

Decisions of the United States Court of International Trade

(Slip Op. 02–154)

ALTX, INC., AMERICAN EXTRUDED PRODUCTS, CORP., DMV STAINLESS USA, INC., SALEM TUBE, INC., SANDVIK STEEL CO., PENNSYLVANIA EXTRUDED TUBE CO., AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND SUMITOMO METAL INDUSTRIES, NIPPON STEEL CORP., KAWASAKI STEEL CORP., NKK CORP., KOBE STEEL LTD., AND SANYO SPECIAL STEEL CO., DEFENDANT-INTERVENORS

Court No. 00–09–00477

[ITC material injury second remand determination sustained.]

(Dated December 31, 2002)

Collier Shannon Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, and R. Alan Luberda) for plaintiffs.

Lyn M. Schlitt, General Counsel, *Marc A. Bernstein*, Assistant General Counsel, United States International Trade Commission (*Rhonda M. Hughes*), for defendants.

Wilmer, Cutler & Pickering (John D. Greenwald, Leonard Shambon, and Lynn M. Fischer) for defendant-intervenors.

OPINION

RESTANI, *Judge*: In *Circular Seamless Stainless Steel Hollow Products from Japan*, Inv. No. 731–TA–859 (final), USITC Pub. 3344 (Aug. 2000) [hereinafter *Final Determination*], the United States International Trade Commission (“ITC” or “Commission”) found that an industry in the United States was neither materially injured nor threatened with material injury from imports of circular seamless stainless steel hollow products (“CSSSHP”) from Japan that are sold in the United States for less than fair value. Finding that decision not substantially supported by the agency record, the court remanded it to the ITC in *Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1374 (Ct. Int’l Trade 2001) (“*Altx I*”) with instructions to reconsider and to adequately explain its negative injury determination in light of significant arguments and evidence raised by Plaintiffs (“Domestic Producers” or “Altx”) that

seriously undermined the ITC's reasoning and conclusions. In the *Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Comm'n Dec. 3, 2001) [hereinafter *Remand Determination*], the Commission, in a 3-3 vote, reversed its views and rendered an affirmative injury determination. The *Remand Determination* was appealed by the Defendant-Intervenors ("Japanese Producers"), and, in *Altx, Inc. v. United States*, No. 00-09-00477, slip op. 02-65 at 46 (Ct. Int'l Trade July 12, 2002) ("*Altx II*"), the court again remanded the Commission's injury determination for further consideration and explanation.

Presently before the court is the ITC's *Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Comm'n Aug. 26, 2002) [hereinafter *Second Remand Determination*], in which the Commission, in a 3-2 vote, reversed its views again and reaffirmed its original negative injury determination.¹ The majority here adopts in full and without change its views as set forth in its dissent to the ITC's finding of material injury in the first *Remand Determination*, and therefore the court must evaluate whether that decision responds to and explains various issues as directed by the court in *Altx I*.² Answering that question in the affirmative, the court sustains the ITC's negative injury determination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations 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) (2000).

DISCUSSION

A material injury analysis under 19 U.S.C. § 1677(7) requires the Commission to assess (1) the volume of subject imports, (2) the effect of such imports on prices for the domestic like product, and (3) the impact of such imports on U.S. production operations of producers of the domestic like product. 19 U.S.C. § 1677(7)(B)(i) (2000). In doing so, the Commission must explain the basis for its conclusions and "address[] relevant arguments that are made by interested parties." *Altx I*, 167 F. Supp. 2d at 1359 (quoting 19 U.S.C. § 1677f(i)(3)(B) (2000)). It does not matter if the arguments of the parties are easily dispensed with or require closer examination, if the Commission does not make its thinking clear. The court can only review the reasoning that the Commission expresses. Because the Commission's *Final Determination* lacked the required support in the record and failed to examine relevant arguments

¹ Vice Chairman Hillman and Commissioners Bragg and Miller reaffirm their determination that the domestic injury is not materially injured, nor threatened with material injury, by reason of subject imports from Japan. Chairman Okun and Commissioner Koplan determine that the domestic industry is materially injured by reason of subject imports.

² The views of the Commission's majority, while incorporated by reference into the *Second Remand Determination*, are actually explained and analyzed in the Commission's first *Remand Determination*, and, therefore, all citations to the Commission's views here will be to the *Remand Determination* for ease of reference. The *Second Remand Determination* contains the analysis and dissenting views of Chairman Okun and Commissioner Koplan.

made by interested parties, the court remanded all three aspects of the Commission's negative injury finding for further proceedings in *Altx I*. *Id.* at 1374. The Commission has now explained itself in sufficient detail for the court to review its determination.

I. Volume

The statute requires the ITC to consider “whether the volume of imports of the [subject] merchandise * * * is significant.” 19 U.S.C. § 1677(7)(C)(i). In its *Final Determination*, the Commission concluded that subject import volume was not “significant” during the period of investigation (“POI”) for four reasons: (1) subject import volumes actually decreased during the period when the domestic industry performed poorly; (2) the “consistent” and “substantial” drop of subject import volume was not in response to the filing of the petition, as Domestic Producers had argued; (3) nonsubject imports may have displaced domestic like products rather than subject imports; and (4) competition between subject imports and the domestic like product was somewhat attenuated. *Altx I*, 167 F. Supp. 2d at 1357–58 (citing *Final Determination* at 15–17). Of those grounds, the court found in *Altx I* that only the ITC's determination with respect to attenuated competition was supported by substantial evidence. *Id.* at 1364. The remaining three justifications were remanded to the Commission for further consideration and clarification in light of meaningful conflicting evidence adduced by Plaintiffs.

A. Correlation Between Import Volumes and Performance of the Domestic Industry

In its *Final Determination*, the Commission heavily relied upon a decline in subject import volume, market share, and value in the latter part of the POI to support its finding that subject import volumes were not significant. *See id.* at 1358. Because the domestic industry actually weakened when subject import volumes “consistently and substantially” declined in 1999, the Commission concluded that there was no correlation between subject imports and the condition of the domestic industry, notwithstanding the Commission's acknowledgement that subject import volumes nearly doubled between 1997 and 1998. *Id.* (quoting *Final Determination* at 17).

Domestic Producers in *Altx I*, however, claimed that the domestic industry's performance was directly linked to increased export sales, and that controlling for exports would reveal a weakening domestic industry due to [] between 1997 and 1998, the period during which subject import volumes almost doubled. *Id.* Domestic Producers also cited a “marked decline” in the domestic industry generally in 1999, and claimed that increased purchases of subject imports during 1997 and 1998 may have been responsible for the industry's later decline. *Id.* Finally, Domestic Producers challenged the Commission's rejection of its staff's econometric analysis, which concluded that subject imports result in a 7.2% to 16.1% reduction in the domestic industry's output. *Id.* In light of the Commission's failure to address this relevant conflicting evidence in its *Final Determination*, the court remanded it with instruc-

tions to consider these points and give a reasoned explanation for the ultimate decision made. *Id.* at 1359–60.

1. Condition of the domestic industry

The ITC's *Second Remand Determination* again makes a negative determination as to the significance of the subject imports. *Remand Determination* at 8. The Commission first reiterates key points raised in its first negative injury determination with respect to the correlation between subject import volume and the condition of the domestic industry. During 1997 and 1998, years in which subject import volumes almost doubled, important indicators of the domestic industry's condition all rose to their peak annual levels for the period, including domestic production, capacity utilization, net sales, operating income, and operating income ratio. *Id.* at 4.

In response to Domestic Producers' argument in *Altix I* regarding the actual condition of the industry during those years if the Commission would control for increased export sales, the Commission recognizes that domestic shipments declined from 1997 to 1999,³ but does not find that controlling for export shipments indicates a weakened domestic industry in 1998. *Id.* at 5. The indicators of the domestic industry's condition, especially operating income, predominantly reflect that domestic sales held a strong majority of the Domestic Producers' total sales in every year of the investigation period.⁴ *Id.* Moreover, because Domestic Producers failed to request that profitability or other data be collected separately for export shipments during the investigation, or proffer that information themselves, the Commission explains that it is unable to "control" for exports other than to consider the changes in shipment levels for domestic and export shipments. *Id.* n.12. The ITC also explains that the record suggests a differing product mix between U.S. and export shipments due to the substantial differences in shipment unit values,⁵ but that the record contains no data to explain these differences or the cost of goods sold for each shipment type. *Id.*

Irrespective of the ITC's conclusions regarding the earlier years of the POI, the Commission finds that trends between 1998 and 1999 are most relevant to the significance of subject import volumes under § 1677(7)(B)(i)(I) because the domestic industry performed well overall during 1997 and 1998, when subject import volumes had greatly increased, but declined in 1999, when subject import volume and market

³ U.S. shipments declined from [] short tons in 1997 to [] short tons in 1998, and fell to [] short tons in 1999. *Remand Determination* at 5 n.10.

⁴ Of the Domestic Producers' total shipments during the POI, the value of export shipments was only [] percent in 1997, [] percent in 1998, [] percent in 1999, and less than [] percent in interim 2000. *Id.* at 4.

⁵ For example, in 1999, the unit value of export shipments was [] per short ton, while the unit value of domestic shipments was [] per short ton. *Id.* at 6 n.12.

share fell but nonsubject market share rose sharply.⁶ See *infra* Part I.C (discussing the impact of nonsubject imports on the producers of the domestic like product). The Commission ultimately finds that the weakened condition of the domestic industry in 1999—production, shipments, capacity utilization, operating income, and market share were all lower than in previous years—cannot be attributed to subject imports because at that time both subject volume and market share were lower than in 1998. *Id.* at 7.

In response to the ITC's *Second Remand Determination*, Domestic Producers argue that the Commission has failed to properly analyze the correlation between the health of the domestic industry and subject import volumes as ordered by the court in *Altx I*. See Plaintiffs' Objections to the International Trade Commission's August 26, 2002 Remand Determination at 3 [hereinafter Pls.' Objections]. Domestic Producers oppose the ITC's position that it is not required to control for exports in reaching its volume determination because, in their view, the court ordered the ITC to do so in *Altx I*. *Id.* at 5 n.2 (citing *Altx I*, 167 F. Supp. 2d at 1364). Careful reading of *Altx I*, however, supports the Commission's position that the court did not specifically order it to consider profitability or other such data relating to exports, but rather ordered it to provide a reasoned explanation of its finding regarding the lack of correlation between subject import volumes and the health of the domestic industry in light of Domestic Producers' arguments, which it has done here. See *Altx I*, 167 F. Supp. 2d at 1360; see also Defendant's Comments on Plaintiffs' Objections to the International Trade Commission's August 24, 2002 Remand Determination at 6 [hereinafter Def.'s Comments].

Focusing on their argument that increased export sales masked a weakening domestic industry in the earlier years of the POI, Domestic Producers continue to urge, as they did in *Altx I*, that they lost market share and domestic shipment volume due to the increase in subject imports during 1997 and 1998, a time during which demand had increased by []. Pls.' Objections at 5–6 (citing *Staff Report* at Table C–1). According to the Domestic Producers, their lack of participation in the expanding 1998 market on a pro-rata basis “is itself indicative that subject imports were significantly injuring the domestic industry during the period through 1998.” *Id.* at 6. The Commission explains, however, that Domestic Producers' approach oversimplifies the issue by ignoring the apparently differing product mixes between domestic and export shipments. Def.'s Comments at 7; see *supra* note 5 and accompanying text. The ITC correctly points out that it would have been unreasonable for it to conclude that increased export sales, measured either in units or val-

⁶The Commission explains:

[W]hile subject imports took market share from the nonsubject imports early in the [POI] when the domestic industry's condition was healthy and improving, we find that subject imports' loss of market share to nonsubject imports later in the period, when the [domestic] industry's condition declined, to be most probative of the relative (or lack of) significance of subject import volume.

Id. at 6 n.13. The market share of nonsubject imports was greater than subject import market share for the entire POI. *Id.* & n.15 (stating that subject import and nonsubject import market shares were, respectively by volume, [] percent and [] percent in 1997, [] and [] percent in 1998, and [] and [] percent in 1999) (citing *Staff Report* at Table C–1)).

ue, masked a weakening domestic industry without more data. *See* Def.'s Comments at 8. And, contrary to Domestic Producers' position, it was their burden to provide such case-specific data to support their claim or to request, at the beginning of the investigation, that the ITC gather it. *See Asociacion De Productores De Salmon Y Trucha De Chile AG v. U.S. Int'l Trade Comm'n*, 180 F. Supp. 2d 1360, 1367–68 (Ct. Int'l Trade 2002) (sustaining the ITC's remand views based on use of best information available). The Commission must make its decision based on the available facts.⁷ 19 U.S.C. § 1677e.

Focusing on the relative market share held by domestic and foreign producers of CSSSHP, Domestic Producers concede that the domestic industry lost volume and market share to nonsubject imports between 1997 and 1999, but maintain that a substantial portion, [], of the total loss of market share over the POI was to subject imports. Pls.' Objections at 6. Domestic Producers also stress that they did earn back market share when subject imports declined in 1999 and 2000, and thus argue that the Commission's view that the decline in market share over the POI cannot be attributed to subject imports is "simply not true."⁸ *Id.*

Contrary to Domestic Producers' characterization of the *Second Remand Determination*, however, the Commission did not find that the market share attributable to subject imports was not significant, but rather, pursuant to the statute, that subject import *volume* was not significant notwithstanding the volume increases during the POI. Def.'s Comments at 8. Domestic Producers' focus on the relative market share held by the domestic industry and subject imports, regardless of the trends in the volume of the subject imports, price trends, or other factors, is misplaced. This part of the ITC's injury determination focuses on the significance of the volume of subject imports during the POI, and the Commission is obligated to examine and weigh all of the record evidence, and not simply to focus on one factor to the exclusion of other conflicting evidence. *See* 19 U.S.C. § 1677(7)(C)(i). Additionally, market share is just one of many economic factors considered by the ITC under the impact prong of the injury analysis. § 1677(7)(C)(iii).

Based upon the foregoing, the court finds that, while there is conflicting evidence in the record, there is substantial evidence to support the ITC's finding that increased subject import volume was not significant in the context of rising domestic production, capacity utilization, net sales, operating income, and operating income ratio, as well as increased nonsubject import volume.

⁷ The Commission also claims failure to exhaust administrative remedies on this issue because Domestic Producers raised this argument for the first time in their reply brief in *Altix I*. Def.'s Comments at 8 (citing Pls.' Reply Br. at 2–3 (Apr. 2, 2001)). The Government, however, had an opportunity to plead failure to exhaust at oral argument or in a supplemental filing. As the Commission failed to do so, the court ordered it to consider Domestic Producers' arguments on this point in *Altix I*, 167 F. Supp. 2d at 1358–60.

⁸ Domestic Producers state: "Where subject imports account for [] of the market share loss, and remain [] they are significant by any definition." Pls.' Objections at 7.

