedial powers in law and equity possessed by other federal courts established under article III of the Constitution.

H. Report No. 1235, 96th Cong., 2d Session, at 19–20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

The 1980 Act was a fundamental change in the judiciary's relationship to Customs law.[4] "The Act clarified and expanded the jurisdiction of the United States Customs Court from both a substantive and remedial standpoint." *Litigation Before the United States Court of International Trade,* Hon. Edward D. Re, Preface to Title 19 U.S.C.A. p. XXV. The first

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[4] The dramatic change from the traditionally limited nature of the Customs Court is seen in other sections of the legislative history, for instance the effect of remand authority:

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

Continued

listed goal of the 1980 Act was to provide an "explicit grant of all judicial powers in law and equity to the Court of International Trade * * * thereby completing the full transformation of the Customs Court to an article III court." 1980 U.S.C.C.A.N. at 3739.

To provide a framework for this new power, Congress amended the statutes that govern the jurisdiction and powers of the court. *See e.g.,* 28 U.S.C. §§ 1581, 1582, 1583, 2643. Traditionally, the Customs Court was unable to consider any claim before all administrative remedies were exhausted. In addition, it could not issue injunctions, writs of mandamus or other equitable remedies. 28 U.S.C. § 2643(c)(i) issued a broad grant of power to the Court of International Trade, specifying that in addition to money judgments, the court has the power to "order any other form of relief that is appropriate in a civil action, including, but not limited to declaratory judgments, orders of remand, injunctions and writs of mandamus and prohibition." Paragraph (4) of § 2643(c), restricted this broad grant. "In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief."

Section 1581(h) is an extraordinary instrument, and a significant exception to the procedural requirements traditionally placed on those challenging a decision by Customs. Historically, in order to challenge a decision like the Revocation at issue in this case, it was necessary for a party to exhaust remedies available through the administrative agency by filing a protest with Customs. *See Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547,1551 (Fed. Cir. 1988). Exhaustion in such a case also requires plaintiffs to pay any duties owed on the entries in question before filing with this court. *See Am. Air Parcel Forwarding Co., Ltd. v. U.S.,* 6 C.I.T. 146, 150, 573 F.Supp. 117,120 (1983), *aff'd* 718 F.2d 1546 (Fed. Cir. 1983). Section 1581(h) allows for bypassing these procedural and monetary burdens in specific and narrow circumstances, namely, if the importer can demonstrate that it "would be irreparably harmed unless given an opportunity to obtain judicial review prior to [an] importation."[5] In such cases the court may exercise jurisdiction; however, as noted above, its remedial power is limited to that of declaratory judgment.

Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930. Under existing law, for example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the customs service was incorrect but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or to schedule a retrial or rehearing so that the parties may introduce additional evidence.

1980 U.S.C.C.A.N. at 3772.

[5] That Congress understood the burden and explicitly wanted to spare a narrow class of plaintiffs the hardship of exhaustion of remedies is clear in the House Report specifying the exceptions including those,

> in a civil action, pursuant to proposed section 1581(h), to contest a ruling by the Secretary of the Treasury, or the refusal by the Secretary to issue or change a ruling be commenced prior to exhaustion of one's administrative remedies. The court is authorized to permit this exception if the party commencing the action can demonstrate that he would be irreparably harmed if forced to exhaust his administrative remedies in following the traditional route prior to judicially challenging the Secretary's ruling or lack thereof.
>
> The Committee believes this provision is essential in light of the grant of jurisdiction under proposed section 1581(h). Without this exception to the exhaustion rule, proposed section 1581(h) would well be rendered meaningless.

1980 U.S.C.C.A.N. at 3769.

In *Pagoda Trading Co. v. United States*, Judge Watson provided background as to the purpose and scope of § 1581(h). 6 C.I.T. 296, 577 F.Supp. 22 (1983).

> The cause of action under § 1581(h) was not created to allow judicial review of general interpretative rulings issued by the Secretary of Treasury whenever there is a likelihood of an effect on importations. The Court reads the language of the law as speaking to rulings which determine the fate of specific importations of specific goods. The Court also reads the legislative history as speaking to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty.

Id. 577 F.Supp. at 24 (citations omitted).

In this context it is clear that Congress intended § 1581(h) to apply in a limited number of cases. Section 1581(a), which provides for appeal following a denied protest was, and remains, the preferred route to this court for classification contests. Subsection (h) comes into play only when the traditional route will inflict irreparable harm on a plaintiff, and when the case is concrete enough that any decision will be ripe for review. The legislative history also makes clear that Congress did not intend for subsection (h) to replace jurisdiction under (a), and, therefore, limited the scope of relief under (h) to declaratory judgment, explicitly precluding injunctive relief.

> Subsection (c)(4) is the third exception to the general grant of remedial powers found in subsection (c)(1). Under this provision, the Court of International Trade may only grant declaratory relief in a civil action commenced under proposed section 1581(h) to review a ruling by the Secretary of the Treasury or the refusal by the Secretary to issue or change a ruling. It is the Committee's belief that declaratory relief is the appropriate remedy for this type of action. To permit injunctive relief would encourage persons to bring suit under proposed section 1581(h) rather than pursuing traditional methods of challenging the secretary's ruling or a lack thereof. As such, the Committee feared that the exception would become the rule and did [not] intend to create such a major shift in trade policy.

1980 U.S.C.C.A.N. at 3773, with correction noted at 126 Cong. Rec. 26555 (1980), (statement of Rep. Rodino).

Declaratory Judgments in American Law: Declaratory relief is of relatively recent vintage in federal law. It was not until 1937, after the passage of the Declaratory Judgment Act (28 U.S.C. § 2201), that the Supreme Court decided it was permissible for a statute to confer declaratory judgment jurisdiction on the judiciary. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). The Court was careful to state that it would grant, "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 241. While the Court recognized the new

power, it was careful to point to constitutional limitations that would need to be heeded.

> We have thus recognized the potential for declaratory judgment suits to fall outside the constitutional definition of a "case" in Article III: a claim "brought before the court(s) for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."

Calderon v. Ashmus, 523 U.S. 740, 746 (1998) (quoting *Fairchild v. Hughes,* 258 U.S. 126, 129 (1922). The threshold test for when a dispute becomes a 'case' under Article III, is when it is found to be an actual controversy. In *Maryland Casualty Co., v. Pacific Coal & Oil Co.*, the Supreme Court stated that the difference between an abstract question and a controversy under the Declaratory Judgment Act is one of degree.

> Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

312 U.S. 270, 273 (1941) (citations omitted).

In *Calderon*, the Supreme Court was even more specific as to the kinds of actions that do not satisfy the actual controversy test of adverse parties, a real dispute of an immediate nature and eligibility for conclusive relief. There, the Court denied the plaintiff the ability to seek a "declaratory judgment to litigate a single issue in a dispute that must await another lawsuit for complete resolution." 523 U.S. at 748. The Court in *Calderon* looked for guidance to an earlier patent case, *Coffman v. Breeze*. *See Calderon*, 523 U.S. at 746 *citing* 323 U.S. 316 (1945). In *Coffman,* a patent holder requested the Court to declare the Royalty Adjustment Act unconstitutional and to enjoin his licensee from paying accrued royalties to the government. However, the constitutionality of the act would arise as an issue only if the patent holder sued to recover the royalties, and the licensee raised the act as an affirmative defense. The Court held there was no justiciable question until the patent holder sued, and the licensee actually raised the affirmative defense. *Coffman*, 323 U.S. at 324.[6]

The foregoing indicates that when Congress conferred the power to issue declaratory judgments on this court it was not an empty exercise. It was a jurisdictional grant with real effect and clear caselaw governing its use.[7] Congress also was clear that if it did grant this authority to the court it did not want it to be meaningless, despite its narrow application.

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[6] Related to the issue of actual controversy is a prudential notion of ripeness, which often turns on similar facts and questions. *See e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

[7] *Black's Law Dictionary* defines Declaratory Judgment as the following: Statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded. Such judgment is conclusive in a subsequent action between the parties as to the matters declared and, in accordance with the usual rules of issue preclusion, as to any issues actually litigated and determined. *Black's Law Dictionary* 409 (6th ed. 1990) (parenthetical references and citations omitted).