2. Import volumes and consumption

The Commission's *Second Remand Determination* rejects Domestic Producers' argument from their first appeal that subject imports during 1997 and 1998 may have been responsible for material injury to the domestic industry in 1999. The Commission points to a decrease in importers' inventories during 1997 and 1998 and a large increase, [], in consumption in 1998⁹ to support its finding. *Remand Determination* at 7 n.19. The decrease in importers' inventories "is contrary to the trend one would expect if merchandise present in 1997 were to have an adverse effect on the domestic industry in 1998." *Id.* Moreover, the substantial increase in consumption in 1998 made it likely that earlier imports were consumed and had cleared the market by 1998. *Id.* Therefore, the Commission concludes that the record does not support Domestic Producers' contention that subject imports in 1997 and 1998 had a material impact on the domestic industry in 1999. *Id.*

Domestic Producers claim that this analysis is flawed for several reasons. First, Domestic Producers attempt to minimize the significance of the [] increase in consumption between 1997 and 1998, claiming the ITC's figures reflect apparent, not actual, consumption.¹⁰ As discussed in Part I.A.1 *supra*, Domestic Producers rely on this same figure in other portions of their brief to bolster their claim that subject import volumes were significant notwithstanding the overall positive performance of the domestic industry during this time period. Either an increase in consumption is significant or it is not. Domestic Producers cannot logically argue in support of one claim that such an increase—and their inability to benefit from the growing domestic market—is significant, and then for another point criticize and minimize the significance of the very same figure. Furthermore, the ITC explains that its characterization of consumption is based here, as always, on the sum of domestic shipments, subject imports, and nonsubject imports. Def.'s Comments at 9. There can be no exact measure of demand in this investigation because, as the parties agree, the measure of demand for CSSSHP is derived from the activity level in other industries. Thus, for the ITC to make conclusions regarding consumption based on any other data would both speculative and contrary to law.¹¹ Therefore, this argument lacks merit.

Second, Domestic Producers assert that the available record evidence "conclusively" demonstrates that a significant portion of imports of subject CSSSHP []. Pls.' Objections at 8. Domestic Producers, however, base this broad characterization on data provided by one purchaser. *See id.* The Commission obtained purchaser questionnaire responses from 30 firms, and the record does not reflect that any other firm had an expe-

⁹ Consumption increased [], from [] short tons to [] short tons, in 1998. *Remand Determination* at 7 n.19 (citing *Staff Report* at C-4, Table C-1).

¹⁰ Domestic Producers argue that the staff report's U.S. consumption figures are simply the sum of imports and domestic shipments, and that they do not provide any information about how much CSSSHP was actually consumed during this period. Pls.' Objections at 8.

¹¹ Although Domestic Producers criticize the ITC's measure of demand in this investigation, they offer no alternative measures. Def.'s Comments at 10.

rience similar to the one relied upon by the domestic industry. Def.'s Comments at 10 (citing *Staff Report* at II-24).

The court finds that the Commission's determination on this issue is correctly based on the industry as a whole, *see Altx I*, 167 F. Supp. 2d at 1369-70, and its ultimate conclusion rejecting Domestic Producers' argument that high subject import volumes in 1997 and 1998 caused them material injury in 1999 is supported by substantial evidence in the administrative record.

3. ITC's rejection of its staff's economic model

19 U.S.C. § 1677(7)(C)(iii)(V) requires the Commission to consider the magnitude of the dumping margin determined by the Department of Commerce ("Commerce") as part of its consideration of the impact of imports. In the past the Commission has utilized an economic model ("COMPAS") to estimate the effects of dumped imports on the domestic industry, and the model is based in part on Commerce's estimated dumping margin. *See Staff Report* at F-3. In recent years, however, the Commission has not relied upon the model,¹² but it is still part of its staff's input. The Commission has not indicated that it makes use of margins in any other manner. In the face of the statute it would not be appropriate for the Commission to decline to consider margins as a general proposition. Nonetheless, COMPAS is merely one tool available to the Commission, and the model alone cannot substitute for consideration of the statutory factors and the record data. The court has repeatedly recognized that the ITC may reasonably base a decision upon facts in the record that vary from a theoretical economic model. *See Altx I*, 167 F. Supp. 2d at 1359-60; *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1058-59 (1995); *Alberta Pork Producers' Mktg. Bd. v. United States*, 683 F. Supp. 1398, 1401 (Ct. Int'l Trade 1988). The Commission, however, cannot ignore interested parties' arguments based on the model, especially where, as here, the model's results undermine the Commission's determination. *See Altx I*, 167 F. Supp. 2d at 1359-60.

The Commission has now responded to Domestic Producers' argument that it must utilize the COMPAS result, and this reflects its consideration, if not its reliance, on the margins calculated in this case.¹³ *See Committee of Domestic Steel Wire Rope & Specialty Cable Mfrs. v. United States*, 201 F. Supp. 2d 1287, 1302-04 (noting that while the ITC has a statutory obligation to consider the dumping margin, it has little significance if there is no connection between the pricing of the foreign product and the condition of the domestic industry). The Commission "ha[s] closely examined the empirical data in the record and determined it to be more useful than conclusions based on the results of the COM-

¹² Commissioners Bragg, Miller, and Hillman state that they do not generally rely on the model in making their material injury determinations. *Remand Determination* at 8 n.21. How they usually consider margins is not made clear, but the court concludes that even if they generally relied on the COMPAS model, it was reasonable not to do so in this case.

¹³ In this determination, the Commission recognizes its statutory duty to consider the magnitude of the dumping margin, but simply notes that the margins on imported CSSHP ranged from 62.14 percent to 156.81 percent. *Id.* at 13 n.43 (citing 65 Fed. Reg. 42,985, 42,986 (Dep't Commerce July 12, 2000)). The Commission also considered its staff's COMPAS model which utilizes the dumping margins, but ultimately rejected the model's result.

PAS model.” *Remand Determination* at 8. The antidumping margin estimated by Commerce was not based on data provided by the Japanese respondents, but was instead based on best information available because the Japanese respondents chose not to provide data.¹⁴ *See id.* at 9 n.24 (citing 65 Fed. Reg. 42,985, 42,985–86 (July 12, 2000)). The Commission explains:

The model assumes that this margin will be passed through in full to the domestic market, i.e., that the weighted average margin of 121.3 percent has resulted in a substantial decrease in the price of the subject imports in the U.S. market (by more than 50 percent). This suggests a pricing level for subject imports that is so high that they would not have been in the U.S. market at a Commerce-determined fair price. Given the historic and established role that these subject imports have played in the U.S. market, including product niches unfilled by domestic producers, we do not find this to be a reasonable conclusion, thus further limiting the usefulness of the COMPAS model in this investigation. Finally, the COMPAS model estimates the possible effect on revenue, but not profitability or other financial data such as cost of goods sold—both important factors in our determination in this case.

Id.

Domestic Producers continue to urge that the results of the COMPAS model contradict the ITC’s negative injury determination and claim that the Commission did not adequately explain its rejection of the model. Pls.’ Objections at 11–14. The parties all agree, however, that the results of the econometric model contradict the Commission’s findings in this investigation. It is the quality of the Commission’s explanation that is the sole issue on appeal. In *Altx I*, the court stated, “whatever discretion the Commission may have to reject deliberately the conclusions found in the agency’s Staff Report, * * * it may not through its silence simply ignore a Staff Report analysis that contradicts the Commission’s own conclusions where an interested party has specifically brought the possibly conflicting evidence to the agency’s attention. * * * [T]he Final Determination lacks needed explanation.” 167 F. Supp. 2d at 1359–60 (citation omitted).

The court finds that the ITC’s *Second Remand Determination* is in compliance with the court’s directions in *Altx I* and that its rejection of results of the COMPAS model is reasonable and supported by substantial evidence. The determination explains in substantial detail why, in this investigation, the Commission viewed the theoretical COMPAS model, which was based on suspect margins, to be less helpful than the other data of record. The Commission has therefore complied with the court’s instructions in *Altx I* by providing a rational explanation for its rejection of the results of the COMPAS model. *See* 167 F. Supp. 2d at 1359–60.

¹⁴ One might argue that this is a good reason to use the margin; that is, either this is the margin expected or manipulation of the proceedings would be discouraged by use of the margins. The ITC, however, is not compelled to accept such reasoning.

B. Declining Volumes as a Response to the Filing of the Antidumping Petition

In *Altx I*, the court held that the Commission had not offered a reasonable explanation for its conclusion that any pre-filing awareness of the antidumping petition did not impact the volume of subject imports. *Id.* at 1360–61. While recognizing that the ITC has discretionary authority to reduce the weight accorded to data it finds to be skewed due to the filing of the antidumping petition, the court nevertheless found that the Commission had abused its authority in engaging in speculation on this issue rather than making a reasoned decision based upon substantial record evidence. *Id.* at 1361 & n.10. Thus, the court instructed the ITC to give a reasonable explanation supporting its 13–26 week time period for assessing whether a drop in subject import volume could be attributed to the filing of the petition. *Id.* at 1360–61.

On remand, the Commission has considered whether the filing of the petition on October 26, 1999, affected the volume of imports in mid-1999 and early 2000 such that it should give less weight to import volumes during those periods. *Remand Determination* at 6. Responding to the court's concerns over the time frame utilized by the ITC, the Commission explains that the weight of the record evidence indicates a general delay of 13–26 weeks between the placement of an order and the arrival of the subject imports. *Id.* at 7 n.18 (citing CR at II–29, PR at II–17). The record as a whole therefore does not support Plaintiffs' argument that orders could be halted in as little as two weeks before export, and even if such cancellations did occur in mid-to-late 1999, the Commission notes that those cancellations still would have occurred after the largest volume decrease of subject imports. *Id.* The sharpest decline in subject imports occurred between the second half of 1998 and the first half of 1999, well before the filing of the petition, and therefore the Commission does not consider the decreased volume to be a result of the filing of the petition or to reflect the impact of rumors of an imminent petition. *Id.* at 7 (citing *Staff Report* at C–17, Table C–6).

Though Domestic Producers continue to challenge the adequacy of this explanation, the court finds that it is supported by substantial record evidence. Domestic Producers cite minimal record evidence in support of their claim that rumors of an imminent filing caused decreased subject import volumes. *Altx* bore the burden of producing evidence to support its assertion of rumors of an imminent petition. *Altx I*, 167 F. Supp. 2d at 1361 n.8. The ITC, as the trier of fact, weighs the evidence in the record and is entitled to accord more weight to evidence it finds most probative to the question at issue. *See Altx I*, 167 F. Supp. 2d at 1360 n.9; *Titanium Metals Corp. v. United States*, 155 F. Supp. 2d 750, 759–60 (Ct. Int'l Trade 2001); *Floral Trade Council v. United States*, 20 CIT 595, 601 (1996). Given the relative weakness of the evidence Domestic Producers proffered in support of their claim of rumors that, in their view, affected the business practices of the Japanese Producers collectively, it

was reasonable for the Commission not to reduce the weight accorded to post-petition information after considering the record as a whole.

C. Displacement of the Domestic Like Product by Nonsubject Imports

In *Altx I*, the court noted that “a positive correlation concerning *non-subject* import volumes, in conjunction with other factors, may be sufficient to cut the causal link between subject imports and any harm suffered by the domestic industry.” 167 F. Supp. 2d at 1362. Nevertheless, the court found that the ITC’s general reference to increasing non-subject market share over only a portion of the POI, 1998 to 1999, was insufficient to sustain its apparent conclusion that “nonsubject imports were so significant as to have displaced subject imports and the domestic like product.” *Altx I*, 167 F. Supp. 2d at 1363.

On remand the Commission provides the required additional explanation the court needs to sustain its finding that the increased volume of nonsubject imports in the latter part of the POI, in addition to other factors addressed in the *Second Remand Determination*, gives rise to a reasonable inference that nonsubject imports may have displaced both subject imports and the domestic like product, thus detracting from the significance of subject import volumes. The ITC first explained why it found 1998 and 1999 to be most relevant to its analysis: any injury that occurred would have been in 1999 in light of the domestic industry’s strong performance in 1997 and 1998. *Remand Determination* at 6. As discussed in Part I.A.1, subject import volume and market share fell between 1998 and 1999, at the same time that nonsubject import volume increased and nonsubject import market share greatly increased. *Id.*; see *supra* note 6 (explaining that subject imports took market share from nonsubject imports early in the POI, when the Domestic Producers’ condition was healthy and improving, but that subject imports lost market share to nonsubject imports in the latter portion of the POI, when the domestic industry’s condition declined). Unlike subject imports, nonsubject imports actually increased their market share through 1999 and the first quarter of 2000, and, in fact, nonsubject imports held more market share than subject imports for the entire POI. See *supra* note 6 (detailing the percentages of subject and nonsubject import market shares throughout the POI). Finally, record evidence that some purchasers perceive nonsubject hollow products to be a more competitive alternative to Japanese products than the domestic product supports the Commission’s view. As the court stated in *Altx I*, “the ITC is permitted to conclude that other factors [such as increased nonsubject import volume] * * * certainly undermine the notion that dumped imports are a cause of injury * * * [to] the domestic industry.” 167 F. Supp. 2d at 1362. The ITC has thus provided sufficient support for its inference that nonsubject import volumes were a significant competitive presence in the market, displacing both domestic and subject CSSHP.

D. Conclusion

In summary, the court finds that the four reasons offered by the Commission for its negative determination as to the significance of subject

import volumes are supported by substantial evidence. The affirmed finding of attenuated competition in *Altx I* is an important aspect of the court's conclusion here. *See id.* at 1364. Furthermore, the Commission's *Second Remand Determination* addressed all of the issues and conflicting evidence relating to the significance of subject import volume as ordered by the court in *Altx I* and gave rational explanations for rejecting Domestic Producers' arguments. As noted by the court before, the Commission may permissibly focus its analysis on a specific time frame within the POI, 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." *Id.* at 1363 (citations omitted). Therefore, the Commission's conclusion that the subject import volume was not significant is sustained.

II. Effect of Subject Imports on Prices for the Domestic Like Product

In evaluating the price effects of subject imports from Japan, the Commission must consider whether: (1) there has been significant price underselling by the imported merchandise as compared with the domestic prices for like products; and (2) subject imports have the effect of depressing domestic prices or preventing price increases, that would have occurred otherwise, "to a significant degree." 19 U.S.C. § 1677(7)(C)(ii). In its *Second Remand Determination*, the Commission again determined that underselling was not significant and that subject imports caused neither price depression nor price suppression. *Remand Determination* at 12-13.

A. Significance of Underselling

In its original determination, the Commission found that underselling was not significant because there was a lack of correlation between (1) underselling and price trends, and (2) underselling and the condition of the domestic industry. *Altx I*, 167 F. Supp. 2d at 1365. In using its conclusions on price suppression and depression as a basis to support its finding on the significance of underselling, the court found that the ITC failed to properly engage in the two separate statutory inquiries and held that "the ITC must consider on remand whether a lack of correlation between underselling and the condition of the domestic industry remains after evaluating Plaintiffs' arguments, and if so, whether that factor is sufficient for the Commission to conclude that underselling is not significant." *Id.* at 1366.