Customs Law Jurisprudence: Invocations of § 1581(h) by this court subsequent to the passage of the 1980 Act confirmed a narrow but binding use of jurisdiction under the subsection, consistent with the legislative history and declaratory judgment caselaw.[8] However, like other provisions in the law that grant declaratory relief, subsection (h) must hew to a fine distinction between when a case is specific enough to be considered an actual case for judicial review, and when it is still not concrete enough to settle an actual dispute between adverse parties. In order to understand the scope and power conferred on this court by § 1581(h), another factor must be added that provides context to the case at bar. The fundamental shift in the power of this court initiated by the 1980 Act, and the real and extraordinary authority to issue declaratory judgments recognized in *Aetna,* must be weighed against a history of customs law practice dating back to the beginning of this nation. The issue can be summarized by analysis of the following sentence from Defendant's brief:

> Because this action considers only the basis and merits of the revocation ruling for pre-importation and does not encompass any entries, the CIT cannot rightfully rule on Heartland's motion.

Def.'s Br. at 4, n. 4. It is the nature of this court's practice that, with few exceptions, the authority to rule on a decision by the Customs Service will be invoked only once a product has entered the United States. This is not a coincidence of statutory construction. It is a product of years of Customs decisions, most of which pre-date this court's transition to an Article III court.

The touchstone case, from 1927, illustrates how the judiciary has treated Customs cases differently from other civil actions. In *United States v. Stone & Downer Co.*, the Supreme Court held that a prior judgment determining the classification of goods and the duty upon their importation was not "res judicata" (in this case meaning the modern day collateral estoppel or issue preclusion) upon another importation of the same kind of goods by the same importer. 274 U.S. 225 (1927). The court's exception to this application of estoppel was note-worthy not only because it distinguished classification cases from other civil actions, but even from other revenue cases brought against the government, such as tax cases. *See e.g., C.I.R. v. Sunnen*, 333 U.S. 591 (1948).

Stone & Downer provides the strongest precedent that each new entry is a new cause of action. *See e.g., Boltex Mfg. Co., L.P, v. United States,* 24 CIT ____, ____, 140 F. Supp. 2d 1339, 1346 (2000). This principle underlies the government's position in this case that § 1581(h) does not provide jurisdiction to cover entries imported after this court's decision because there were no entries before the court in the original adjudication. Even if there were, the government would argue, each entry

[8] *See e.g., Pagoda Trading Co.*, 577 F.Supp. at 24 (jurisdiction can be invoked only when ruling is specific as to merchandise plaintiff intends to import); *Am. Air Parcel Forwarding*, 557 F. Supp. at 608 (jurisdiction is not available for "internal advice" ruling as it related to product already imported); *Nat'l Juice Products Ass'n. v. United States*, 10 CIT 48, 628 F. Supp. 978 (1986) (country of origin ruling could be challenged under § 1581(h) when plaintiffs clearly intended to produce and import product described in the ruling).

would be a new cause of action, beyond the scope of the current Heartland case.[9] Before the court recognizes such a broad reading of this precedent, which would undermine Congress' intent as to § 1581(h), it must examine the rationale behind the *Stone & Downer* case and the significant subsequent narrowing of the principle by statute and case-law.

Stone & Downer involved importations of wool fleece and yarn. 274 U.S. at 229. A similar case between the same parties with similar merchandise had been decided in the government's favor. *Id.* The question before the Supreme Court was the res judicata effect of the previous ruling. The Court held that in classification cases there would not be res judicata. The Court relied on two rationales. First, the Court granted deference to the rule established by the Court of Customs Appeals (predecessor to the Court of Appeals for the Federal Circuit) when that court was the final appellate body on customs matters. Second, the Court found wisdom in the rule itself:

> The business of importing is carried on by large houses between whom and the government there are innumerable transactions as here, for instance, in the enormous importations of wool, and there are constant differences as to the proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next.

Id. 274 U.S. 235–36. The Court was concerned that a decision would create binding law between one house and Customs that would be applied to another house, without giving the second house a chance to litigate any distinguishing elements. Therefore, the Court limited the broader rule of collateral estoppel in customs cases. "There of course should be an end of litigation as well in customs matters as in other tax cases, but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation." *Id* at 235. Subsequent cases expanded the use of collateral estoppel in tax revenue cases, but not in customs revenue cases. *See e.g., United States v. De Messimy,* 16 U.S. Cust. Appls. 150, 152 T.D. 42781 (1928).[10] The courts did apply res judicata (modern claim preclusion) principles to cases which in-

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[9] A different reading of Defendant's term "not before the court" could be that in Customs cases the court is essentially acting in rem, and unless it has jurisdiction over some physical property it cannot exercise jurisdiction. Yet this concept does not have any specific caselaw to support it, is contrary to the court's use of equity power in other cases and would make § 1581(h) absolutely meaningless. *See e.g., Queen's Flowers de Colombia, v. United States*, 20 CIT 1122, 947 F. Supp. 503 (1996)(enjoining collection of antidumping duty deposits at importation for certain entries to be imported in the future). Therefore, the court will focus its attention on the argument that each entry is its own cause of action, and, therefore, entries dated after the court's decision of October 19, 1999 are not before the court because they are new causes of action.

[10] Collateral estoppel is the more specific term for binding parties to a determination essential to a previous case that the party was able to litigate on the merits. It is a species of the larger category of principles embodied in the phrase res judicata. Opinions of several decades ago, however, simply use the broad term "res judicata." Over time they have been given specific meanings. The Restatement of Judgments 2d equates the term res judicata to claim preclusion, and collateral estoppel to issue preclusion. The linguistic change is noted in Kenneth C. Davis, *Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise,* § 21:8 at 408, (1989):

> The Court said in *Mendoza*, 464 U.S. at 158: "Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. * * * Collateral estoppel, like the related doctrine of res judicata, serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication." Then the Court said in footnote 3: "Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. * * * The Restatement of Judgments speaks of res judicata as 'claim preclusion' and of collateral estoppel as 'issue preclusion.' (Citing *United States v. Mendoza,* 464 U.S. 165 (1984)).

volved the same cause of action as in a prior suit. In such cases the courts equated cause of action with entries, and claims decided in previous cases involving the same entries could not be re-litigated. *See e.g., United States v. Edward M. Poons Co. of Kobe Inc.,* 18 C.C.P.A. 283 (1930).

J.E. Bernard & Co., Inc. v. United States further constrained the impact of the exception to collateral estoppel in Customs cases. 66 Cust. Ct. 545, 324 F. Supp. 496 (1971). *Bernard* was an appeal for reappraisement in a valuation case. Judge Maletz, after recounting in greater detail the history of collateral estoppel outlined above, distinguished *Stone & Downer* from *Bernard*, pointing out that *Stone & Downer* was a classification case, and *Bernard* a valuation case. The court thereby limited the reach of *Stone & Downer's* exception to collateral estoppel:

> [C]ollateral estoppel is applicable in reappraisement litigation. * * * [in these cases] the name of the nominal plaintiffs, the parties are the same, the cases involve identical merchandise, the same purchase price, the same exporter and importer, and arise out of the same contract of sale. The only distinction between the two cases is that different importations are involved and, therefore, two causes of action.

324 F. Supp. at 502–3. The court then explains the impact of applying collateral estoppel. "In short, given the circumstances here, collateral estoppel requires that the prior judgment be conclusive." *Id.* at 503.

Therefore, in this case when Defendant invokes the phrase "no entries before the court" it must be seen as a shorthand for judicial rules that governed Customs practice prior to the 1980 Act. It also is clear that, contrary to the government's assertion, the rule that each new entry is a new cause of action does not apply in all Customs cases. Instead it is limited to classification cases where the new entries differ such that Customs cannot rely on previous rulings to deny an importer the opportunity to raise new facts. This principle is not a broad jurisdictional limitation of the court's power in Customs cases, so that it requires the court to have jurisdiction over specific entries before it can rule on matters concerning those entries. It is simply a specific exception to traditional rules of res judicata in certain classification decisions. *Bernard* established that in valuation cases Customs is bound by this court's decisions even as to entries that are prospective. Since *Bernard*, and the 1980 Act, the court has found collateral estoppel applicable in classification cases where a plaintiff sought to apply collateral estoppel against Customs, when Customs applied regulations governing classification of goods deemed invalid by this court. *See Gulfstream Aerospace Corp. v. United States,* 21 CIT 1038, 981 F.Supp. 654 (1997).