The Commission's *Second Remand Determination* again finds that there has not been significant price underselling of subject imports as compared with prices of domestic like products. *Remand Determination* at 12. Though the ITC recognizes that the pricing data it collected indicate "extensive" underselling by subject imports throughout the POI, and "substantial margins" of underselling, the Commission nevertheless finds such underselling insignificant due to a lack of correlation between underselling and the condition of the domestic industry. *Id.* at 10. The Commission finds that despite persistent underselling by subject imports and declining domestic prices, the domestic industry's condi-

tion was strong between 1997 and 1998, markedly improved in 1998 when subject imports were at their highest levels,¹⁵ and remained favorable through interim 2000. *Id.* Moreover, underselling was prevalent despite shifts in prices for the domestic like products and shifts in subject import volume.¹⁶ *Id.* Finally, rather than experience operating declines due to subject imports, the Domestic Producers experienced an improvement in their performance. *Id.* Based on this lack of correlation between underselling and the domestic industry's condition, the Commission did not find the underselling to be significant. *Id.* at 10–11.

Domestic Producers' claim that the Commission did not consider their arguments lacks merit. The Commission noted that its conclusion was not changed by taking into account export shipments and that it found the empirical data in the record to be more useful than conclusions based on the COMPAS model, as explained *supra* Part I. *See id.* at 10 nn.29–30. Altx's argument that the ITC erred in failing to address semiannual data fails because, as a general proposition, the Commission is not required to rest its findings on the semiannual data. *Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988). Here, the Commission finds that semiannual data does not undermine its finding that underselling was not significant. *See* Def.'s Comments at 22–23 (explaining that in spite of the underselling by the subject imports, the semiannual data show that the performance of the domestic industry did not improve when subject imports decreased). Domestic Producers attempt to show a correlation between the underselling and the negative performance of the domestic industry, claiming that underselling is concentrated within the last half of 1998 and the first half of 1999, when subject import volume and market share exceeded the performance of the domestic industry. *See* Pls.' Objections at 21–22. This claim is false, as the record data shows that underselling was prevalent throughout the POI. *See Staff Report* at Tables V–2, V–4, V–5, V–6, V–7, V–9, & V–10 (detailing the underselling margins of various pricing products). Therefore, in view of the trends in imports and industry performance factors, as well as the fact that underselling occurred during 1998 when the industry's performance indicators were strong, the Commission's finding that the underselling is not significant is reasonable and supported by substantial evidence.

B. Effect of Underselling on Price Depression and/or Suppression

In *Altx I*, the court ordered the ITC to: (1) explain why it rejected the findings of its Staff's econometric analysis that dumped imports resulted in a "3.0 percent to 11.0 percent reduction in price" for domestic like products; (2) clarify the relevance of raw material costs and demand to domestic prices and how those two factors interrelate as explanatory

¹⁵ For example, the quantity of the Domestic Producers' net sales and gross profit increased in 1998. Both operating income and net income nearly doubled as well. *Remand Determination* at 10 (citing *Staff Report* at Table VI–1).

¹⁶ "[U]nderselling was prevalent during periods when the domestic prices were stable or rising, as well as during periods of declining prices and at a time when the volumes of imports associated with the underselling were decreasing." *Id.* (Citing *Staff Report* at Tables V–2 – V–10 and Table C–1) (footnotes omitted).

variables for declines in domestic prices; and (3) reconsider and provide support for its conclusion on the price leadership of nonsubject (specifically, European) imports. 167 F. Supp. 2d at 1366–69. The Commission’s *Second Remand Determination* again reaches the conclusion that undersold subject imports have not suppressed or depressed domestic prices to a significant degree. *Remand Determination* at 12–13.

The court first notes that the ITC failed to respond specifically to the court’s instruction to explain its rejection of the COMPAS model’s conclusion on domestic price depression. Contrary to Domestic Producers’ view, however, this is not fatal to the *Second Remand Determination*. The Commission in fact explained in substantial detail, and reiterated throughout its decision on remand, why it rejected the COMPAS model with respect to other aspects of the investigation. See discussion *infra* Part I.A.3. Having provided a reasonable explanation for generally rejecting the theoretical model’s conclusions in favor of the Commission’s own based on data in the administrative record, Domestic Producers’ argument that the court should remand the negative injury determination due to the ITC’s failure to specifically reject the model’s price depression conclusions is unfounded. Second, the court reiterates its finding in *Altx I* that the Commission reached a reasonable conclusion in finding that, due to the lack of correlation between underselling and domestic prices, subject imports did not result in significant domestic price suppression. 167 F. Supp. 2d at 1366–67.

In addressing the court’s instruction to the ITC to clarify its findings on raw material costs and decreased demand, the Commission first states that a decline in input costs during the POI explains “[a]t least some of the price declines” suffered by the Domestic Producers. The Commission explains that, while most of the pricing data indicate declines of about 10 percent or less between the first quarter of 1997 and the fourth quarter of 1998 (with some price levels increasing), unit raw material costs and the total unit cost of goods sold fell 11 percent between 1997 and 1998. *Remand Determination* at 11 (citing *Staff Report* at Tables V–2 – V–10 and VI–4). Overall input costs continued to fall in 1999, despite increased costs for certain raw materials such as nickel and chromium, which the ITC found consistent with price trends for that year. *Id.* (citing *Staff Report* at Table V–1). Addressing demand, the Commission notes that the domestic industry’s condition improved in 1998, when demand rose, in spite of falling input costs and the corresponding declining prices. But in 1999, both demand and input costs fell, offering an explanation for the price declines during that year. *Id.* The Commission concluded that “the weight of the evidence supports our finding of no significant price depression or suppression by reason of subject imports.” *Id.*

The Commission next addressed the price effects of nonsubject imports. As noted *supra* Part I.C, nonsubject imports surpassed subject imports in both absolute volume and market share throughout the POI. In 1999, nonsubject import volume and market share surged, while subject

import volume and market share declined and the domestic industry suffered from declining prices and falling performance indicators. *Id.* at 12. The Commission seems to have reconsidered its finding that European producers of nonsubject imports were the price leaders in the market during the domestic industry's downturn, *see Altx I*, 167 F. Supp. 2d at 1368, stating instead in its *Second Remand Determination* that there is record evidence that price leadership is diffused among several large firms, including some nonsubject producers and two domestic producers. *Remand Determination* at 12 n.39. Several purchasers indicated that European producers were the price leaders from June 1998 to November 1999, which would have coincided with the surge in nonsubject import volumes and the domestic industry's declining condition. *Id.* at 12 (citing CR at II-34, PR at II-21; Tr. at 151-52 (Mr. Bootz)). Other evidence often points to domestic producer Sandvik as the true price leader during the period. *Id.* at 12 n.39 (citing CR at II-10, PR at II-6). The Commission correctly points out that "the Court has recognized that lack of price leadership by subject producers or evidence of price leadership by the domestic producers supports a finding of no adverse price effects by reason of subject imports." *Id.* (citing *Angus Chemical Co. v. United States*, 20 CIT 1255, 1269, 944 F. Supp. 943, 954 (1996), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998); *Maverick Tube Corp. v. United States*, 12 CIT 444, 453-54, 687 F. Supp. 1569, 1578 (1988)). Finally, the ITC notes that it was only able to confirm Domestic Producers' lost sales allegations in a very small fraction of cases. *Id.* at 12 (citing CR at V-29, V-32, PR at V-13, V-14, *Staff Report* at Table C-1). Therefore, the Commission does not find that subject imports have suppressed or depressed domestic prices to a significant degree. *Id.* at 12-13.

Domestic Producers object to the ITC's findings on the effects of underselling on price depression and/or suppression on various grounds, none of which the court finds persuasive. The record evidence clearly supports the Commission's findings with respect to declining raw material and input costs. Its focus on the 1998-99 time period is within the Commission's discretion, *see Altx I*, 167 F. Supp. 2d at 1363, and is reasonable in light of record evidence that the domestic industry would have suffered material injury, if at all, in 1999. As noted above, the Commission no longer focuses solely on European price leadership to bolster its explanation for falling domestic prices, but instead finds that price leadership is diffused among several large firms, including domestic producers, nonsubject producers, and subject producers. Based on the additional record evidence cited by the ITC, the Commission could reasonably find that price leadership is not limited to subject producers from Japan and could reasonably be attributed to the nonsubject imports, particularly in view of the rising nonsubject import volumes and the corresponding decline in the domestic industry's performance. Based on the foregoing, the court concludes that the ITC has complied with the court's instructions in *Altx I* to "reconsider and support its conclusions with regard to price effects," and that the *Second Remand De-*

termination is supported by substantial evidence and is otherwise in accordance with law.

III. Impact of Subject Imports on Domestic Producers

In the third prong of the Commission's material injury determination, the ITC must "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States," including sales, market share, profits, productivity, capacity utilization, and prices. 19 U.S.C. § 1677(7)(C)(iii). On remand, the Commission again concludes that subject CSSSHP imports have not had an adverse impact on the domestic industry based, among other things, on: (1) the lack of significant volume and price effects; (2) shipments, domestic production, capacity, capacity utilization, and capital expenditures either essentially remained steady from 1997 to 1998, or increased, but then decreased between 1998 and 1999, at the same time that apparent U.S. consumption decreased, subject imports sharply declined, and nonsubject imports experienced a sharp increase; (3) substantial increases in productivity over the entire POI; and (4) the lack of correlation between operating income and subject imports. *Remand Determination* at 13. Regarding the court's direction to reconsider Altx's argument regarding semiannual data, the ITC stated that it weighed the evidence in the record and determined to utilize the annual data, which the Commission finds to be the most complete and most probative data. Nevertheless, the ITC did consider the semiannual data and found that it did not contradict the conclusions reached on the basis of the annual data. *Id.* at 16 n.61.

Domestic Producers again contest the Commission's failure to separately explain its rejection of the COMPAS model in its impact analysis, but the court rejects this argument for the same reasons expressed in its consideration of the Commission's volume and price analyses, *supra*. Plaintiffs' argument that a comparison of domestic producers that import CSSSHP from Japan with those that do not reveals the injurious impact of subject imports on the industry as a whole must fail for the reasons the court explained in *Altx I*, 167 F. Supp. 2d at 1369-71. Domestic Producers also unsuccessfully continue to reiterate arguments already rejected by the court in Parts I and II, *supra*. The court therefore upholds the Commission's impact analysis as it is supported by substantial evidence.

IV. Threat of Material Injury

In addition to determining whether the domestic industry suffers present material injury by reason of subject imports, the Commission must determine whether the domestic industry is threatened with material injury by evaluating whether "further dumped * * * imports are imminent and whether material injury * * * would occur unless an order is issued or a suspension agreement is accepted." 19 U.S.C. § 1677(7)(F)(ii). The Commission adopts its prior views regarding the threat of material injury and, based on the relevant statutory factors, finds that the domestic industry is not threatened with material injury

from imports of CSSSHP from Japan that are sold in the United States for less than fair value.¹⁷ *Remand Determination* at 17; see *Altx I*, 167 F. Supp. 2d at 1372–73 (detailing the seven bases for the Commission’s negative threat determination).

The Domestic Producers continue to challenge the ITC’s threat determination, claiming that the negative threat finding should be remanded due to the Commission’s reliance on “its unsupported volume, price and impact analyses.” Pls.’ Objections at 39. As discussed above, however, the ITC has reconsidered and reaffirmed its findings on the volume, price effects, and impact of the subject imports, and the court has upheld the *Second Remand Determination* in all respects as the court finds it supported by substantial record evidence. As a result, there is now sufficient support for the Commission’s negative threat determination as well.

CONCLUSION

In light of the foregoing, the court sustains the Commission’s *Second Remand Determination*. The Commission complied with the court’s instructions in *Altx I* to “address significant arguments and evidence which seriously undermines its reasoning and conclusions.” 167 F. Supp. 2d at 1374. Taken as a whole, the court now finds that the ITC decision is substantially supported and explained.

¹⁷The court notes that it sustained two of the ITC’s proffered reasons for its negative threat determination in *Altx I*. See 167 F. Supp. 2d at 1372–73.

(Slip Op. 03-01)

BROTHER INTERNATIONAL CORP, PLAINTIFFS *v.*
UNITED STATES, DEFENDANT

Court No. 00-04-00177

[Defendant's Motion to Dismiss for lack of jurisdiction denied.]

(Decided January 2, 2003)

*Barnes, Richardson & Colburn, (Sandra Liss Friedman); Joseph M. Spraragen, of Counsel, for Plaintiff.**Robert D. McCallum, Jr., Assistant Attorney General; John J. Mahon, Acting Attorney in Charge, International Trade Field Office; Amy M. Rubin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice; Yelena Slepak, Office of Assistant Chief Counsel, United States Customs Service, of Counsel, for Defendant.*

OPINION

I. INTRODUCTION

BARZILAY, *Judge*: On November 25, 2002, the court heard oral argument in this case to consider Defendant's motion to dismiss for lack of jurisdiction under 28 U.S.C. § 1581(a)(1999).¹ At the conclusion of oral argument, the court ruled from the bench denying Defendant's motion. This opinion elaborates on the bench ruling.

Plaintiff in this case, Brother International Corporation ("Brother"), filed a complaint on April 18, 2000, arguing that the United States Customs Service ("Customs") improperly refused to allow Brother to offset its underpayments of duties against its overpayments of duties when it sought prior disclosure treatment under 19 U.S.C. § 1592(c)(4).² Defendant Customs argues that voluntary payments under § 1592 do not give rise to a protestable event under 19 U.S.C. § 1514(a) and, therefore, Brother is precluded from invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1581(a). Brother counters that a letter to it from Customs dated May 5, 1999 constitutes a "charge" or "exaction," as enumerated in § 1514(a)(3). Thus, Brother asserts that there was a "protestable" act. *Pl.'s Mem. of Law in Resp. to Def.'s Mot. to Dismiss ("Pl.'s Br.")* at 4. Customs further states that Brother should have exercised the proper avenue for redress through the protest of the overpayments when they

¹ "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a).

² The relevant portions of 19 U.S.C. § 1592(c)(4) states:

(4) Prior disclosure.

If the person concerned discloses the circumstances of a violation of subsection (a) before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) shall not exceed—

* * * * *

(B) if such violation resulted from negligence or gross negligence, the interest * * * on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure, or within 30 days (or such longer period as the Customs Service may provide) after notice by the Customs Service of its calculation of such unpaid amount.

were liquidated.³ The fundamental issue, in order to determine if the Court can exercise jurisdiction under § 1581(a), is whether the letter dated May 5, 1999 was either a charge or an exaction. An affirmative answer would confer jurisdiction under § 1581(a).

This Court, like all Article III courts, is a court of limited jurisdiction, and once jurisdiction is challenged a plaintiff must prove that proper jurisdiction exists. *See, e.g., Dennison Mfg. Co. v. United States*, 12 CIT 1, 3, 678 F. Supp. 894, 896 (1988) (citing *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 247, 248–49, 597 F. Supp. 510, 513 (1984)).

II. BACKGROUND

Brother imports rolls of polyethylene terephthalate (“PET”) film that are subsequently sold as refills for printing cartridges in printers and fax machines marketed by Brother. From March 1994 through January 1999, Brother entered and classified PET under three different HTSUS subheadings with various duty rates. *Def.’s Mem. in Supp. of Mot. to Dismiss (“Def.’s Br.”)* at 2. Customs clarified the status of PET in a March 5, 1998 letter issued by the New York office, holding the “printing cartridges” were properly classified as “photographic film.” NY C82342. As a result of the prior classifications under three different subheadings and different duty rates, Brother both overpaid and underpaid duties. To rectify these entries Brother sought prior disclosure treatment and requested that Customs allow an offset of the amount due. *Compl.* at ¶ 7. Prior disclosure treatment is provided for at 19 U.S.C. § 1592(c)(4).

On April 30, 1999, Brother requested that Customs allow it to offset the underpayments against the overpayments and voluntarily tendered \$29,125.14, representing the offset amount. *Compl.* at ¶ 7. Customs denied that request in its letter dated May 5, 1999. *Id.* at ¶ 8. Customs further stated that Brother had to tender the remaining amount of \$172,558.79, and, if Brother did not comply, Customs would commence an action to recover the remaining amount plus penalties.⁴

On May 24, 1999, Brother tendered the remaining amount, but also protested the payment and filed a Customs Form 19 requesting further review of the \$172,558.79 amount tendered under 19 U.S.C. § 1592(d).

³ Customs states, specifically, that:

Brother might have obtained refunds of its overpayments by filing a timely 1514 protest against Customs’ liquidation of the entries in which there were overpayments. Brother could also have sought relief in an action under 19 U.S.C. § 1520(c)(1) within one year of liquidation, if appropriate. Brother could also have raised its “offset” claim as a defense in a collection or penalty action. By electing to make a prior disclosure, however, Brother voluntarily subjected itself to all of the requirements of the prior disclosure statute, including paying the actual loss of duty revealed by the disclosure.

Def.’s Reply to Pl.’s Opp’n to Def.’s Mot. to Dismiss at 6–7 (footnote omitted).
19 U.S.C. § 1520(c)(1) provides that the Customs Service may

reliquidate an entry or reconciliation to correct (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction.

⁴ Customs’ letter of May 5, 1999 stated that the Customs’ “office maintains that the loss of duties resulting from a violation of 19 U.S.C. § 1592 cannot represent the net difference between overpayments and underpayments relating to the merchandise involved in the violation.” The letter went on to state that a “[d]emand is hereby made for the balance of the actual loss of revenue in the amount of \$172,558.79. * * * If the duties requested are not received within 30 days of this letter, Customs will initiate an action to recover the duties and full penalties under 19 U.S.C. § 1592.” The court notes that Customs adheres to the use of the phrase “actual loss of revenue” despite the fact that Brother tendered the full amount of duties owed on those entries where there was overpayment at the time of their liquidation.

Compl. at ¶¶ 9, 10. In its reply, dated October 22, 1999, Customs refused to perform an administrative review pursuant to 19 U.S.C. § 1514 on the basis that there was no “protestable act.”⁵ In support of its decision, Customs declared that its May 5, 1999 letter was not a “charge or exaction” and, therefore, no basis for invoking 19 U.S.C. § 1514 existed since the tender must have been for a charge or exaction to be protestable.⁶

On April 18, 2001, Brother filed a complaint requesting a refund of its overpayment in duties and asserting a right to offset its underpayments against its overpayments. Customs filed a motion to dismiss for lack of jurisdiction on April 1, 2002, which is at issue in the present proceeding.

III. DISCUSSION

This Court in *Bridalane Fashions, Inc. v. United States*, observed “[t]he issue of jurisdiction over cases such as the one at hand and other types of 19 U.S.C. § 1592 penalty and duty recovery cases is in considerable turmoil.” 22 CIT 1064, 1068, 32 F. Supp. 2d 466, 470 (1998). Plaintiff’s case highlights many of the aspects of that turmoil.

A. Determination of a Protestable Event under § 1514.

Analysis of the question presented by Defendant’s motion to dismiss for lack of jurisdiction begins with detailing the test applied by this Court to determine if a decision by Customs is protestable. Under §1514(a)(3) Customs’ decisions as to “all charges and exactions of whatever character within the jurisdiction of the Secretary of the Treasury” are subject to protest. No case to date has categorically held that payments under § 1592 cannot be considered charges or exactions. Instead, the cases have looked to the specific circumstances of each case to determine if they meet the requirements of those terms.

The definition of charge or exaction has previously come before this Court. *See, e.g., Syva Co. v. United States*, 12 CIT 199, 681 F. Supp. 885 (1988). “A ‘charge’ encompasses a broad range of meanings including: an obligation or duty, a liability, an expense or the price of an object; an entry in an account of what’s due from one party to another.” *Syva*, 681 F. Supp. at 888 (quoting 1 West’s *Law & Commercial Dictionary in Five Languages* 237 (1985); *Webster’s Third New Int’l Dictionary* 337 (1981); *Black’s Law Dictionary* 221 (5th ed. 1979)). “Exaction” has been defined as “the wrongful demand for payment under color of official authority, where no payment is due; an unjust compulsory levy.” *Id.* (citing *Webster’s* at 377, *Black’s* at 500). These definitions are broad in scope, but caselaw has clarified their meanings and indicated what kinds of transactions will not be considered charges or exactions. The question generally turns on whether the payment is truly voluntary.

In *Carlingswitch, Inc. v. United States*, the Customs Court stated that “payment of moneys” without any “legal obligation or compulsion can

⁵The letter stated: “In the * * * letter dated May 5, 1999, Customs responded that it would not allow offsets for overpayments in its calculation of the loss of revenue and provided notification that the balance of the loss of revenue amounted to \$172,558.79. On May 24, 1999, Brother tendered the balance of the loss of revenue as calculated by Customs in the amount of \$172,558.79, therein completing its prior disclosure.”

⁶“The May 5, 1999 letter discussed in your submission relates to a voluntary tender made by Brother in order to complete its prior disclosure of a violation of 19 U.S.C. 1592(a).” Customs’ Letter of Oct. 22, 1999.

hardly constitute an ‘exaction.’” 500 F. Supp. 223, 227 (Cust. Ct. 1980) *aff’d* 651 F.2d 768 (CCPA 1981). The Court noted that the payments at issue were made voluntarily, during the course of an investigation, before any specific amount had been requested by Customs, and done in a good faith gesture to impact the result of that investigation. *See id.* at 226. At the time the payments were made, Customs had not made any request for payment, or threatened any penalty. Ultimately, Customs found that a penalty should be assessed, but determined that the applicable statute of limitations prevented collection. *Id.* Following the Customs’ decision that a penalty could not be pursued, the plaintiff requested a refund of its payments, which Customs refused. The Customs Court held that “refusal of Customs to refund the moneys plaintiff has tendered to it [does not] constitute an exaction.” *Id.* at 227. The Court of Customs and Patent Appeals affirmed the Customs Court on this narrow ground: “[t]hat a refusal to refund money is not a 1514 ‘charge or exaction’ is the basis upon which we affirm the decision granting appellee’s motion for summary judgment.” *Carlingswitch Inc. v. United States*, 651 F.2d 768, 773 (CCPA 1981). The *Carlingswitch* cases indicate that if money is offered when a penalty remains only a possibility, the transaction cannot be considered a charge or exaction.⁷ In addition, when an importer offers money to mitigate a possible penalty, and no specific amount has been requested, such a payment should be considered a voluntary tender and not a charge or exaction.⁸

This Court in *Tikal Distrib. Corp. v. United States* also found that where money “was tendered voluntarily by Plaintiff on its own initiative and without request or demand by Customs,” it is not a protestable event. 21 CIT 715, 719, 970 F.Supp. 1056, 1060 (1997) (citing *Carlingswitch*, 500 F. Supp. at 226). The Court in *Tikal* noted that for voluntary tenders made pursuant to § 1592, “before, or without knowledge of, the commencement of a formal investigation,” the statute does not provide a specific avenue of relief. 970 F. Supp. at 1061 (quoting 19 U.S.C. § 1592(c)(4)). However, the Court in *Tikal* did not rest its decision on the principle that all payments under § 1592 are to be considered voluntary, but rather on a finding that the plaintiff tendered the money as “an act of good faith” in the course of an administrative proceeding to determine if a penalty was in order. *See id.* at 1060. The Court further found that Customs made no demand or threat to constitute compulsion. *Id.*

In *ITT Semiconductors v. United States*, this Court held:

Since payment in the case at hand was a means of mitigating a claim and optional on the part of the parties, this court can only conclude

⁷ Both the appeals court and the Customs Court comment on the unusual nature of the jurisdiction of the Customs Court prior to the 1980 Act, whereby it could hear appeals regarding many Customs matters, but penalty cases were brought before district courts, and were beyond the Customs Court’s jurisdiction. *See Carlingswitch*, 651 F.2d at 773. The Court of International Trade possesses jurisdiction over penalty cases arising under § 1592. *See* 28 U.S.C. § 1582.

⁸ The CCPA also took note that the plaintiff in *Carlingswitch* was not raising a claim under § 1592 “voluntary disclosure.” Therefore, it did not address the argument that failure to afford judicial review of voluntary disclosure payments would “chill” the provision’s effectiveness. *See id.* at 773.

that the decision to pay the settlement amount was by the exercise of free will and not by compulsion on the part of the defendant.

6 CIT 231, 237, 576 F. Supp. 641, 646 (1983). The Court in *ITT Semiconductors* was faced with a plaintiff seeking to challenge certain unfavorable elements of a settlement, while retaining the benefit of other elements.⁹ The Court found the record to be “replete with facts that demonstrate voluntary behavior.” *Id.* at 236. *ITT Semiconductors* affirmed two key elements of the caselaw regarding this issue. First, voluntary payments made within the context of a settlement cannot be considered a charge or exaction. Second, whether a payment is considered voluntary is a determination made looking at the circumstances of the case, and not to be determined by blanket or categorical judgments based merely on the statutory avenue of relief.

Taken together, these cases provide no support for the proposition that, in the circumstances of a prior disclosure under § 1592, a charge or exaction does not exist when the plaintiff pays Customs a specific amount requested or demanded by Customs. On the contrary, where the circumstances of the payment indicated a lack of voluntariness, either due to Customs making the request “under color of official authority” or an imposition of liability, and where the amount paid is not the product of a settlement process, the cases support the proposition that the demand or request may constitute a charge or exaction.

B. Brother’s payment was protestable.

The court finds that Customs’ letter of May 5, 1999 constituted a “charge” or “exaction” pursuant to 19 U.S.C. § 1514(a)(3). The letter stated that a “[d]emand is hereby made for the balance of the actual loss of revenue in the amount of \$172,558.79.” It further threatened that “[i]f the duties requested are not received within 30 days of this letter, Customs will initiate an action to recover the duties and full penalties under 19 U.S.C. § 1592.” If Brother had not complied, it would have been faced with fines well beyond the amount of duties owed. The record clearly indicates that Brother did not believe it owed the amount requested by Customs. Brother had made an initial payment for an amount it deemed proper. That offer was rejected by Customs as insufficient, and Customs demanded additional money. Customs never offered to settle this amount for anything less than the full duties it contended were owed.

Comparison to the cases mentioned above will highlight the different nature of the facts in Brother’s case. In *Carlingswitch*, the Court held that the refusal of Customs to refund payments that should have been refunded did not constitute a “charge” or “exaction” pursuant to 19 U.S.C. § 1514(a)(3). See *Carlingswitch*, 651 F.2d at 773. Brother’s claim is not that Customs refused to refund monies, but, rather, that the letter

⁹ Defendant also cites to *Halperin Shipping Co., Inc. v. United States*, 14 CIT 438, 742 F. Supp. 1163 (1990), as supporting its contention that jurisdiction is not appropriate. *Def.’s Br.* at 11. Like *ITT Semiconductors*, *Halperin* involved a settlement, where the plaintiff attempted to protest its payment of the settlement amount offered by Customs. *Halperin*, 742 F. Supp. at 1167. In *Halperin*, Customs did not assess a specific amount and Halperin was under no compulsion to tender the settlement amount. *Id.*

of May 5, 1999 amounted to a charge or exaction and, therefore, the actual payment of nearly \$173,000 was tendered involuntarily. Further, in *ITT Semiconductors*, this Court found that a payment is not involuntary where it was made in exchange for prior disclosure treatment pursuant to a settlement. In the present case, this characterizes the initial payment made by Brother. In contrast, the second payment was clearly made after Customs' letter demanding the full amount be paid, and the only advantage gained by Brother was to lessen the chance of additional penalties. Furthermore, unlike in Brother's case, many of the cases cited by Customs involved a negotiated settlement or some form of settlement discussion.¹⁰ In the present case, Customs explicitly refused to hold settlement discussions. Given these circumstances, it is clear that Brother did not tender the amount voluntarily.¹¹

As Plaintiff points out, the facts of this case parallel those in *Trayco, Inc. v. United States*. See *Pl.'s Br.* at 7 (citing, 994 F.2d 832 (Fed. Cir. 1993)). In *Trayco*, an importer sought administrative review of a penalty imposed by Customs for country of origin marking violations. Trayco disputed that it had committed any violation or owed any penalty. It paid the mitigated penalty amount under protest and exhausted administrative remedies. See 994 F.2d at 838. Trayco claimed the penalty it paid under protest was wrongfully exacted. *Id.* at 837. Trayco filed suit in district court under the so-called "Little Tucker Act," which provides for civil actions against the United States, for an amount less than \$10,000.00, founded upon an Act of Congress. *Id.* (citing 28 U.S.C. § 1346(a)(2)). The Federal Circuit found that a district court was the proper venue for a importer-initiated suit contesting a penalty. See *id.* at 839. Brother's case is properly addressed to this Court because it involves duties paid under § 1592. See *Pentax Corp v. Robison*, 20 CIT 486, 490-91, 924 F. Supp.193, 197 (1996) *rev'd on other grounds* 125 F.3d 1457 (Fed. Cir. 1997). The venue, however, does not dilute the force of the reasoning the Federal Circuit employed, that an importer does not need to withhold payment and wait for Customs to initiate a suit under 28 U.S.C. § 1582 to seek judicial review of its claim. "Trayco was not estopped from seeking judicial review of the underlying legality of a penalty assessed by the United States Customs Service because it paid the mitigated penalty under protest expressly reserving its rights to judicial review." *Trayco*, 994 F. Supp. at 839. Likewise, Brother may pay the full amount requested by Customs under protest and seek review with this Court. As in *Trayco*, if Customs' demand for the money was improper,

¹⁰ See *Tikal*, 970 F. Supp. at 1058; *Halperin*, 742 F. Supp. at 1164-65; *ITT Semiconductors*, 576 F. Supp. at 645-46.

¹¹ *Pope Products v. United States*, 15 CIT 279 (1991), also relied on by Defendant, is not applicable. *Pope* dealt with liquidated damages owed to Customs which the Court held could not be protested. The Court stated, in dicta, that choosing to seek optional administrative review indicated voluntary behavior on the part of the plaintiff. Nevertheless, the Court went on to say:

The voluntariness issue is a close one and need not be resolved here. Despite whatever compulsion one might perceive stemming from either the original demand in this case or the overall administrative scheme, one cannot denominate the opportunity to pay and obtain administrative review a "charge or exaction" if the original demand itself is not a "charge or exaction."

Id. at 285.

and Brother paid with only the additional liability of a penalty suit as a possible avenue of relief, such a payment was an exaction.