In addition to the collateral estoppel cases, the court has consistently applied the principle of stare decisis to previously litigated legal issues, even in classification cases. Under stare decisis courts refuse to examine legal issues previously decided in another case. In *Schott Optical Glass, Inc. v. United States,* the Federal Circuit confirmed the validity of stare

decisis as applied in a classification case, as well as the exception that a party can challenge a previous decision if it is clearly erroneous. 750 F. 2d 62, 64 (1984). When read together with the collateral estoppel cases, *Schott Optical Glass* establishes that decisions of this court are binding on Customs, and the contention that every new entry is a new cause of action is narrowly applied.

Defendant makes an additional argument about the scope of the court's power under § 1581(h) and the lack of entries before the court, that "judicial review is available only for prospective transactions." *Def.'s Br.* at 10. Defendant buttresses its point by citing to the legislative history that states subsection (h) covers "contemplated transactions" and a case where § 1581(h) was not available because the goods had already been imported. *Id.* at 11 (citing 1980 U.S.C.C.A.N. 3729, 3758; *Dennison Mfg. Co. v. United States*, 12 CIT 1,3, 678 F. Supp. 894, 897 (1988). Defendant contends the normal protest and denial process under § 1581(a) is the only avenue to relief, because "there were no specific, designated entries before this Court." *Def.'s Br.* at 11. In essence the government contends § 1581(h) jurisdiction lasts only as long as no product is imported, and expires once any importation takes place.

Having placed § 1581(h) in the appropriate context, the court can now directly address the question of what did the court have jurisdiction over when it took the case in 1999. The government argues that subsection (h) only covers prospective entries, and therefore can never apply to an actual entry, even when the actual entry was the prospective entry contemplated by the court when it took jurisdiction of the case, and by the ruling that was the subject of Plaintiff's complaint.

The Scope of § 1581(h): The government is attempting to make a semantic (nearly metaphysical) argument that when the court takes jurisdiction under § 1581(h) the power of that decision lasts only as long as the entries remain prospective. As soon as a prospective entry becomes an actual entry by importation of the goods into the United States, the court's power ends. This cannot be true if the court's jurisdiction under § 1581(h) is to have any meaning or effect. The history of the 1980 Act and the history of declaratory judgments lead to the certain conclusion that any judgment by this court under § 1581(h) must resolve a real legal issue between adverse parties, and must be applicable to future actual entries (as opposed to present hypothetical entries). The statutory and caselaw does not say differently, and to the degree it does, it is overruled by the 1980 Act.

The government's argument has conflated the timeline for litigation. While the jurisdictional predicate for § 1581(h) requires that the entries be prospective, this must be distinguished from the effect of a judicial decision which can only be useful if it is applied to real entries. The entire rationale for pre-importation review under § 1581(h) is that Customs will be bound to apply the court's decision on the adjudicated ruling to future entries. Defendants argue that because subsection (h) is for settling legal issues prior to importation, the result of that judicial

inquiry cannot apply to those importations once they enter the country. Not only is this illogical, it is contrary to the clear intent of the statute. It is also potentially unconstitutional. Accepting Defendant's argument would render § 1581(h) unconstitutional as calling for the court to issue merely an advisory opinion in a matter not a case or controversy as discussed *supra*.

The judiciary's struggle to balance the use of declaratory judgment with the constitutional mandate that it hear only actual cases or controversies indicates that the 1980 Act did not, and could not, limit the reach of a judicial decision under § 1581(h) only to rulings, but never to actual entries. In order for a case to qualify as an actual case, and not an advisory opinion, it must involve a true legal issue between opposing parties and have the ability to render conclusive relief within the case at issue. It cannot be used to settle a legal issue merely for advantage in a separate cause of action. *See e.g., Calderon*, 523 U.S. at 747.

With § 1581(h) Congress created an exception to the usual requirements that administrative remedies must be exhausted, and any duties owed be paid prior to seeking relief. Consistent with the constitutional requirements of declaratory judgment jurisprudence, the exception is available only when plaintiffs show irreparable harm in cases "which determine the fate of specific importations of specific goods." *Pagoda Trading Co.,* 577 F. Supp. at 24. It speaks "to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty." *Id.*

When this court took jurisdiction under § 1581(h) in the original *Heartland* decision, it had the power to issue a legally binding decision. That decision would determine the correctness of the Revocation. The decision was not merely advisory, it had practical, concrete application. In this case, it was applicable to the Revocation and to all entries contemplated by the Revocation and at issue in the litigation. In such cases it is not the court that frames the issue and designates entries at stake. It is the importer that requests an advance ruling and Customs that determines how broad the ruling will be. The traditional rule that each entry is a new cause of action does not obtain in the case where the initial cause of action encompasses prospective entries. To force an importer to seek relief under § 1581(h) to establish its rights, and then force it to litigate again when it seeks to enforce those rights with actual entries, would make § 1581(h) superfluous as an avenue of relief. It is also contrary to the requirements for a valid declaratory judgment case under the Supreme Court's decision in *Calderon*.

Having established that decisions of this court grounded in the jurisdiction of § 1581(h) can have binding application to subsequent entries, the next issue is to determine which parties are bound, and for how long.

B. Who is bound by the decision?

Under normal circumstances it is not necessary to inform parties to cases that they are bound by the decision of the court. However, implicit in the Government's brief is the idea that Customs law, and therefore

the Customs Service, is subject to distinct laws and rules, which render normal litigation practice inapplicable. To some extent this is true. In certain circumstances it is possible for the Customs Service to limit (but not abrogate) a decision of this court. *See Boltex v. United States,* 140 F. Supp. 2d at 1346; 19 C.F.R. § 177.10(d) (1998). However, this is not a wholesale waiver, but an exception. Once the judiciary has spoken to a law, in the absence of congressional action, parties to the dispute are bound by the court's decision.[11] The fact that one of the parties to this litigation is the government does not exempt it from complying with the law as interpreted by the judicial branch. It is the purpose of this court to adjudicate and settle disputes between private individuals and our government. Having waived sovereign immunity, the government is bound the judiciary branch's decisions. While there are exceptions to this rule, none of them are present in this case. The government was bound by the original unstayed *Heartland* decision of this court, as much as Heartland is bound by the Federal Circuit's reversal.

C. How Long are the Parties Bound?

The Rules of the U.S. Court of International Trade provide for a party to stay the execution of a decision pending appeal. USCIT R.62. In fact, there is a specific rule exempting the United States from posting a bond when it is the appellant. *See* USCIT R.62(d). In the absence of a request by one of the parties the decision of the court is binding.[12] As explained by the Court of Appeals for the District of Columbia in another case involving review of agency action,

> the vitality of that judgment is undiminished by pendency of the appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative. To be sure, for as long as the appellate court re-

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[11] The issue of agency non-acquiescence has surfaced before. For example, in the first half of the 1980's the Social Security Administration refused to acquiesce to district and circuit court opinions. Often an agency will apply certain court decisions only within the circuit that issues them. *See* Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 Yale L.J. 679 (1989). Obviously, circuit specific rulings are not applicable in Customs cases because the CIT is a court of national jurisdiction. A federal district court addressing the issue stated the following:

> Our system of constitutional government is undoubtedly a unique and complex one, with three distinct branches of government with independently derived legal authority and substantially separate functions—the legislature, to enact the law; the judiciary, to interpret the law; and the executive (and its administrative agencies), to enforce the law. Undoubtedly, too, the lines of separation between these functions are not always clearcut. The judiciary necessarily exercises enforcement-related functions as an incident of its interpretive and adjudicative activities, while the executive, particularly in the modern era of elaborate administrative agency regulation of a multitude of commercial, social, economic, scientific and employment-related affairs, is permitted to exercise a degree of interpretive authority in its enforcement of the law. However, only a fundamental reordering of this constitutional balance would permit the [Social Security Administration] to exercise the power to which it claims an entitlement in this case. The fundamental principles of our constitutional scheme, as articulated in decisions such as *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) (judicial determination of constitutionality of congressional legislation), *Cooper v. Aaron*, 358 U.S. 1, 17–19, 78 S.Ct. 1401, 1409–10, 3 L.Ed.2d 5, 19 (1958) (state executive and legislative officials' duty to obey federal court decisions), and *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (judicial determination of scope of presidential power), *establish the authority of federal courts to render decisions which bind all other participants in our constitutional system of government.*

Stieberger v. Heckler, 615 FSupp. 1315, 1356–57 (S.D.N.Y. 1985) (emphasis added) *rev'd on other grounds, Stieberger v. Bowen,* 801 F.2d 29 (2d Cir. 1986)).

[12] Requesting a stay is not the only option open to Customs in the face of an adverse ruling. Any product falling under the Revocation could be subject to at least three actions by Customs. First, Customs could apply the pre-Revocation rate, consistent with the decision of this Court. Second, under 19 U.S.C. § 1504(b) and (c), Customs could extend liquidation pending the outcome of the appeals process, making clear its intent to apply the Revocation if it is upheld by the Federal Circuit. Third, Customs could flout the decision of this court, liquidate the entries and risk punitive action by this court. It is unclear, but, at least until August 30, 2001, Customs may have chosen the second option and extended liquidation pending the outcome of the judicial process. Apparently some entries were given the pre-Revocation rate. It is the actions Customs took after August 30, 2001 that raise the most serious questions and problems.

> tains its mandate it maintains jurisdiction over the case, and thus the power to alter the mandate. But non-issuance of the mandate by the appellate court has no impact on the trial court's powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendency of the appeal.

Deering Milliken, Inc. v. Fed. Trade Comm'n, 647 F.2d. 1124, 1129 (D.C. Cir. 1978).

Under the Federal Rules of Appellate Procedure, an opinion of the appeals court is not final until it issues its mandate. Fed. R. App. P. 41(c). This rule is confirmed in the caselaw. Even if the appeals court issues a decision without the mandate, it is still open and subject to change. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (vacating a prior en banc opinion in light of new legislation). In some cases the initial decision has been withdrawn and changed prior to the mandate's issuance. It is important to understand that unless specifically directed, the parties cannot rely on the decision as final until the mandate issues. *See T.S. Alphin v. Henson,* 552 F.2d 1033, 1035 (4th Cir. 1977). Once the mandate is issued, the court of appeals relinquishes jurisdiction over the case back to the trial court for further proceedings consistent with the mandate. *See e.g., United States v. Cote*, 51 F.3d 178, 181–82 (9th Cir. 1995).

Defendant quotes *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, for the proposition that "when a judgment for the plaintiff is reversed * * * the only matters that remain for the district court are to dismiss the complaint and enter the judgment in the docket." 137 F.3d 1475, 1483 (Fed. Cir. 1998). The government failed to include the important sentence that immediately precedes the one quoted: "As an initial matter, every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings." *Id.*

In light of the relevant caselaw, the Federal Rules of Appellate Procedure, and the Rules of this court, it is clear the decision of this court remains binding and enforceable until the issuance of the mandate. Any action by Customs that applies the Revocation prior to the issuance of the mandate directly flouts the authority of this court over rulings under § 1581(h). This court's October 1999 decision that the Revocation is contrary to law remains binding on Customs until the issuance of the mandate by the Federal Circuit. Had Customs not acted precipitously with regard to at least some liquidations, thus eliciting Plaintiff's motion, this matter would have concluded at that time.

D. Application of § 1581(h) and disposition of motion.

In summary, while the Court of International Trade remains one of limited jurisdiction, the 1980 Act fundamentally changed the jurisdictional reach and remedial powers of the court. The legislative and case histories detailed above confirm that § 1581(h) is a significant grant of jurisdiction to the court. It allows for pre-importation review of certain cases, if the requirements for irreparable harm can be shown.

When the court hears a case under § 1581(h), it has the power to issue a binding opinion that covers the entries contemplated by the ruling at

issue. In the absence of "specific contemplated import transactions" which will apply a ruling with "virtual certainty" jurisdiction under § 1581(h) is not available. *See Pagoda Trading Co.*, 577 F. Supp. at 24. Failure of litigants and the court to identify the relevant contemplated import transactions presents the prospect of an unconstitutional advisory opinion, and prudential concerns of ripeness. Once the class of contemplated imports is defined by the importers and Customs, the scope of the jurisdiction the court will exercise is set. Often this class will be defined by the ruling the government issues. A decision reached in an § 1581(h) cases is binding in that case, and a party is not required to file a new case to enforce that decision.

The court's decision binds the parties as long as it remains in place, or a motion is granted to stay the decision. In a routine case when the decision is reversed the original decision is binding until a mandate from the appeals court issues. Even in cases of reversal the district court still retains jurisdiction to settle collateral issues, such as attorney fees. *See White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445 (1982). Nevertheless, with a traditional case, this court relinquishes jurisdiction over parties and issues with entry of judgment following a mandate.

This, however, is not a typical case. The court has extended its jurisdiction well past reception of the mandate to consider the Plaintiff's motion. In addition, Plaintiff is seeking uncommon relief by asking the court to rule on the purpose and meaning of 19 U.S.C. § 1625(c) when that issue was not adjudicated in the original proceeding. Plaintiff's motion requests that the judgment order implementing the mandate of the Federal Circuit specify that the higher Tariff Rate Quota rate applies only to entries following a 60-day notice period after the issuance of the Federal Circuit's mandate, and perhaps even further to 60 days after this court's disposition of Plaintiff's motion. *Pl.'s Br.* at 2.

At issue are four categories of import entries arranged chronologically: those imported before the Federal Circuit opinion of August 30, 2001, those between August 30 and December 11, 2001, those between December 11, 2001 and disposition of the Plaintiff's motion, and those entered after disposition of the motion. Parallel to the entries are the instances and dates for liquidation, which also can be divided into the four time periods above.

The court clearly has jurisdiction over some of these entries, specifically those entered and liquidated prior to December 11, 2001. It is not at all clear that the court could rule on the application of the higher tariff rate to liquidations, let alone entries, after December 11, 2001. The effective date of the Revocation was not an issue disputed in the original case. It is an issue created by arguably premature Customs' actions against Heartland. Therefore, the court should consider this matter only if necessary to enforce its, or the appellate, decision. There is an obvious link between the restoration of the Revocation by the Federal Circuit, and determining the effective date of its application. Plaintiff, however, has not to date established to the satisfaction of the court a sig-

nificant nexus between the original decision of this court and its request for relief under § 1625(c) sufficient to warrant the maintenance of extraordinary jurisdiction to grant that relief to all entries Plaintiff claims are at issue in the case.

The court then has the option of ruling on the applicability of § 1625(c) on some of the entries covered by the Plaintiff's motion. However, the court would not be able to consider all the relief the Plaintiff is requesting. In addition, the factual record is not clear. At oral argument the status of the liquidation process was uncertain. *Oral Arg. Tr.* at 8, 36. If Customs had properly extended pursuant to its statutory authority under 19 U.S.C. § 1504(b), there would be no issue with regard to those entries. For the court to maintain jurisdiction to settle the application of § 1625(c) to new entries, and those with uncertain liquidation status, requires adjudication of both new law and new facts distinct in nature from the original case. *See* Fed. R. Civ. P.15; CIT R.15., (providing for supplemental pleadings, allowed at the discretion of the court); *See also* 28 U.S.C. § 1367 (providing for supplemental jurisdiction by district courts over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.)[13]

The court declines to exercise its jurisdiction under § 1581(h) as there is a better alternative available in this case. Plaintiff already has filed protests on liquidations by Customs of entries, some of which occurred while this court's decision of October 19, 1999 was still in force. Other liquidations occurred after the mandate issued on December 11, 2001. If denied, these protests will soon be ripe for adjudication under § 1581(a).[14] This allows the court to consider Plaintiff's claims relating to the 60 day notice provision of § 1625(c) on the more traditional jurisdictional grounds of § 1581(a).[15] Should the court decide that the 60 day period applies to entries after the mandate it would then have all the entries squarely before it, preventing any further gaming of the process by parties. The protest process would also allow for development of a factual record so the court can be specific in its application of § 1625(c). If the Plaintiff's protests are denied, then Plaintiff is free to file a suit with this court. Heartland may not be required to pay the liquidated duties on all the entries it seeks to adjudicate. Customs in the past has been willing to suspend liquidation pending the outcome of a case. *See Oral Arg. Tr.* at 39. Waiting to hear arguments with regard to the 60 day notice provision is advantageous in another way. Through the protest process the parties have a chance to reach an equitable solution to the problem

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[13] *See e.g., Ammex, Inc. v. United States*, Slip Op. 02–20 (CIT February 22, 2002) (Motion for order to show cause why defendant should not be held in contempt denied, but noting if Customs attempted to attach or evade a court's judgment, the court could exercise jurisdiction over such behavior under its inherent enforcement powers and as an extension of its jurisdiction to hear a plaintiff's original complaint.)