Customs maintains that the amount paid by Brother is not a charge or exaction because until it initiates a penalty action with a suit before this Court under 28 U.S.C. § 1582, an importer is under no compulsion to pay the amount requested. Specifically, Customs is contending that when it issues notice of an amount due by a certain date, under the statutory authority it has to collect duties, that such a notice is not a “demand for payment under color of official authority” and that Brother’s subsequent payment was a voluntary act free of legal liability and under no duress.¹² The court cannot agree. Customs “official authority” is granted by the statute and confirmed by this Court. *See, e.g., United States v. Menard, Inc.*, 16 CIT 410, 415–16, 795 F. Supp. 1182, 1187 (1992) (“Recognizing that provisions for liquidation and reliquidation were insufficient to permit the United States to recover revenue lost through culpable acts of importers, Congress implemented § 1592(d) to remedy the situation.”). Therefore, the court finds that the letter of May 5, 1999 amounted to a “demand for payment under color of official authority.”

Payment by Brother pursuant to that letter cannot be considered voluntary when non-payment could have resulted in further penalties, in addition to the disputed amount. Brother did not gain any advantage by payment, it only avoided the further liability of a penalty action. Consequently, Brother’s second payment is either a charge or an exaction. If Brother had a right to offset its overpayments and underpayments, then the letter is an exaction as a “wrongful demand for payment under color of official authority, where no payment is due.” *Syva*, 681 F. Supp. at 888. If Customs is correct that no offset was required, then it is a charge as “an entry in an account of what’s due from one party to another.” *Id.* In either case, it was a protestable action.

The court is certainly aware that this is an unusual case finding jurisdiction in the context of a payment pursuant to § 1592. However, it is important to recognize that this case did not occur in a vacuum. The nature of how importers and Customs interact has not remained static in the last two decades since the *Carlingswitch* cases. The modernization of Customs procedures and laws has changed traditional understandings of how to treat entries and file documents.

For two centuries the standard liquidation and protest method characterized Customs practice. Under that system goods were evaluated by

¹² It is interesting to note that Customs’ characterization of a payment as “voluntary” to avoid judicial review has a long history. In *Elliott v. Swartwout*, the Supreme Court, in 1836, heard a challenge to a case brought by an importer who claimed that he only paid the duties claimed by the port collector of New York in order to secure release of his goods. 35 U.S. 137 (1836). Despite payment, the importer protested the payment and declared his intention to seek recovery. The port collector claimed that he could not be sued for the “wrongful” duties because the importer had voluntarily paid the duties, and the collector had already turned the duties over to the Treasury. The Court rejected this argument and held a cause of action would lie against the collector when,

at the time of payment, notice is given to the collector that the duties are charged too high, and that the party paying, so paid to get possession of his goods; and accompanied by a declaration to the collector, that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury.

Id. at 156.

a Customs officer prior to release into the stream of commerce. *See, e.g., United States v. G. Falk & Bro.*, 204 U.S. 143 (1907) (holding duty on imports withdrawn from bonded warehouses must be assessed on the basis of weight at the time of original entry, not as previously provided for at time of withdrawal). In the last twenty years, Customs has moved away from this labor intensive method towards one of “automatic bypass” where goods are liquidated “as entered” by the importer.¹³ Customs now relies heavily on post-import audits to reconcile mistakes made in the liquidation process.¹⁴ However, these audits occur months after liquidation has become final and after the time to protest has elapsed for the importer. In essence, the traditional rule that liquidation is final and binding on both importer and government is no longer true. Now, in practice, it is only binding on the importer.¹⁵ If an importer disagrees with the results of the audit, Customs insists that the importer may not challenge that determination. Instead, Customs contends, as it does in this case, that the importer must wait for suit to be initiated by Customs and risk additional penalties. *See Def.’s Br.* at 13. As Judge Restani pointed out in *Bridalane*:

The problem here is that plaintiff seeks prior disclosure treatment, but has not paid the claimed marking duties to Customs because there is no definitive avenue of recovery of the duties if they are wrongfully extracted by Customs and if they are considered part of a “voluntary” prior disclosure. The matter is further complicated by Customs’ lack of clear regulatory procedures and timetables for protesting post-disclosure exactions of duties under 19 U.S.C. § 1592.

If this matter concerned extracted penalties, the court could say to plaintiffs, “Pay the penalties and seek recovery in district court pursuant to *Trayco*, or do not pay them and let the Government sue you.” But the issue here is prior disclosure treatment and the recovery of *duties*, the essence of this court’s jurisdiction.

32 F. Supp. 2d at 469–470 (citations omitted; emphasis in original).

In *Bridalane*, the Court exercised jurisdiction under the residual jurisdiction provided for in 28 U.S.C. § 1581(i). The facts of this case point toward a protestable decision, as discussed above; therefore, the court not need reach the question of whether it could exercise jurisdiction under § 1581(i) in the alternative. However, it is clear in light of *Trayco*, *Pentax*, *Bridalane* and Brother’s case before us, these types of situations will arise again.

The court wishes to emphasize that resolving whether Customs’ demand was a charge or exaction is separate from consideration of wheth-

¹³ For a more thorough discussion of this issue see John M. Peterson and John M. Donohue, *Streamlining and Expanding the Court of International Trade’s Jurisdiction: Some Modest Proposals*, presented at the 12th Judicial Conference of the Court of International Trade (November 13, 2002).

¹⁴ *See, e.g.,* Matthew T. McGrath, Robert A. Shapiro, and James B. Doran, *International Legal Developments in Review: 1999, Business Regulation: Customs Law*, INTERNATIONAL LAWYER, 376–77 (Summer 2000).

¹⁵ *See* 19 U.S.C. § 1621 providing for a five year statute of limitations on “actions to recover any duty under section 1592(d).”

er Brother had a substantive right to offset the amounts in question.¹⁶ Clearly these are distinct issues. Finding jurisdiction is predicated on the voluntariness *vel non* of the payment. Whether Customs had a right to demand such a payment will hinge on the statutory and regulatory framework in place. The court will, of course, carefully determine whether the statute or congressional intent provides Customs with a directive to allow or refuse offset payments in cases such as these.

IV. CONCLUSION

For the foregoing reason the court denies Defendant's Motion to Dismiss for Lack of Jurisdiction. The court exercises jurisdiction under 28 U.S.C. § 1581(a), finding that Customs' letter of May 5, 1999 amounted to a demand for payment protestable under 19 U.S.C. § 1514. As directed at oral argument, counsel will confer and schedule a Rule 16 conference with the court.

(Slip Op. 03-2)

TOY BIZ, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96-10-02291

[Plaintiff's Motion for Summary Judgment is granted and Defendant's Cross-Motion is denied with respect to classification of action figures and trading cards. Plaintiff's Motion for Summary Judgment is denied and Defendant's Cross-Motion is granted with respect to "Jumpsie."]

(Decided January 3, 2003)

Singer & Singh, (Sherry L. Singer, Indie K. Singh), for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office; (*Mikki Graves Walser*), Civil Division, United States Department of Justice, Commercial Litigation Branch; *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge*: This is the fourth and final opinion for this Court in a case involving the tariff classification of dozens of action figures from various Marvel Comics series. See *Toy Biz, Inc. v. United States*, 26 CIT ____, ____, 219 F. Supp. 2d 1289 (2002) ("*Toy Biz III*"); 25 CIT ____, ____,

¹⁶ Pertinent to the question of the right to offset is *United States v. Snuggles Inc.*, 20 CIT 1057, 937 F. Supp. 923 (1996), raised by Defendant during oral argument. In that case the defendant sought to offset overpayments with underpayments within the same entry. The Court was skeptical of the defendant's argument, but rejected the defendant's claim, at least in part, on the fact that it did not file a protest. See *id.*, 937 F. Supp. at 929. The Court in *Snuggles* did not have to analyze fully the substantive merits of the defendant's claim. The factual circumstances are also distinct from the present case; therefore, *Snuggles* is not dispositive of the question before this court. However, it is relevant.

132 F. Supp. 2d 17 (2001) (“*Toy Biz II*”); 24 CIT ____, ____, 123 F. Supp. 2d 646 (2000) (“*Toy Biz I*”). The legal issue presented in this case involves the construction of the “dolls” provision *vis a vis* the “other toys” provision. This issue was an historically contentious one¹ under the former classification scheme, the Tariff Schedules of the United States (“TSUS”), and this case presents an issue of first impression² under the Harmonized Tariff Schedule of the United States (“HTSUS”) adopted by the United States in 1989. This court holds that, first, the change in language from the TSUS to the HTSUS with respect to the “dolls” and “other toys” provisions reflects a change in law; second, to be properly classifiable as a “doll” under the HTSUS, a toy figure must clearly represent a human being; third, the action figure playthings at issue here are not properly classifiable as “dolls” under the HTSUS by virtue of various non-human characteristics they exhibit; and finally, the item “Jumpsie” is properly classifiable as a “doll” under the HTSUS.

II. BACKGROUND

Plaintiff Toy Biz, Inc. (“Toy Biz”) brings this action to challenge the tariff classification by the United States Customs Service (“Customs” or “Defendant”) of various items imported from China and entered at the ports of Seattle and Los Angeles in 1994.³ The items are action figures from various Marvel Comics series, including the “X-Men,” “Spider-Man,” and the “Fantastic Four,” and an additional item called “Jumpsie,” which is not an action figure. The items are packaged in boxes or blister packs attached to colorful cardboard backing covered with printed illustrations and writing. The packaging of a number of items includes small accessories, such as weapons and other equipment.⁴ Customs classified the items as “Dolls representing only human beings and parts and accessories thereof: Dolls whether or not dressed: Other: Not over 33 cm in height,” under subheading 9502.10.40 of the HTSUS (1994), dutiable at 12% *ad valorem*.⁵ Toy Biz contends that the action figures at issue are properly classifiable as “Toys representing animals or other non-human creatures (for example, robots and monsters) and parts and accessories thereof: Other,” under subheading 9503.49.00,

¹ See discussion *infra* regarding the many cases construing the TSUS provisions, including *Hasbro Indus., Inc. v. United States*, 12 CIT 983, 703 F. Supp. 941 (1988), *aff’d*, 879 F.2d 838 (Fed. Cir. 1989) (“*Hasbro*”).

² It may also be a case of last impression. The current action may have retrospective practical effect only. Although the most recent HTSUS (2002) retains the distinctions in the “toys” classifications, the court notes that all of the “toys” provisions including the “dolls” provision now have the same duty rate, that is, all “toys” are allowed to enter the United States duty-free. See HTSUS (2002) 9502 & 9503.

³ This case, Court No. 96-10-02291, has been designated a test case, under which four other cases, Court Nos. 96-05-01299, 96-05-01448, 96-05-01449, and 97-05-00744, have been suspended. See Order signed on June 12, 1998.

⁴ Contrary to Plaintiff’s assertion, the inclusion of the weapons and such does not convert the items into “toy sets.” See *Pl.’s Mem. in Supp. of Mot. for Summ. J.* at 15 (“*Pl.’s Br.*”). These items are properly classifiable as “accessories” under the HTSUS “doll” or “toy” provisions because they are of subordinate value compared with the figures themselves and their inclusion with the figures is intended to enhance the play value of the figures. See discussion *infra* regarding “accessory.”

⁵ See HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995); HQ 957603 (Oct. 12, 1995); HQ 958244 (Mar. 4, 1996); HQ 958039 (Mar. 8, 1996).

HTSUS (1994),⁶ dutiable at 6.8% *ad valorem*.⁷ Toy Biz further contends that “Jumpsie” should be classified as a “toy set,” under HTSUS (1994) subheading 9503.70.80, dutiable at 6.8% *ad valorem*.⁸

Customs further classified the trading cards, included in the packaging of the action figures and which picture and describe other action figures (other than the one with which they are included), separately under HTSUS (1994) subheading 4911.99-6000 as “Other printed matter, including printed pictures and photographs: Other: Other: Other: Printed on paper in whole or in part by a lithographic process,” dutiable at 0.4% *ad valorem*.⁹ Plaintiff disputes the separate classification of the trading cards. *See Pl.’s Mem. in Supp. of Mot. for Summ. J.* at 15 (“*Pl.’s Br.*”). Both parties have stipulated to the material facts and have filed motions for summary judgment pursuant to USCIT R. 56.¹⁰ The court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

II. SUMMARY JUDGMENT AND STANDARD OF REVIEW

This court may decide classification cases on summary judgment when it is appropriate. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998); *Ero Indus., Inc. v. United States*, 24 CIT ___, ___, 118 F. Supp. 2d 1356, 1359 (2000). “The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) (citation omitted). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” USCIT R. 56(c). “It is the func-

⁶ In its entirety, HTSUS (1994) subheading 9503.49.00 reads: “Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: Toys representing animals or non-human creatures (for example, robots and monsters) and parts and accessories thereof: Other.”

⁷ This Court previously rejected two alternative arguments of Toy Biz with respect to certain items. Concerning a class of items referred to as “X-Men Projectors,” Toy Biz had argued that they were alternatively classifiable as “toy sets,” under subheading 9503.70.80, HTSUS. In rejecting this argument, this Court specifically found that neither the projector mechanism housed in the figure nor the film disks packaged with the “X-Men Projectors” justify their classification as “toy sets.” *Toy Biz, Inc. v. United States*, 26 CIT ___, ___, 219 F. Supp. 2d 1289, 1302-03 (2002) (“*Toy Biz III*”) (also holding that film disks are properly classified as “accessories”). Concerning another class of items called “X-Men Steel Mutants” and an additional item named “Silver Samurai” (in assortment 4900 I), Plaintiff had argued that they were the equivalent of “tin soldiers and the like” expressly included within the scope of HTSUS heading 9503 per Explanatory Notes to that heading and that they were therefore specifically precluded from being classified as “dolls.” Relying on the reasoning of *Hasbro*, this Court dismissed that argument because the items displayed unique and distinctive physical appearances and personalities. *See Toy Biz, Inc. v. United States*, 25 CIT ___, ___, 132 F. Supp. 2d 17, 20-21 (2001) (“*Toy Biz II*”).

⁸ Subheading 9503.70.80 of HTSUS reads: “Other toys, put up in sets or outfits, and parts and accessories thereof: Other: Other.”

⁹ *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995); HQ 957603 (Oct. 12, 1995); HQ 958039 (Mar. 8, 1996).