[14] If Customs grants the protests, Plaintiff will have gained much of the relief it seeks here through the administrative process.

[15] Plaintiff argues that the court could also take jurisdiction under 28 U.S.C. § 1581(i). *Reply Mem. of Points and Authorities in Supp. of Pl.'s Mot. for Entry of J.* (January 16, 2002) at 25. However, § 1581(i) is not appropriate when another avenue is available.

without resorting to further judicial intervention. Without commenting further on the merits of each party's substantive claims relating to §1625(c) and the unfortunate timing of Customs' liquidations, the court has urged both sides to explore ways to bring this litigation to a conclusion, sooner rather than later.[16]

In this case, to maintain jurisdiction under § 1581(h), or extend it under § 1581(i), when another more comprehensive avenue is available is unwise. The court cannot overlook the fact that the Federal Circuit has determined the higher duty rate is the legally correct one. It is therefore difficult for the Plaintiff to make out a strong case that it is being severely prejudiced by its application sooner rather than later. The court originally found the extraordinary jurisdiction of § 1581(h) appropriate because the Revocation would have destroyed Heartland's long-term arrangements. Now the Federal Circuit has settled the long-term outlook of the company's current business. As for the remaining questionable liquidations by Customs, those are better handled by the traditional protest process and appeal to this court under § 1581(a). This is especially true in light of Customs' recent decision to liquidate at the lower rate on some of the protested entries. *See Oral Arg. Tr.* at 9. It is conceivable that some cases originally brought under § 1581(h), even after a reversal, may necessitate the court's maintenance of jurisdiction after a mandate has issued. That necessity is not present in this case.

IV. CONCLUSION

For the foregoing reasons, the court declines to extend jurisdiction of this case and Plaintiff's Motion for Entry of Judgment is denied. Therefore, consistent with the mandate of the Court of Appeals for Federal Circuit in Appeal #00–1287, –1289, dated December 11, 2001, reversing the decision of this court dated October 19, 1999, there is nothing further for the court to determine in this matter and the case is dismissed. Judgment will be entered accordingly.

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[16] *See Oral Arg. Tr.* at 40.

(Slip Op. 02–23)

SONY ELECTRONICS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 98–07–02438

[Harbor Maintenance Tax refund awarded pursuant to 28 U.S.C. § 1581(a) jurisdiction with post-summons interest]

(Dated February 26, 2002)

Galvin & Mlawski (John J. Galvin) for plaintiff Sony Electronics, Inc.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes,* and *Jeffrey A. Belkin), Richard McManus* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court for entry of judgment following the court's opinion finding pre-judgment interest is not owing except as provided in 28 U.S.C. § 2644. *See Swisher Int'l, Inc. v. United States,* Slip-Op. 01–144 (Ct. Int'l Trade Dec. 11, 2001). The court has jurisdiction in this Harbor Maintenance Tax refund suit pursuant to 28 U.S.C. § 1581(a), which is limited to actions "contesting the denial of a protest." *See Swisher Int'l, Inc. v. United States,* 205 F.3d 1358, 1364 (Fed. Cir.), *cert. denied,* 581 U.S. 1036 (2000). Because Sony timely contested Customs' denial of its HMT refund requests through Customs' formal protest process, the parties are in agreement that refunds arising under § 1581(a) are now due. The principal to be refunded pursuant to that provision remains in dispute.

Plaintiff Sony Electronics, Inc. ("Sony") seeks a refund of all HMT payments made during the last three quarters of 1990 and all of 1991 and 1992.[1] The total amount requested by Plaintiff is $522,886.71.[2] Defendant argues that the court possesses § 1581(a) jurisdiction only as to certain payments made during that time period because Plaintiff did not correctly identify the remaining payments in its protests.[3] Defendant argues that Plaintiff's § 1581(a) refund should, therefore, be limited to $284,655.36. The parties agree that Plaintiff is, at minimum, entitled to a refund of the payments totaling $284,655.36 pursuant to § 1581(a) jurisdiction. The difference between the two amounts ($238,231.35) represents payments made by Plaintiff during the same period, as verified by Customs, but which were not included in the quarterly reports at-

[1] The parties agree that Plaintiff received a refund in 1999 under 28 U.S.C. § 1581(i) of three payments made later than those at issue in these matters. *See Sony v. United States,* No. 95–03–00297 (Ct. Int'l Trade 1999). Presumably, plaintiff does not seek refund under 28 U.S.C. § 1581(i) here because of the two year time bar of 28 U.S.C. § 2636(i) applicable to § 1581(i) claims.

[2] In its proposed judgment, Plaintiff inadvertently understated the amount due. Plaintiff listed a payment in the first quarter of 1990 as $50,220.86. In a letter to Plaintiff dated January 11, 2002, Defendant states that the amount is actually $50,226.86, a difference of $6.00. The court will consider the higher amount conceded by Defendant as the correct amount and calculate accordingly.

[3] While the court maintains jurisdiction under § 1581(i) for HMT refund claims not originally protested, *see U.S. Shoe v. United States,* 523 U.S. 360 (1998), there is no statutory provision for interest on claims made under § 1581(i). *See IBM Corp. v. United States,* 201 F.3d 1367, 1375 (Fed.Cir. 2000).

tached to Plaintiff's protests.[4] The dispute, therefore, is whether these additional payments were protested.

Section 514 of the Tariff Act enumerates the requirements for a valid protest. 19 U.S.C. § 1514. Section 1514(c)(1) requires that a protest "must set forth distinctly and specifically * * * each [Customs] decision * * * as to which protest is made * * *." Although the "decisions" traditionally protested involve imports, the Federal Circuit determined that a denial of an HMT refund request is a protestable decision. *See Swisher,* 205 F.3d at 1369. Defendant argues that, under § 1514(c)(1) and its implementing regulation,[5] Plaintiff was required to explicitly identify each contested HMT payment in its protest. The dispute at hand is a legal one and no material facts are at issue.

Generally, a protest "must be sufficiently distinct and specific to enable the Customs Service to know what is in the mind of the protestant" at the time of the protest. *Computime, Inc., v. United States,* 772 F.2d 874, 878–79 (Fed. Cir. 1985). "The test for determining the validity and scope of a protest is objective and independent of a Customs official's subjective reaction to it." *See Power-One Inc. v. United States,* 23 CIT 959, 964, 83 F. Supp. 2d 1300, 1305 (1999). If the protest reasonably apprises the collector of the objection, a protest is legally sufficient. *See Mattel, Inc. v. United States,* 72 Cust. Ct. 257, 377 F. Supp. 955 (1974). The court generally construes a protest in favor of finding it valid unless the protest "gives no indication of the reasons why the collector's action is alleged to be erroneous * * *." *See Koike Aronson, Inc., v. United States,* 165 F.3d 906, at 908 (Fed. Cir. 1999) (quoting *Washington Int'l Ins. Co. v. United States,* 16 CIT 599, 602 (1992)). Customs protest procedures were not created to address HMT refund requests and, therefore, the court will not rigidly construe ambiguities against Plaintiff.

Customs original protest procedures were intended to allow importers the ability to contest more traditional Customs decisions, such as liquidation or reliquidation. *See, e.g., Mitsubishi Electronics America, Inc., v. United States,* 18 CIT 929, 932, 865 F. Supp. 877, 880 (1994) ("The protest informs Customs that corrections effected by a reliquidation have not appeased the importer and explains why the importer finds particular corrections unsatisfactory."). Because Customs had not created procedures and related forms to address the unique and unforeseen problems related to the HMT on exports, Plaintiff had no other option than to file its constitutional protests on Customs' standard protest form, Customs Form 19.

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[4] To the extent necessary, the court considers these additional payments conceded by defendant as amendments to Plaintiff's protests. The court may allow amendments to assert claims which could have been made in the original protest. *See Schieffelin & Co. v. United States,* 61 Cust. Ct. 397, 401, 294 F. Supp. 53, 56 (Cust.Ct. 1968) (claim for duties added to claim for taxes on same merchandise), *aff'd* 57 C.C.P.A. 66, 424 F.2d 1396 (C.C.P.A.), *cert. denied* 400 U.S. 869 (1970). Although a party may amend its protest at the agency level pursuant to 19 U.S.C. § 1514(c)(1)(D), it would have been futile for Plaintiff to amend these protests because, at that time, Customs was not granting any HMT refund denial protests brought on constitutional grounds.

[5] 19 C.F.R. § 174.14(a)(6) requires that "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal * * *."

Plaintiff filed two protests on separate Customs Forms 19, both dated October 23, 1995. In the first protest, Plaintiff requested a "refund of the Harbor Maintenance Fee (HMF) deposited with respect to the 2nd, 3rd, and 4th quarters of 1990, and 1st through 4th quarters of 1991, 1992 and 1st quarter of 1993." Def.'s App., Tab B at 1. In the second protest, Plaintiff requested refund of payments made during the "2nd, 3rd, and 4th quarters of 1992 and the 1st and 2nd quarters of 1993." Def.'s App., Tab C at 3. Both forms clearly state the reason for protest: "It is claimed that the HMF was unconstitutionally assessed on the exports covered by the Quarterly Summary Reports and should be refunded pursuant to the Amended Quarterly Reports." Defendant argues that, because the time periods identified in the two protests overlap and because different quarterly reports are attached to each form, this is "conclusive evidence" that Plaintiff intended each protest to include only specific payments. The court first addresses the submission of separate protests.

Defendant argues that Plaintiff submitted two protests covering the same time period because Plaintiff's protests were directed at specific payments, not all payments, made during that time period. It is more likely that Plaintiff submitted two protests because it was unclear whether a single protest would sufficiently notify Customs of Plaintiff's claims. Customs Form 19 identifies the protesting party by "importer" number.[6] *See* Form 19, Section 1—"Importer and Entry Identification." Plaintiff's first protest identifies "Sony Electronics, Inc." as the importer and lists the importer number as 22–28788067NY. Def.'s App., Tab B at 1. The second protest also identifies "Sony Electronics, Inc." as the importer but lists the importer number as 22–2878067SD.

Plaintiff presumably has two importer numbers because Sony exports different goods from different ports or through two separate exporters. The attached quarterly reports confirm that Plaintiff made HMT payments under both numbers. It is reasonable to assume that Plaintiff submitted separate protest forms because Plaintiff was unclear whether it could contest payments made under one identification number in a protest specified under another number. That Plaintiff submitted separate forms is more likely a result of Customs' lack of direction than Plaintiff's intent to protest only specific payments. In any case, Plaintiff's subjective intent is no more at issue than is Customs' subjective understanding of the protests. The court finds that Plaintiff's separate submissions should be interpreted as a reasonable attempt to cover as many claims as possible given the forms provided. The court, therefore, turns to Defendant's argument regarding the quarterly reports attached to Plaintiff's protests.

Prior to *U.S. Shoe,* Customs required all exporters to file Harbor Maintenance Fee Amended Quarterly Summary Reports (Customs

[6] The Customs form requires the protestor to submit its "importer" number. Because the Export Clause prohibits any tax on exports, *see U.S. Shoe,* 523 U.S. 360, Customs would not need to identify exporters in its protest form except in the context of an exporter's protest of a denial of an HMT refund request. That Form 19 identifies parties protesting HMT refund denials by "importer" number is indicative of Form 19's overall inadequacies here.

Form 350) to indicate the value of goods exported and the amount of HMT paid during that quarter. *See Swisher,* 205 F.3d at 1361 (describing Customs requirements for submitting Forms 350). Plaintiff attached several of its quarterly reports to its protests. The reports directly correspond to the importer identification numbers discussed previously. For example, only quarterly reports associated with 22–28788067NY are attached to Plaintiff's first protest, which identifies Sony as importer number 22–28788067NY. Likewise, only quarterly reports associated with Sony 22–2878067SD were attached to the second protest, which identifies Sony as importer number 22–2878067SD. Because both of Plaintiff's protests request that the HMT payments "be refunded pursuant to the Amended Quarterly Reports," Defendant argues that Plaintiff's refund should be limited to those payments identified in the quarterly reports attached to Plaintiff's Forms 19.

Regardless of the documents attached, the core of Plaintiff's refund requests and subsequent protests was that the HMT was unconstitutionally assessed on exports. Defendant would have the court determine that Plaintiff conveyed to it only a protest of the simultaneously documented payments as unconstitutional and that the Export Clause somehow did not apply to those payments not listed on the attachments. The court finds Defendant's suggestion untenable. It is reasonable to assume that, because of the aforementioned inadequacies of the protest process, Plaintiff's attachments were an *ad hoc* method of supplementing a necessarily *ad hoc* protest and, therefore, not representative of the breadth of Plaintiff's claim. That Plaintiff submitted two separate protests or attached specific quarterly reports to those protests is not representative of or limiting on Plaintiff's overall claim that the HMT is unconstitutional and that Plaintiff was requesting refund of all HMT payments on exports for those quarters specifically claimed on the face of the protests.

"[H]owever cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section 514 if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel*, 72 Cust.Ct. at 262, 377 F. Supp. at 960. Because Plaintiff was limited by the procedures and forms available and because the protest was based on an overarching constitutional claim, the court finds that Defendant was reasonably apprised that Plaintiff objected to the denial of a refund of all HMT payments on exports during the listed quarters.

The court finds that Plaintiff's §1581(a) claims include all HMT payments on exports made during the quarters mentioned in the protests. Judgment shall enter accordingly.

(Slip Op. 02–24)

VIRAJ GROUP, LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CARPENTER TECHNOLOGY, CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 00–06–00291

[Plaintiff's request that the Department of Commerce's Final Results of Redetermination Pursuant to Court Remand be remanded to the Department of Commerce for reconsideration is granted. Defendant's request to sustain the Final Results of Redetermination is denied.]

(Dated February 26, 2002)

Ablondi, Foster, Sobin & Davidow (Peter Koenig), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David W. Richardson,* Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Collier Shannon Scott, PLLC (Robin H. Gilbert, Laurence J. Lasoff), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Exercising jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994), this Court reviews the Department of Commerce's (Commerce) Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.,* Slip Op. 01–104 (CIT August 15, 2001) *(Remand Determination)* to determine whether Commerce's approach to the Indian rupee's devaluation during the administrative review period, December 1, 1997 through November 30, 1998, is supported by substantial evidence on the record and otherwise in accordance with law.

BACKGROUND

In Plaintiff Viraj Group, Ltd.'s (Plaintiff or Viraj) initial challenge before this Court, Plaintiff raised the issue of whether the exchange rate used by Commerce to convert Indian rupees into United States dollars had created an inaccurate dumping margin in *Stainless Steel Wire Rod From India; Final Results of Antidumping Duty Administrative Review,* 65 Fed. Reg. 31,302 (May 17, 2000) (*Final Results*). Specifically, Plaintiff argued that use of the November 3, 1997 exchange rate distorted dumping margin calculations because the rupee's subsequent devaluation required Viraj to pay more rupees for imported raw materials. Viraj ultimately recovered its higher cost of production because the devaluation caused it to receive more rupees for the U.S. dollar price of its subject merchandise. Commerce's use of the earlier exchange rate, however, failed to reflect this offset and caused an understatement of the rupees actually received, resulting in a dumping margin.

This Court remanded this issue to Commerce but sustained the remainder of the *Final Results in Viraj Group, Ltd. v. United States of*

America and Carpenter Technology, Corp., et al., 162 F. Supp. 2d 656 (Ct. Int'l Trade 2001) (*Viraj I*). Specifically, this Court directed Commerce to: (1) articulate the reasoning behind its approach to the devaluation of the Indian rupee during the period of review; and (2) properly address and explain whether Commerce's currency conversion methodology resulted in an accurate dumping margin and, should it be necessary, recalculate such margin as may be required.

On October 1, 2001, Commerce filed its *Remand Determination* with this Court, explaining why it had decided alternative means for accounting for the Indian rupee's depreciation were unnecessary. As background, Commerce discussed two types of exchange rate fluctuations-one which it ignores, and the other which it adopts. *Remand Determination* at 2–3. Under the first, a spot exchange rate that deviates from the benchmark rate by more than 2.25 percent on a given day is ignored as unrepresentative of the underlying currency value because the "fluctuation" is "outside the normal range." *Id*. at 2. Under the second,

> where the currency is depreciating over time, and where the rate of change in the exchange rate and the overall change are such that the exchange rate movement clearly is more than just a fluctuation that can be ignored, *i.e.*, it represents an event signaling a fundamental change in the underlying value of the currency, the spot rate on a given day (in the period of currency depreciation) is the best measure of the new foreign currency value and is therefore the appropriate exchange rate of [sic] currency conversion purposes for any sale occurring on that day. Thus, "fluctuation" in this context means "a change within the normal range."