¹⁰ On October 18, 2000, the parties entered into a Stipulation identifying all items at issue in this action. Later, with both parties’ consent, Plaintiff withdrew from the case the items “Daredevil,” “Invisible Woman,” “Punisher,” “U.S. Agent,” and “Peter Parker,” and Defendant agreed to classify the items “Beast,” “Bonebreaker,” “Cameron Hodge,” “Robot Wolverine,” and “Vulture” as “other toys,” under subheading 9503.49.00 of the HTSUS. *See* Letter from Attorney for Pl. (Mar. 9, 2001); Pl.’s Mot. to Withdraw Items from Case (Order signed by Judge Delissa A. Ridgway on March 27, 2001); Decl. of Alice Wong ¶ 3 (Apr. 5, 2001); Letter from Attorney for Def. (Apr. 6, 2001). The parties agree that there is no dispute as to what the items in question are. *See* Letter from Attorney for Def. (Nov. 18, 2002). Moreover, the court has before it sufficient samples and pictures of the items in question which enable the rendition of a dispositive decision. *Cf. Janex Corp. v. United States*, 80 Cust. Ct. 146, 148 (1978) (“samples are potent witnesses and have great probative effect respecting the purpose for which an article is designed”).

tion of the court to determine whether there are factual issues that are material to resolution of the action.” *Ero Indus.*, 118 F. Supp. 2d at 1359 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In classification actions, “summary judgment is appropriate when there is no genuine dispute as to * * * what the merchandise is * * * or as to its use.” *Id.* at 1359–60. When there are no factual issues in the case, the “propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law,” subject to *de novo* review.¹¹ *Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998); *Nat’l Advanced Sys. v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994); see also 28 U.S.C. § 2640 (1994). Here, the parties cross-moved for summary judgment, stipulated to material facts, and submitted affidavits.¹² No genuine issues of material fact remain as to the nature of the merchandise or its use. The items at issue are various playthings for children, classifiable either as “dolls” or “other toys” under the HTSUS. The only remaining question is the proper scope of those classification provisions of the HTSUS, which is a question of law. Accordingly, a grant of summary judgment for either side, based on pleadings and supporting documents, is appropriate.

III. DISCUSSION

“The proper classification of merchandise entering the United States is directed by the General Rules of Interpretation (“GRIs”) of the HTSUS and the Additional United States Rules of Interpretation.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). “The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category.” *Id.* Under GRI 1, “[a] classification analysis begins, as it must, with the language of the headings.” *Id.* at 1440. GRI 1 states in pertinent part “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” “[T]he other GRI provisions may be consulted only if headings and notes ‘do not otherwise require’ a particular classification.” *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998) (quoting GRI 1). If a subheading is at issue, “[f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related

¹¹ The court notes that in the absence of a Customs regulation interpreting the HTSUS provisions, Customs’ tariff decision in an ordinary classification ruling is not entitled deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001); *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). Such rulings may, however, be upheld based on their “power to persuade.” *Mead*, 533 U.S. at 235 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹² This Court previously rejected the parties’ motions for summary judgment, finding that genuine issues of material fact remained in the application of the Customs’ classification test (casual observer test) to this case and that the “parties do not agree on * * * material facts.” See *Toy Biz I* at 651 (2000). Since then the parties have submitted affidavits to the court, see Aff. of JoAnn E. McLaughlin (May 24, 2001); Decl. of Alice Wong (April 5, 2001), and further solidified the list of the items at issue, see Letter from Attorney of Def. (Nov. 18, 2002) (confirming Stipulation dated October 18, 2000 and the items disposed of since then), which have resolved earlier issues of material fact.

subheading notes and, mutatis mutandis, to” the other GRIs. GRI 6, HTSUS.

The “proper scope of a classification in the HTSUS is an issue of statutory interpretation.” *Bauerhin Techs. Ltd. P’ship v. United States*, 110 F.3d 774, 776 (Fed. Cir. 1997). “It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of the statute, a court should not inquire further into the meaning of the statute.” *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) (citation omitted). If “statutory language of [a] tariff classification is ambiguous,” the court may use various “aids in construing the statute and disclosing legislative intent.” *Celestaire, Inc. v. United States*, 20 CIT 619, 623, 928 F. Supp. 1174, 1178 (1996) (citation omitted). Among such aids are “standard canons of statutory construction [or] legislative ratification of prior judicial construction.” *Id.* (citations omitted). Additionally, the court may construe HTSUS terms “according to their common and commercial meaning” if such construction would not contravene legislative intent. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citation omitted); see also *John S. James A/C The Consol. Packaging Corp. v. United States*, 48 C.C.P.A. 75, 77 (1961) (“it is incumbent upon [the court] to assume that Congress attributed to the words their common meaning unless the evidence or some other factor indicates otherwise”). “A court may [also] rely upon its own understanding of the terms used, lexicographic and scientific authorities, dictionaries, and other reliable information.” *JVC*, 234 F.3d at 1352. Finally, “a court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings.” *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted).

Here, Customs classified the items under HTSUS heading 9502, “Dolls representing only human beings and parts and accessories thereof.” Basing its contention on the wording of HTSUS 9502, Toy Biz argues that to be classifiable as a “doll,” the “item must represent *only*, i.e., exclusively, a human being.” *Pl.’s Br.* at 5 (emphasis in original). Toy Biz points to the tentacles, claws, wings or other non-human features that a number of the items at issue possesses. *Id.* Toy Biz thus concludes that the items at issue are not classifiable as “dolls” because “the figures represent creatures other than humans, and possess features characteristic of non-humans.” *Id.*

Toy Biz next argues that the items are properly classifiable as “Toys representing animals or non-human creatures (for example, robots and monsters)” under subheading 9503.49.00, by virtue of possessing non-human features. See *id.* at 6–7. Toy Biz observes that the Explanatory Note 95.03(A)(1) provides that “other toys” under heading 9503 include “[t]oys representing animals or non-human creatures even if possessing predominantly human physical characteristics (e.g. angels, robots, dev-

ils, monsters).” *Id.* at 5–6. According to Toy Biz, the Explanatory Notes thus add to the list of creatures that should be considered non-human (angels and devils) and emphasize that the item should be considered non-human even if predominantly human in physical appearance. Toy Biz would frame the classification issue as “not whether the character has some human features, or even whether the character resembles a human being,” but “whether the figure *represents* only a human being.” *Id.* at 7 (emphasis in original).

Customs answers this argument by first observing that “[h]eading 9502 is an *eo nomine* provision for ‘dolls.’” *Def.’s Mem. in Supp. of Cross-Mot. for Summ. J. and in Opp. to Pl.’s Mot. for Summ. J.* at 18 (“*Def.’s Br.*”). Customs explains that “[i]n the absence of contrary legislative intent, **an *eo nomine* provision includes all forms of the article.**” *Id.* at 18–19 (emphasis in the original) (citing *Nootka Packing Co. v. United States*, 22 C.C.P.A. 464 (1935) and *Hasbro Indus., Inc. v. United States*, 879 F.2d 838 (Fed. Cir. 1989)).¹³ According to Customs, “[h]eading 9502 is, therefore, an *eo nomine* provision covering all forms of dolls which represent human beings.” *Def.’s Br.* at 19 (citation omitted). In explaining its interpretation of “dolls,” Customs relies primarily on case law that in turn relied on dictionary definitions for the term “doll.” *Id.* For example, the Court in *Hasbro Indus., Inc. v. United States*, found that “the dictionaries referred to by the Court invariably define[d] the word doll as a representation of a human being used as a child’s plaything” and declared that “[t]his, in itself, is virtually decisive.” 12 CIT 983, 988, 703 F. Supp. 941, 945 (1988), *aff’d*, 879 F.2d 838 (Fed. Cir. 1989). Customs further observes that so far “judicial decisions interpreting the term ‘dolls,’ without exception, have broadly construed the scope of that term to include a broad range of physical characteristics and a wide variety of uses.” *Def.’s Br.* at 20 (citations omitted). Thus, since the figures at issue all have “the appearance of human beings” by virtue of having “a head, mouth, eyes, nose, hair, arms, torso, breasts, muscles, and [with one exception] legs and feet;” are “noticeably lifelike and constructed in a manner which permits an impressive range/simulation of human movement;” are “dressed as human beings and equipped with weapons and accessories in a manner associated with actual or fictional warfare;” and finally possess “such human characteristics as gender, race, physical impediment/handicap, and nationality,”¹⁴ according to Customs, they fall under “the *broad* definition of the tariff term ‘dolls.’” *Id.* at 21–22 (emphasis added). Finally, Customs argues that the few non-human characteristics the figures possess, such as claws or robotic arms, “fall far short of transforming [these figures] into

¹³ Even though Customs cites pre-HTSUS cases for this proposition, the court notes that an *eo nomine* provision still “includes all forms of the article” under the HTSUS. See *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).

¹⁴ Customs points out, for example, “Professor X” being featured in a wheel chair, “Silver Samurai” being a “Japanese action figure,” “Bishop” being “a black man,” and “Rogue” being “a female action figure.” *Def.’s Br.* at 22.

something other than the human beings which they represent.” *Id.* at 23.¹⁵

The construction of the HTSUS provision “dolls” *vis a vis* the HTSUS provision of “other toys” is a case of first impression.¹⁶ In defending its classification of the figures at issue as “dolls,” Customs primarily relies on the case law that interpreted the classification of “dolls” under the TSUS and previous case law. *See, e.g., Hasbro*, 879 F.2d at 838 (classification as “dolls” under TSUS); *Am. Imp. Co. v. United States*, 22 Cust. Ct. 51 (1949) (classification as “dolls” under paragraph 1513 of Tariff Act of 1930). Prior to the HTSUS, the tariff classification for “dolls” had always been broadly construed. *See Russ Berrie & Co., Inc. v. United States*, 417 F. Supp. 1035, 1039–40 (Cust. Ct. 1976) (listing items previously classified as dolls including “dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc., * * * [s]mall woven rush figures made in Mexico, consisting of a horse and rider and a figure of a woman made of straw, [a dancing female figure affixed to] a music box, [and a] papier-mache Hawaiian hula girl [used in] a car as a decorative item”) (citations omitted); *see also R. Dakin & Co. v. United States*, 14 CIT 797, 798, 752 F. Supp. 483, 484 (1990) (holding that “a puppet-like toy made up of a doll head and hands attached to a sleeve of bunting” is properly classified as “doll” under TSUS); *Hasbro*, 879 F.2d at 841 (affirming CIT holding that G.I. Joe action figures are “dolls”); *Wregg Imps. v. United States*, 10 CIT 679, 682 (1986) (affirming Customs classification of “matreshkas” as “dolls”). Previous judicial and Customs determinations interpreting TSUS provisions are not “dispositive” in interpreting the HTSUS provisions. H.R. Conf. Rep. No. 100–576, at 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1548, 1582. However, “on a case-by-case basis prior decisions should be considered instructive in interpreting the [HTSUS], particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the [HTSUS].” *Id.* at 549–50.

¹⁵ In framing its arguments, Customs first contends that Toy Biz has “not met its burden of establishing that its claimed classification provisions are correct, independently or in comparison to the decisions made by Customs.” *Def.’s Br.* at 17. Customs cites 28 U.S.C. § 2639(a)(1), which provides that Customs’ tariff classifications are “presumed to be correct” and the “burden of proving otherwise shall rest upon the party challenging such decision.” However, the court notes that that presumption, as it relates to evidence, “carries no force as to questions of law.” *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). “[W]here * * * a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant.” *Blakley Corp. v. United States*, 22 CIT 635, 639, 15 F. Supp. 2d 865, 869 (1998); *see also JVC Co. of Am., Div. of US JVC Corp. v. United States*, 23 CIT 523, 527, 62 F. Supp. 2d 1132, 1136 (1999), *aff’d*, 234 F.3d 1348 (Fed. Cir. 2000). Accordingly, since the interpretation of the scope of the HTSUS provisions at issue here is a question of law presented on cross-motions for summary judgment, Customs’ interpretation of those provisions will not be presumed correct.

¹⁶ In two other cases that involved the HTSUS “doll” classification, the alternative classification was different than the classification of “other toys.” *See Club Distribution, Inc. v. United States*, 20 CIT 839 (1996) (“other articles for Christmas festivities under subheading 9505.10.50, HTSUS”); *Midwest of Canon Falls, Inc. v. United States*, 20 CIT 123, 128 (1996), *aff’d in part and rev’d in part*, 122 F.3d 1423 (Fed. Cir. 1997) (“Christmas ornaments made of wood under subheading 9505.10.15, HTSUS” and “Christmas ornaments other than those made of wood or glass under subheading 9505.10.25, HTSUS”).

The TSUS “dolls” classification heading reads “Dolls, and parts of dolls including doll clothing.”¹⁷ TSUS Schedule 7, Part 5, Subpart E (1987). HTSUS heading 9502 reads “Dolls *representing only* human beings and parts and accessories thereof” (emphasis added). HTSUS heading 9502 thus represents a definite change in the nomenclature of the “dolls” provision from the TSUS. It is a well-established maxim in statutory construction that, if there is a change in the statutory language, the court is to assume that “the change was not made by accident, but that it was intentional, and that by making such a change in expression Congress used the term in a different sense from that in which the former expression was used.” *Stroheim & Romann v. United States*, 13 Ct. Cust. App. 489, 493 (1926). “This rule is, however, not absolute, and does not compel the conclusion that a change in meaning was meant.” *Id.* “It merely *indicates* such an intention.” *Id.* (emphasis in the original). Here, the change in the language of the tariff classifications at a minimum indicates an intention to change their meanings. Accordingly, this court observes that pre-HTSUS interpretations of the “dolls” provision (by the courts and Customs) can no longer direct the interpretation of HTSUS heading 9502. Such pre-HTSUS interpretations may only inform the court’s interpretation of HTSUS heading 9502.

The first issue before the court is whether the addition of the clause “representing only human beings” in the HTSUS constricts the “dolls” tariff classification previously interpreted broadly.¹⁸ The second issue before the court is whether, if the “dolls” provision is indeed narrower, the action figures in question would nevertheless be encompassed by HTSUS heading 9502 instead of the alternative HTSUS heading 9503 for “other toys.” Only after determining the proper heading may the court inquire into the propriety of HTSUS subheading 9503.49.00 “Toys representing animals or non-human creatures (for example, robots and monsters) and parts and accessories thereof” as the tariff classification of the items in question. *See* GRI 1 & 6, HTSUS.

The court first recognizes that the 9503 “other toys” provision of the HTSUS is a residual or a default provision. Both the 9502 “dolls” and the 9503 “other toys” provisions appear in Chapter 95 of the HTSUS, titled “Toys, Games and Sports Equipment; Parts and Accessories Thereof.” The first heading, 9501, is reserved for “[w]heeled toys designed to be ridden by children;” heading 9502, for “dolls;” and heading

¹⁷ In the TSUS, the “dolls” provision is in Subpart E (“Models; Dolls, Toys, Tricks, Party Favors”) of Part 5 (“Arms and Ammunition; Fishing Tackle; Wheel Goods; Sporting Goods, Games and Toys”) of Schedule 7 (“Specified Products; Miscellaneous and Nonenumerated Products”). The TSUS “dolls” provision is subdivided into “Doll clothing imported separately,” 737.17, TSUS, and “Other: Dolls,” 737.18–25, TSUS. The TSUS “toys” provisions are found in 737.28–55, TSUS. The TSUS headings for “toys” read “Toy figures of animate objects (except dolls)” and “Toy figures of inanimate objects, * * *.”

¹⁸ The “dolls” provision continues to be broadly construed in the sense that it “includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes (e.g., boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.” Explanatory Note 95.02, HTSUS. Further, dolls can be made of a variety of materials, such as “rubber, plastics, textile materials, wax, ceramics,” *etc. Id.* In any event, the issue here is not the “broadness” of the “dolls” provision with respect to uses of dolls or the materials they are made of. Also, not at issue here is how much detail a doll must have and in what form a doll must be to represent a human being. *Cf., e.g., Wregg Imps. v. United States*, 10 CIT 679, 682 (1986) (affirming Customs classification of nested “mashreshkas” as dolls even though they are egg-shaped with human features drawn on wood).