Id. at 2–3.

Next, Commerce distinguished the instant case from two scenarios in which currency conversion concerns caused market participants to make pricing decisions based upon anticipated future currency values. In the first scenario, hyperinflation in Brazil increased prices and costs measured in home currency units, requiring the respondent's pricing decisions to reflect an expected future exchange rate. *See Budd Co., Wheel & Brake Div. v. United States*, 746 F. Supp. 1093 (Ct. Int'l Trade 1990). Commerce reasoned in the *Remand Determination* that its calculations in such a situation should reflect the linkage between hyperinflation, pricing decisions, and anticipated exchange rates. In the instant case, however, Commerce asserted Indian market conditions during the period of review did not make it reasonable to think-and Viraj did not claim-that Viraj had set export price on the basis of a forward exchange rate. *Remand Determination* at 3.

In the second scenario, comprised of two cases, the Korean won fell 40 percent over two months and the Thai baht dropped 18 percent in one day. Commerce stated that these currencies experienced such rapid and large drops in value of apparent medium- to long-term duration that market participants based their changed pricing decisions upon the most current exchange rate data available-the daily current spot exchange rate. *See Notice of Preliminary Determination of Sales at Less*

Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 Fed. Reg. 137 (Jan. 4, 1999) *(Stainless Steel from Korea) and Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 56,759 (Oct. 21, 1999) (*Pipes and Tubes from Thailand*). In contrast, Commerce stated that in this case the rupee's gradual change made it less likely that market participants would change their pricing, thereby giving Commerce no clear basis to view the currency movement as a fluctuation that could not be ignored. *Remand Determination* at 3–4. Further, Viraj, as an individual market participant, provided no basis for Commerce to invoke its forward exchange rate provision. *Id*. at 4–5.

Commerce concluded:

> In the instant case, what the Department found were typical movements that one would expect of a flexible exchange rate subject to market vagaries. There were no extraordinary aspects to the observed movement in the rupee between November 3, 1997 and November 30, 1998, and no evidence on the record to suggest that the movement was an event or signal recognized at the time by all market participants as warranting a change in their pricing behavior. For this reason, the record supports the Department's decision to treat the depreciation of the rupee as a fluctuation that could be ignored in a manner consistent with the overriding statutory goal of calculating accurate dumping margins. * * * Viraj's [sic] makes an opportunistic claim for the Department to account for rupee depreciation that all agree would lower the calculated dumping margin. But Viraj's claim is hardly distinguishable from a claim based on any of a multitude of changes in other variables that can occur after sale, but which should not be reflected in the dumping margin because they have no connection to respondent's pricing decisions or the terms and conditions of sale.

Remand Determination at 5.

Following Commerce's filing of its *Remand Determination*, Plaintiff filed a Memorandum in Opposition to the Final Results of Redetermination of the U.S. Department of Commerce (Plaintiff's Memo). Defendant then filed a Memorandum in Opposition to Plaintiff's Memorandum (Defendant's Memo).

STANDARD OF REVIEW

This Court will sustain Commerce's *Remand Determination* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). In assessing whether Commerce's *Remand Determination* is in accordance with law, this Court accords substantial weight to Commerce's interpretation of the statute it administers. *See Floral Trade Council of Davis, CA v. United States*, 888 F.2d 1366, 1368 (Fed. Cir. 1989). In addition, where Congress has implicitly delegated to an agency on a particular question, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844

(1984); *see Pesquera Mares Australes LTDA v. United States,* 266 F.3d 1372, 1379–82 (Fed. Cir. 2001) (applying *Chevron* deference to a statutory interpretation articulated by Commerce in a dumping determination). If, however, Commerce's position is unreasonable, "deference does the agency no good." *Thai Pineapple Canning Ind. Corp. v. United States,* 273 F.3d 1077, 1083 (Fed. Cir. 2001) *(Thai Pineapple).*

PARTIES' CONTENTIONS

Plaintiff's Contentions

Plaintiff first contends the *Remand Determination* "constitute[s] a mechanical application of exchange rates that defeats the overriding statutory goal of fair comparisons and accurate margins" because Commerce's analysis does not address the effect that an exchange rate change after the purchase order date has upon Viraj's actual costs and money received. (Plaintiff's Memo at 2.) Here, Plaintiff argues, the exchange rate change resulted in Viraj actually receiving more from its customer than the actual cost to Viraj; therefore, no dumping occurred. *Id*.

Second, Plaintiff contends Commerce's claims as to Viraj's expectations are not supported by substantial evidence. Plaintiff states that because it knew the rupees received would move in tandem with its costs, it knew that it would ultimately receive more rupees from customer payments in U.S. dollars to make up for the higher rupees required to pay for imported raw materials in U.S. dollars. *Id*. Plaintiff argues that Commerce defeated these expectations by using the exchange rate at purchase order date to determine rupees received by Viraj, but the post-devaluation exchange rate to determine costs. *Id*. at 2–3.

Third, Plaintiff contends it is unclear how its expectations would be relevant, as dumping calculations are based upon actual events rather than speculation. *Id*. at 3.

Finally, Plaintiff contends Commerce has not adequately explained why it departed from past practice by calculating the dumping margin without using the rupees actually received. *Id.* at 3.

Defendant's Contentions

Defendant first contends Commerce's determination that it could ignore the fluctuation of the rupee in a manner consistent with the statutory goal of accurate dumping margin calculations is supported by substantial evidence on the record and otherwise in accordance with law. Defendant argues the *Remand Determination* demonstrates that the rupee's gradual depreciation gave Commerce a legitimate reason to have considered the devaluation a fluctuation to be ignored. (Defendant's Memo at 8–9.)

Defendant counters Viraj's argument that Commerce should have calculated the dumping margin using the rupees actually received, claiming that to do so would have contradicted the statutory requirement that Commerce use the exchange rate in effect on the date of sale of the subject merchandise; the only statutory exception, inapplicable

here, allows for use of an exchange rate specified in a forward sale agreement. *Id*. at 10. Defendant asserts the statute provides that exchange rate fluctuations shall be ignored and Commerce has adequately explained why it appropriately ignored the rupee's fluctuations in this case. *Id*.

Defendant contends the Court should sustain Commerce's *Remand Determination* even if it did not result in the most accurate dumping margin possible. Defendant argues that the Federal Circuit's position in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 813 (1994) conflicts with this Court's position that the Court must assess whether Commerce's actions further the antidumping statute's underlying goal of accuracy. Defendant cites *Ad Hoc* for the proposition that, "where the Act itself clearly expresses the intent of Congress," the reasonableness of Commerce's interpretation of the Act is irrelevant. (Defendant's Memo at 12, *citing Ad Hoc*, 13 F.3d at 402– 403.) Defendant acknowledges the Federal Circuit has stated in several decisions that Commerce must determine margins as accurately as possible, and the Statement of Administrative Action expresses the intent that dumping margins be undistorted by currency conversion practices. However, Defendant asserts these statements "are hortatory in nature such that specific statutory provisions that evince the intent of Congress must be followed even if the result appears to be an unfair or inaccurate dumping margin." (Defendant's Memo at 13.) Because Commerce has followed the "clear directive" of the currency conversion statute, Defendant asserts the *Remand Determination* should be sustained. *Id.*

ANALYSIS

The issue before this Court is whether Commerce's application of its standard currency conversion methodology resulted in an accurate dumping margin. The Federal Circuit and this Court have repeatedly acknowledged that fairness and accuracy are underlying statutory goals of dumping margin determinations.[1] In addition, the Statement of Administrative Action (SAA) states that "[t]o a large extent, the Agreement tracks existing practice, the goal of which is to ensure that the

[1] *See, e.g., Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed Cir. 2001) ("The overarching purpose of the antidumping statute is to permit a fair, apples to apples comparison between foreign market value and United States price * * *.") (internal quotations omitted); *NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995) (stating the antidumping laws "are remedial not punitive"); *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) (noting one of the purposes of the antidumping laws "is to calculate antidumping duties on a fair and equitable basis"); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (acknowledging "the basic purpose of the statute: determining current margins as accurately as possible"); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States,* 102 F. Supp. 2d 486, 495 (Ct. Int'l Trade 2000) (stating that "any given methodology must always seek to effectuate the statutory purpose-calculating accurate dumping margins"); *Borlem S.A.-Empreedimentos Industriais v. United States*, 718 F. Supp. 41, 48 (Ct. Int'l Trade 1989) (finding Congress would not authorize "proceedings that are so flawed with inaccurate facts that different results would obtain if accurate facts were used").

process of currency conversion *does not distort* dumping margins."[2] Uruguay Round Agreements Act, Statement of Administrative Action, H.R. DOC. NO. 103–316, at 841 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177 (SAA) (emphasis added).

The provision at issue in 19 U.S.C. § 1677b–1 states:

> (a) In general
>
> In an antidumping proceeding under this subtitle, the administering authority shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise, except that, if it is established that a currency transaction on forward markets is directly linked to an export sale under consideration, the exchange rate specified with respect to such currency in the forward sale agreement shall be used to convert the foreign currency. Fluctuations in exchange rates shall be ignored.

Commerce appears to argue that it is obligated to follow the express direction of the statute and ignore fluctuations even if they distort dumping margins in a manner that appears unfair. Nevertheless, where there is a fundamental change in the underlying value of the currency, Commerce is required by its own policy to make an adjustment. In this case, during the period of review of approximately twelve months the value of the rupee declined an average of 1.1 percent per month. *See Remand Determination* at 4. At the end of the period of review, the cumulative declination was 14.6 percent. *Id*. Commerce argues that it was appropriate to ignore the 1.1 percent declination in value on a monthly basis and to ignore the overall 14.6 percent declination in the value of the rupee during the period of review.

Although Congress clearly intended Commerce to further its goal of accuracy in the currency conversion process, it did not define all terms of that process. Neither the statute, the SAA, nor the Uruguay Round Agreements define the term "fluctuations." Because the statute is silent regarding the meaning of "fluctuations," Commerce appears to have been given discretion in its approach to the term. The SAA does state the intent that "Commerce will promulgate regulations implementing the [currency conversion] requirements of section 773A [or 19 U.S.C. 1677b–1]." SAA at 841. Rather than address the meaning of the term "fluctuations" through regulations, Commerce did so through *Policy Bulletin 96–1*, which creates two versions of the term-one to be ignored and the other to be acknowledged. *See Notice: Change in Policy Regarding Currency Conversions,* 61 Fed. Reg. 9,434 (Mar. 8, 1996) *(Policy Bulletin 96–1)*. An actual daily rate that varies from the benchmark rate by more than 2.25 percent is treated as a fluctuation, and an actual daily

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[2] The currency conversion elements of the Uruguay Antidumping Agreement must be read within the context of required fair comparisons. Article 2.4 of the Uruguay Antidumping Agreement requires that "[a] fair comparison shall be made between the export price and the normal value" in dumping determinations. It subsequently lists the currency conversion requirements also found in 19 U.S.C. § 1677b–1.

United States domestic law echoes the fairness requirement. In determining whether merchandise "is being or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

rate that varies within 2.25 percent from the benchmark rate is treated as normal. In addition, Commerce recognized that "whenever the decline in the value of a foreign currency is so precipitous and large as to reasonably preclude the possibility that it is only fluctuating, the lower actual daily rates will be employed from the time of the large decline." *Id.* at 9,436. Finally, *Policy Bulletin 96–1* indicates it may be appropriate to use daily rates in those "situations where the foreign currency depreciates substantially against the dollar over the period of investigation or the period of review." *Id*. at 9,435 n.2.

Commerce has in the past exercised discretion in deciding whether to apply its standard methodology or whether to apply the lower daily rate because the "decline in the value of [the] foreign currency [was] so precipitous and large as to reasonably preclude the possibility that it [was] only fluctuating." *Policy Bulletin 96–1*, 61 Fed. Reg. at 9,436. The won's 40 percent decline over two months in *Stainless Steel from Korea* and the baht's 18 percent drop in one day in *Pipes and Tubes from Thailand* are obvious examples of the precipitous and large declines to which Commerce refers. Commerce, however, declined to define "precipitous and large" in *Policy Bulletin 96–1,* leaving this determination "to be made in future cases." *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 56,759, 56,764 (Oct. 21, 1999).

This Court does not suggest that the rupee's gradual change is factually identical to the rapid and large declines in value of the won and baht. However, the rupee's downward movement, while small and gradual, appears cumulatively to have had more than a *de minimis* effect upon Commerce's dumping margin calculations. Here, the lag time between the established date of sale and the receipt of payment, together with the effect of the rupee's devaluation upon imported raw material costs and actual payment received, cause this Court to question whether Commerce's use of its standard methodology in this case falls "within the range of permissible construction of the statute." *Thai Pineapple*, 273 F.3d at 1085. The statute may permit various methodologies, but "it is possible for the application of a particular methodology to be unreasonable in a given case when a more accurate methodology is available and has been used in similar cases." *Id*. at 1085. This case, although factually distinguishable from *Stainless Steel from Korea* and *Pipes and Tubes from Thailand*, is "no different *in principle* from cases in which Commerce has modified its approach." *Id*. (emphasis added).

In its Remand Order, the Court requested that Commerce explain whether its currency conversion methodology resulted in an accurate dumping margin. Only two statements in the *Remand Determination* appear to comply with this request. The first explains that because of the absence of extraordinary aspects to the observed movement in the rupee, "the record supports the Department's decision to treat the depreciation of the rupee as a fluctuation that could be ignored in a manner consistent with the overriding statutory goal of calculating accurate

dumping margins." *Remand Determination* at 5. The second states that "Viraj's [sic] makes an opportunistic claim for the Department to account for rupee depreciation that all agree would lower the calculated dumping margin." *Id*. The first statement is conclusory. The second appears to concede inaccuracy.

This Court therefore remands once again to Commerce to consider whether the application of its standard currency conversion methodology in this case is the most accurate method available to reach a dumping margin undistorted by the rupee's devaluation during the period of review. The Court notes that in the preamble to the final rule Commerce stated, "We agree * * * that we should address depreciating currencies more fully in a final model, and we welcome further suggestions on this point." *Antidumping Duties; Countervailing Duties: Final Rule,* 62 Fed. Reg. 27,296, 27,377 (May 19, 1997). Commerce does not appear to have addressed depreciating currencies more fully, however, and this Court invites Commerce to consider whether the circumstances of this case present an opportunity to do so.

In addition, in response to Plaintiff's argument that Commerce used the exchange rate at purchase order date to determine rupees received by Viraj, but the post-devaluation exchange rate to determine costs, this Court notes that it is not clear from the record whether Commerce used the exchange rate on the date of sale for one part of its calculation and the changed exchange rate for another. If Commerce did apply a different rate for Viraj's costs, this would appear to skew the calculations unfairly to the importer. As part of this remand, the Court therefore directs Commerce to explain if different rates were used, if this was appropriate, and if not appropriate, to make any necessary corrective calculations.

Finally, Commerce has emphasized that the change in the currency exchange rate did not influence Viraj's pricing decisions. Commerce is nevertheless directed to explain where there is a long-term declination in the value of a foreign currency during the period of review by as much as 14.6 percent, how such a long-term substantial declination can be ignored if Commerce is to arrive at an accurate and fair dumping margin and not embrace an absurd result.

CONCLUSION

Because Commerce failed adequately to explain whether its currency conversion methodology furthers the antidumping statute's requirement of a fair comparison in this dumping determination, and because other more accurate methodologies may exist to do so, this Court remands to Commerce (1) to consider how to apply a currency conversion methodology that best reaches an accurate dumping margin in this case; (2) if necessary, to recalculate Plaintiff's dumping margin using a methodology that furthers the congressional goal of accuracy in dumping de-

terminations; (3) to explain if different currency exchange rates were used in Commerce's dumping margin calculations, if the use of different rates was appropriate, and if not appropriate, to make any necessary corrective calculations; and (4) to explain the significance of Plaintiff's pricing decisions to Commerce's determination of whether the change in rupee valuation in this case constituted a fluctuation to be ignored.