9503, for “other toys.” The Explanatory Note 95.03 to heading 9503 explicitly states that the “other toys” provision includes *all* toys not included in 9501 and 9502. Thus, heading 9503 is a default provision intended to encompass all toys that are not “wheeled toys” or “dolls.” Accordingly, when the choice is between the “dolls” and “other toys” provisions of the HTSUS, the construction of the provisions must start with that of “dolls.”¹⁹ The construction of the “dolls” provision may not, however, render either the “other toys” provision or any other provision of the HTSUS meaningless and lead to ambiguous and contradictory results.²⁰ It is therefore necessary to interpret the “dolls” provision in the context of the entire Chapter 95 and especially in relation to the “other toys” provision.

The task of the court is to ascertain which meaning the words “representing” and “only” were intended to carry in the phrase “dolls representing only human beings” in heading 9502 of the HTSUS.²¹ The question regarding the word “only” is answered more readily. The court agrees with Toy Biz that one of the primary meanings of the term “only” is “exclusively.” The Oxford English Dictionary (“OED”) provides referring to the adverb “only”: “1. As a single or solitary thing or fact; no one or nothing more or else than; nothing but; alone; solely, merely, *exclusively*.” 10 OED at 818 (2d ed. 1989) (emphasis added). The OED further provides that “only” limits the word it precedes, for example, in a way that produces the connotation “as opposed to any *other*.” *See id.* (emphasis in the original). Therefore, the heading “dolls representing only human beings” can be read as “dolls representing human beings, as opposed to any *other* beings.”

The meaning of the term “representing” in heading 9502 is harder to ascertain. Toy Biz urges that “to represent” in this context means more (or other) than “to resemble.” *See Pl.’s Br.* at 7.²² The court agrees. The reason is multi-fold. First, consulting the OED, the court finds that “to resemble” is only one of the many possible meanings of “to represent.” 13 OED at 657–58. In the senses more pertinent to our purpose here, “to represent” may, for example, mean “to show, exhibit, or display to the eye,” “to portray, depict, delineate,” “to symbolize, to serve as a visible or concrete embodiment of,” “to stand for or in place of,” “to be the figure or image of,” “to take or fill the place of,” or “to serve as a specimen or example of” a person or a thing. *Id.* Second, given the entire context of

¹⁹ Moreover, the observation that the “other toys” provision is a residual provision compels the conclusion that the “dolls” and “other toys” classifications are mutually exclusive. Therefore, the items are not *prima facie* classifiable under both provisions and GRI 3 is thus not pertinent to the analysis here. *Cf.* GRI 3(a), HTSUS (“When, * * * for any * * * reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be affected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.”)

²⁰ The plain meaning rule of statutory construction dictates that “when results flowing from an apparently plain meaning of a statute are ridiculous, absurd, or manifestly unjust, or will have the effect of rendering some other plain provision of the statute nugatory, it will not be presumed that the lawmaking body so intended, and further inquiry may be had.” *United States v. Palm, Fichteler & Co.*, 4 Ct. Cust. App. 1, 2 (1913).

²¹ There is no definition for these terms in the HTSUS.

²² Elsewhere, Customs draws a similar distinction between “to represent” and “to resemble.” In holding that “troll” figures are not classifiable as “dolls,” Customs specifically noted that even though certain troll figures may *resemble* human beings, they do not *represent* human beings. *See* HQ 089895 (Nov. 4, 1991).

the HTSUS, “to represent” in “dolls representing only human beings” must mean something more than (or other than) “to resemble.” In other words, one cannot read the “dolls” provision as meaning exclusively “dolls *resembling* human beings.” This reading of the “dolls” provision would create ambiguity and conflict with the “other toys” provision of the HTSUS. One of the subheadings at issue here reads “Toys representing animals or non-human creatures (for example, robots and monsters).” The accompanying Explanatory Note 95.03, HTSUS, further explains that “[t]hese include: (1) Toys representing animals or non-human creatures *even if possessing predominantly human physical characteristics*” (emphasis added). Thus, the “other toys” provision clearly encompasses toys that possess predominantly human physical characteristics, i.e. resemble human beings. If “to represent” in “dolls representing only human beings” meant exclusively “to resemble,” a toy that merely resembled a human being would be *prima facie* classifiable under both the “dolls” and “other toys” provisions. The HTSUS scheme, however, prevents this interpretation. As explained above, *see supra* note 19 and accompanying text, the “dolls” and the “other toys” provisions are mutually exclusive; and an item cannot be classified as both a “doll” and “other toy.”

The court next considers what the effect these interpretations of “only” and “to represent” have on the “dolls” provision that reads “dolls representing only human beings.” To be classified as a “doll” under the HTSUS, a toy needs to be an “embodiment” of a human being or to serve as an “example” of a human being. This condition is more restrictive than merely to resemble a human being. The word “only” further restricts the provision because it will not allow the representation of any being other than a human being to be classified as a “doll.” The court thus concludes that by excluding toys that do not exclusively represent human beings (however much they resemble human beings), the HTSUS “dolls” provision has indeed narrowed the scope of what can be classified as “dolls” when compared with the TSUS “dolls” provision which simply read “Dolls, and parts of dolls including doll clothing,” and was not restricted by any qualifiers.²³

²³ The court notes that for over a decade Customs has employed a test, called the “casual observer” test, to differentiate between the “dolls” and “other toys” provisions of the HTSUS. *See* HQ 086088 (Feb. 21, 1990). The same test was applied to the items in question here. This court’s task is to construe the tariff provisions at issue and to determine which provision properly encompasses the items presented here. Therefore, it is appropriate for the court to examine Customs’ application of the “casual observer” standard as gleaned from Customs’ published rulings. The “casual observer” standard is described as eliminating the need to closely evaluate toy figures to determine their non-human characteristics. *See id.* The court notes that this description seems to be honored more in the breach and that the word “casual” may be misleading. Customs claims that it should not be necessary to closely examine the item to determine its non-human characteristics and that “[t]he phrase ‘close examination’ may encompass the need to look closely, the need to remove the clothes of the figure, or perhaps even the need of the observer to guess as to whether a feature that appears to be non-human is, in actuality, such a feature.” *Id.* However, and in fact, close examinations seem to be regularly performed when Customs makes such determinations. *See, e.g., id.* (Customs describing the figure “Gloriana” in detail and observing that the “only non-human characteristic” of the figure is a “set of small wings attached to the cloth at her back,” which “can be easily removed from the figure without causing damage to the basic item,” and that they, “even from the rear, are not easily recognizable as wings,” in making the determination that the figure is properly classifiable as a “doll”). Indeed, the court itself by necessity undertook similar comprehensive examinations when determining the correct classification of the items at issue in this case. *See* discussion *infra*. The classification decision must be a carefully considered one and so long as Customs performs the casual observer test as it has done in the past it need not perform, pursuant to this opinion, any examination stricter. When it is readily apparent to a “casual observer” that a toy item (given its equipment, accessories, costumes, general appearance, and packaging) does not represent a human being, a “doll” classification is not warranted under the HTSUS.

The court next considers whether the items at issue here are properly classifiable as “dolls” under the HTSUS. The action figures at issue²⁴ are organized by Toy Biz in various assortments. The figures in assortments numbered 4900 I, 4900 J, 4900 K, 4900 F, 4900 G, and 4900 H are five-inch poseable (or capable of standing erect with movable joints) plastic figures, collectively referred to “X-Men” action figures.²⁵ See Stipulation (Oct. 18, 2000). Similarly, the figures in assortments 4950 E, 4950 F, and 4950 C are five-inches tall, made of plastic with movable joints, and are referred to as “X-Force” action figures. Assortments 49500 and 49710 in turn consist of ten-inch poseable plastic action figures, referred to also as “X-Force” or “X-Men.” In addition, there are “X-Men Steel Mutants” that come in assortments 49210 and 49220 and are replicas of figures found in other “X-Men” or “X-Force” assortments. The “X-Men Steel Mutants” are packaged in pairs; as, for example, “Professor X vs. Magneto.”²⁶ These figures are approximately two and a half inches tall, made of die-cast metal, fully painted, and again have movable joints. Also packaged in pairs (with an additional smaller figure included) are the so-called “Kay-Bee Collectors Editions,” assortments 49605-I and 49605-II, which consist of five-inch “X-Men” figures already found in other assortments.²⁷ Included among the “X-Men” figures is “Senyaka,” Toy Biz Item No. 49389, which is again a five-inch poseable plastic figure. Finally, a class of figures referred to as “X-Men Projectors” (assortment no. 49110) are seven-inch replicas of the “X-Men” figures of “Wolverine,” “Magneto,” and “Cyclops” included in other assortments with the addition of a mechanical “projector” housed in the body of the figure.²⁸ The “X-Men Projectors” come with “film disks” with strips of frames from the “TV Show” which can be projected onto a wall from the body of the figure.²⁹ All these “X-Men” (or “X-Force”) figures manifest human characteristics at varying degrees.

²⁴ The item known as “Jumpsie” is not an “action figure.” See discussion *infra* regarding “Jumpsie.”

²⁵ Customs agreed to classify “Beast” and “Robot Wolverine” in Assortment 4900 I and “Bonebreaker” and “Cameron Hodge” in Assortment 4900 J as “other toys.” See Letter from Attorney for Def. (April 6, 2001).

²⁶ The fact that these items are packaged in pairs has no bearing on their classification. The court rejects the position that when two or more toys are merely packaged together, the resultant product is a “toy set” under HTSUS 9503.70. *But see* Aff. of JoAnn E. McLaughlin at 10 (May 24, 2001). There have been no cases so far that construed HTSUS 9503.70. Customs, on the other hand, notes that while “some components [of a toy set] may be used independently of the rest * * * without disqualifying the classification[, * * *] integral to that concept is that the articles ‘typically’ are used together to provide amusement [and that] it is sufficient that the components of the toy set possess a clear nexus which contemplates a use together to amuse.” HQ 962327 (June 23, 2000) (quotation omitted). While here the pairing of, for example, “Professor X” and “Magneto” may have been to communicate their opposing positions in the “X-Men” storyline, this fact alone is insufficient to convert such a combination into a “toy set.” While it may not be random, such a combination is not intended to create something different than what the figures themselves stand for on their own.

²⁷ Assortment 49605-II consists of “Silver Samurai v. Robot Wolverine” with a smaller “Cyclops” figure included. Customs already agreed to classify “Robot Wolverine” as “other toy” under HTSUS 9503.49.00. See Letter from Attorney for Def. (April 6, 2001).

²⁸ The court notes that it does not have samples of all of these “X-Men Projectors.” The court, however, has samples of the figures themselves from the other assortments and samples “Bishop Projector” and “Dr. Octopus Projector” to illustrate the projection mechanism, all of which is sufficient to visualize the “X-Men Projectors” at issue.

²⁹ Previously, this Court found that the “X-Men Projectors” are not “toys sets” under HTSUS subheading 9503.70.80. See *Toy Biz III* at 1302-03. Thus, with respect to “X-Men Projectors,” the remaining issue is the same as with other “X-Men” figures, that is, whether or not they represent human beings to be classified as “dolls,” and, if not, whether they are to be classified as “toys representing animals or non-human creatures.” The *Toy Biz III* court also held that “the existence of the projector component alone is [in]sufficient to warrant the Projectors’ classification as ‘other toys.’” *Toy Biz III* at 1302. This court agrees with the *Toy Biz III* court on this point, yet the court still finds that the “X-Men Projectors” are properly classifiable as “other toys” for different reasons.

Some clearly resemble human beings, some clearly not. Most are on the borderline in that they exhibit a mix of human and non-human characteristics, such as arms and legs alongside non-human features (for example, one of the more popular figures of the series “Wolverine” has long, sharp-looking claws grafted onto his hands that come out from under his skin along with wolf-like hair and ears).

Whatever the degree is to which they resemble human beings, the court finds that these action figures do not represent human beings and are therefore not properly classifiable as “dolls” under HTSUS heading 9502. The court bases its finding on at least three observations. First, most of the figures at issue exhibit at least one non-human characteristic. The court does not agree with Customs that the few non-human characteristics the figures possess, such as claws or robotic eyes, “fall far short of transforming [these figures] into something other than the human beings which they represent” because the issue under the HTSUS is not a straight headcount of the human features a figure may possess, rather the issue is whether the figure as a whole and in a wider context represents a human being. *See Def.’s Br.* at 23. Moreover, under the more restrictive “dolls” provision of the HTSUS, even one non-human feature the figure possesses prohibits its classification as a “doll.”³⁰

Second, these Marvel characters are known in popular culture as “mutants.” That fact further informs their classification. *Cf., e.g.,* HQ 950200 (Dec. 18, 1991) (Customs recognizing that some knowledge from popular culture is necessary to identify certain figures, such as angels, devils, monsters, as “non-human”). They are more than (or different than) humans. These fabulous characters use their extraordinary and unnatural physical and psychic powers on the side of either good or evil.³¹ The figures’ shapes and features, as well as their costumes and accessories, are designed to communicate such powers. For example, “Storm” (a tall and thin figure with white mane-like hair and dark skin) in assortment 4900 K has a lightening bolt as an accessory, reflecting the character’s power to summon storms at will. “Rictor” in assortment 4950 E which has a human appearance but comes with a built-in wheel in the back which when turned makes the figure vibrate and thus is designed to simulate Rictor’s “power to generate earthquake-like vibrations.” “Pyro” in assortment 4950 E has a costume that, with two long

³⁰ By the same token, an angel figure, for example, may have all of the human features, except a pair of wings on its back (which may or may not be visible to an observer from the front), yet not be a “doll” under the HTSUS. *See* NY 894669 (Mar. 2, 1994) (Customs denying doll classification to an angel toy because “despite having an obvious human appearance, * * * [the toy] possesses an apparent non-human feature, large transparent wings”).

³¹ The back of the packaging for the duo “Professor X vs. Magneto” tells the story in synopsis:

Both Professor Charles Xavier and his friend Magnus agreed that an upsurge in mutant activity had begun—what they couldn’t agree on is how mutants and normal humans could co-exist. Believing that mutants must rule, Magnus became Magneto, the evil master of magnetism. To combat him, the telepathic Professor-X formed the X-Men, a group that would represent his dream of human-mutant cooperation!

hoses attached to it, is designed to aid the character's "mutant ability to control and shape flames."³²

Third, the "X-Men" figures are marketed and packaged as "mutants" or "people born with 'x-tra' power." That they are denoted as such by the manufacturer or the importer lends further credence to the assertion that they represent creatures other than (or more than) human beings. See *R. Dakin & Co. v. United States*, 14 CIT 797, 801, 752 F. Supp. 483, 486 (1990) (noting that "the importer's own consistent reference to the subject merchandise [by name] is a factor-albeit not the only one-to be considered for tariff classification purposes") (emphasis in the original); *Dan-Dee Imps., Inc. v. United States*, 7 CIT 241, 246 (1984) (finding reference to article on packaging by a particular name a "significant" factor).³³ For all the foregoing reasons, the "X-Men" and "X-Force" figures considered are not properly classifiable as "dolls" under HTSUS heading 9502.

If these figures are not "dolls" under HTSUS heading 9502, then they must fall into the category of "other toys" under HTSUS heading 9503. See Explanatory Note 95.03, HTSUS.³⁴ After determining the proper heading, the court may next inquire under which subheading the items are properly classifiable. See GRI 1 & 6, HTSUS. In particular, this court finds that the action figures at issue are properly classifiable under HTSUS subheading 9503.49.00, "Toys representing animals or non-human creatures (for example, robots and monsters) and parts and accessories thereof." A number of the figures exhibit likenesses to robots or monsters. For example, they have robotic features, such as artificial eyes or limbs, or monster-like features, such as exaggerated muscle tone and large, sharp-looking teeth. Cf. *Minnetonka Brands, Inc. v. United States*, 24 CIT ____, ____, 110 F. Supp. 2d 1020, 1029 n.5 (2000) (finding that the containers in the shape of the well-recognized children's character "Ernie" is properly classifiable under HTSUS 9503.49.00 rather than as plastic bottles because "Ernie's cartoon-like figure, orange complexion, red button nose, and oval head [is] a sufficient basis for finding him a 'non-human creature'").

More importantly for the purposes here, the category "mutants" is like the categories of "robots" or "monsters." The categories of "robots," "monsters," and "mutants" are all, even if humanoid, extra-human (or non-human) categories of being. A "robot" is a "machine (sometimes resembling a human being in appearance) designed to func-

³² In the rare instances that a figure seems to exhibit no non-human characteristics, its "mutant" nature is communicated otherwise. For example, "Longshot" in assortment 4900 F looks like a young man with blond long hair who is equipped with knives, and wears unusual clothing. Longshot has extraordinary abilities at par with the other "X-Men" figures (as provided for on its packaging):

Once a slave to the extradimensional tyrant Mojo, Longshot eventually escaped, came to Earth and joined forces with the X-Men. Armed with razor-sharp throwing knives, his combined abilities of amazing agility and incredible luck allow him to take on the fiercest foes.

³³ The court does not wish to imply that any toy designated by the manufacturer/importer as "non-human" can escape the "doll" designation under the HTSUS. Here, the figures are not merely packaged as such, but known to anybody familiar with the Marvel Comics characters as "mutants."

³⁴ Any toy not classifiable as a "doll" or a "wheeled toy" falls under the "other toys" category. It goes without saying that these items are not "wheeled toys;" nor is such an interpretation urged.

tion in place of a living agent.” 14 OED at 7. A “monster” is “[s]omething extraordinary or unnatural; a prodigy, a marvel.” 9 OED at 1036–37. A “mutant” is an “individual (or, formerly, a species or form) which has arisen by or undergone mutation, or which carries a mutant gene (in *Science Fiction*, usu[ally] an individual with freak or grossly abnormal anatomy, abilities, etc.).” 10 OED at 145–46. The first meaning of “mutation” is the “action or process of changing; alteration or change in form or qualities.” *Id.* at 146–47. Thus, a “mutant” is someone (possibly originally belonging to human species) who has undergone change and become something other than human. Especially, in science fiction, a “mutant” is someone with an extraordinary appearance or abilities, such as the figures at issue here. Since HTSUS subheading 9503.49.00 leaves open the set of those that can be classified as “toys representing animals or non-human creatures (for example, robots and monsters),” it is clear that the intention was to include other categories of non-human creatures that are not necessarily enumerated in the subheading. Thus, to include “mutants” under this subheading is perfectly appropriate.

The court next turns to the more difficult classification of the action figures referred to as “Fantastic Four.” The assortment 45100 is comprised of the “Fantastic Four” action figures “Black Bolt,” “Mole Man,” “Terrax,” “Mr. Fantastic,” and “Silver Surfer.” The plastic figures are five-inch tall, poseable, and humanoid in shape. On their packaging, the characters are not referred to as “mutants” or are not known in popular culture as “mutants.” They are, however, known to have extraordinary, “super-human” abilities. “Mr. Fantastic” is the “leader of the super-human quartet known as the Fantastic Four,” as described on the “Mr. Fantastic” figure’s packaging. The character can “stretch himself into almost any shape.” Accordingly, the “Mr. Fantastic” figure has stretchable arms made of soft plastic. “Black Bolt,” despite resembling a human, has wings attached to its arms and is described as belonging to “Inhumans.” “Terrax” has a grey skin color signifying that the character’s body is made of a “living stone-like substance.” “Silver Surfer,” although once human, has been transformed by “the power cosmic,” and the figure’s entire body along with its surfboard is consequently metallic.

Accordingly, the court finds that the four “Fantastic Four” figures considered above do not represent human beings and are thus not classifiable as “dolls” under HTSUS heading 9502. They are properly classifiable as “toys representing animals or non-human creatures (for example, robots and monsters),” under HTSUS subheading 9503.49.00. The last figure in this series is truly a close call. “Mole Man” is described as both being human and having an “odd appearance, * * * extraordinary intelligence, cunning, and fighting prowess with his staff.”³⁵ The

³⁵ The sample of “Mole Man” before the court has purple hair which this opinion does not consider. In the pictures of “Mole Man” on the packaging of other figures, the figure appears to support brown hair. It would be flatly arbitrary to hinge the classification of “Mole Man” on which sample the court (or Customs) had before it and what hair color such a sample would have.

figure is stout and thick, has exaggerated troll-like features, wears a green outfit and cape, and comes with a staff and a small figure of a “humanoid” creature (yellow in skin with protruding white eyes) symbolizing the fact that the character uses small humanoid creatures to “do his bidding.” Mole Man lives “within the Earth,” and consistent with the character’s subterranean nature, the figure has unusually pale skin and wears blue glasses. The character also “controls a legion of giant monsters.” Given the entire context of the figure’s appearance and fantastic story, and the fact that it is part of a series where the characters are described as “super-human,” the court finds that “Mole Man” is also not properly classifiable as a “doll” under the HTSUS and instead should be classified as an “other toy” under HTSUS subheading 9503.49.00.

The court next considers the items collectively referred to as “Spider-Man” action figures, two of which also pose more difficult determinations than the mutant figures of the “X-Men” series. “Spider-Man” action figures come in assortments numbered 47100, 47110, 47700, 47710, and 47720. They are similar to “X-Men” figures in that they are made of plastic, poseable, and five- or ten-inches tall. At issue are essentially four figures, “Hobgoblin,” “Dr. Octopus,” “Kingpin,” and “Kraven.”³⁶ Two of the figures are humanoid with at least one feature that prevents them from being representations of normal humans. The figure of “Hobgoblin” has blood red eyes with no pupils and features fangs and yellow skin. The “Dr. Octopus” figure has four tentacles coming from its back. Both Hobgoblin and Dr. Octopus have supernatural powers. The other two figures are more difficult to classify. The figure of “Kingpin” resembles a man in a suit carrying a staff. Nothing in the storyline indicates that Kingpin possesses superhuman powers. Yet, Kingpin is known to have exceedingly great strength (however “naturally” achieved) and the figure itself has a large and stout body with a disproportionately small head and disproportionately large hands. As it is, the figure is designed to communicate the legendary and freakish nature of the character. Even though “dolls” can be caricatures of human beings, the court is of the opinion that the freakishness of the figure’s appearance coupled with the fabled “Spider-Man” storyline to which it belongs does not warrant a finding that the figure represents a human being. The last figure in the “Spider Man” line is “Kraven.” According to its packaging, Kraven is the “last of a dynasty of Russian aristocrats” and “trained himself to be the greatest hunter on Earth.” He uses “secret jungle potions” to “augment[] his strength and stamina.” The character’s strength and extreme ability to hunt are reflected in the figure’s highly exaggerated muscle tone in arms and legs, its lion’s-maned vest, studded belt, and the spear that is included in the packaging. “Kraven” is the representation of a mythical or legendary creature more properly belonging to the list of robots, monsters, angels, and devils

³⁶ The court does not have before it the sample of “Dr. Octopus” and the ten-inch versions of the figures. Instead, the court has “Dr. Octopus Projector” and the five-inch versions of the other three, which are sufficient to evaluate the figures.

(which have been expanded by Customs to include trolls),³⁷ rather than being a representation of an ordinary human being. *See* 9503.49.00, HTSUS; Explanatory Note 95.03, HTSUS. Consequently, the court finds that all of the four “Spider-Man” figures before it are properly classifiable as “toys representing animals or non-human creatures (for example, robots and monsters).”³⁸

With respect to the trading cards included in the packaging of a number of figures, the court agrees with Toy Biz that they are classifiable as “accessories” of the figures within the meaning of HTSUS 9503.49.³⁹ “[N]either the HTSUS nor its legislative history defines ‘accessory.’” *Rollerblade, Inc. v. United States*, 24 CIT ____, ____, 116 F. Supp. 2d 1247, 1252 (2000). “When a tariff term is not defined in either the HTSUS or its legislative history, the term’s correct meaning is its common meaning.” *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted). To determine the common meaning of a tariff term, a “court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities.” *Id.* (citation omitted). The noun “accessory” is defined as “a thing of secondary or subordinate importance,” *Toy Biz III* at 1302 (citing *Merriam Webster’s Collegiate Dictionary* 7 (10th ed. 1997)), or “something contributing in a subordinate degree to a general result or effect; an adjunct, or accompaniment,” 1 OED at 74. Customs interprets the term “accessory” according to its common meaning and further notes that “an accessory * * *, in addition to being an article related to a primary article, is used solely or principally with that article.” *See, e.g.*, HQ 958924 (June 20, 1996). Moreover, even though “an accessory is not necessary to enable the goods with which they are used to fulfill their intended function[, it], however, must contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation).” *Id.*

Elsewhere, Customs rejected separate classification of certain “trading cards” included with a toy set, which was comprised of the trading cards, two toy figures, and a toy box called “environment.” *See* HQ 958345 (Mar. 11, 1996). Instead, Customs found that the cards are properly classifiable as “simple accessories,” which are allowed to be included in a toy set per Explanatory Notes. *See id.* In that case, the cards were depicting at least one figure contained in the set. *Id.* Customs, on the other hand, thought a separate classification of the trading cards was appropriate in the case of “X-Men” because “[a]lthough the trading

³⁷ *See* HQ 089895 (Nov. 4, 1991). *But see* DD 897488 (May 31, 1994) (Customs classifying a stuffed elf figure with “large eyes, pointed ears, a bulbous nose, puffy cheeks and a painted-on smile” as a “doll” under HTSUS 9502) (emphasis added). The court notes that in the latter case, Customs “explained” its position by stating that “elves are not non-human creatures, as defined, and thus not excluded from the doll provision.” *Id.* It is not clear how Customs reconciled classifying trolls as “other toys” and elves as “dolls.”

³⁸ *See also* HQ 957803 (Feb. 2, 1996) (Customs classifying the actual “Spiderman” figure as “other toy” on the basis that “[t]he head of the figure is clearly non-human in appearance” covered with the well-known mask of “Spiderman”).

³⁹ Customs classified the trading cards under HTSUS (1994) subheading 4911.99-6000 as “Other printed matter, including printed pictures and photographs: Other: Other: Printed on paper in whole or in part by a lithographic process,” dutiable at 0.4% *ad valorem*. *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995); HQ 957603 (Oct. 12, 1995); HQ 958039 (Mar. 8, 1996).

cards picture and describe the powers of individual action figures, each card has no connection to the figure with which it is packaged.” HQ 958039 (Mar. 8, 1996). This court finds the distinction legally insignificant. Each trading card here may not be related to that figure, but it does picture and describe a figure in the same series and is thus related to the series. The trading cards here serve the function of linking the figures in the series and, therefore, enhance the play value and use of the figures. Even though the trading cards may also be used for collecting and trading, their inclusion with the figures indicates that those are not their principal use. The inclusion of the trading cards provides additional incentive to purchase the package. Moreover, if separate classification of printed materials that generally accompany toys were encouraged in every case, that may lead to absurd results; for example, the classification of an instruction manual included with a toy item as separate “printed matter.”⁴⁰ The 9503 “other toys” (and the 9502 “dolls”) provision of the HTSUS is sufficiently broad (by virtue of including “accessories” of the articles) to also allow the inclusion of the trading cards at issue here.

Finally, the only non-action figure item before the court, “Jumpsie,”⁴¹ assortments 33200 or 33201, is properly classifiable as a “doll” under HTSUS subheading 9502.10.40, as classified by Customs.⁴² The parties agree that “Jumpsie” consists of a doll representing a girl child and a toy trampoline with other accessories, such as a toy comb for the doll, included. The doll has the ability to “jump” on the trampoline when a built-in mechanism in the doll is activated. Toy Biz argues that Jumpsie is classifiable as a “toy set” under HTSUS 9503.70.80, primarily by virtue of the inclusion of the trampoline.⁴³ *See Pl.’s Br.* at 17. Toy Biz points out that Customs described the item as a “set” and then resorted to “essential character” analysis under GRI 3(b), HTSUS, to classify the item as a “doll.” *See id.* at 18. GRI 3(b) provides in pertinent part that:

[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their *essential character*, insofar as this criterion is applicable. (emphasis added)

GRI 3(a) provides in pertinent part that:

⁴⁰ While Customs may separately classify an instruction manual which will be “repackaged” in another country with a pager cradle, a transformer, and recorded media, *see* NY E89772 (Nov. 26, 1999); when the instruction manual is already “packaged for retail sale,” it is properly classifiable as an “accessory” (to certain computer equipment), *see* HQ 089180 (Aug. 2, 1991).

⁴¹ Customs described the item as:

The “Jumpsie” doll set, identified by item nos. 33200 or 33201, is composed of a doll (not stuffed), two small pom-poms (for the doll), a small styling comb (for the doll), and a toy trampoline. Assembly of the toy trampoline involves snapping together a round plastic frame, and attaching (by 16 rubber bands) a plastic-coated textile mat measuring approximately 10½ inches in diameter. The doll measures approximately 10½ inches in height and has a battery compartment for 2 “AA” batteries (not included). When placed on the toy trampoline and switched on, the doll appears to jump on its own. When imported, the retail package is suitable for direct sale without repacking.

HQ 957688 (Oct. 11, 1995) (emphasis added).

⁴² HTSUS subheading 9502.10.40 reads: “Dolls representing only human beings and parts and accessories thereof: Dolls, whether or not dressed: Other: Not over 33 cm in height.”

⁴³ HTSUS subheading 9503.70.80 reads: “Other toys, put up in sets or outfits, and parts and accessories thereof: Other: Other.”

when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

In classifying “Jumpsie” as a doll, Customs reasoned that the item met the criteria for a “set” specified in Explanatory Note X to GRI 3(b),⁴⁴ but pursuant to Explanatory Note VIII to GRI 3(b), the item’s “doll” component lent its “essential character” to the item by being of “greatest bulk, weight, and value.” HQ 957688 (Oct. 11, 1995); Explanatory Note VIII to GRI 3(b) (providing that for essential character analysis the item’s “bulk, quantity, weight or value” is a factor). Customs also explained that while “the doll’s ‘jumping’ ability would be adversely affected by the toy trampoline’s absence, * * * [w]ithout the toy trampoline, the article would remain a doll (capable of at least some movement) and its accessories.” HQ 957688 (Oct. 11, 1995). Customs’ reasoning is persuasive; the “doll” component lends the item “Jumpsie” its “essential character.” While the doll would still have value as a plaything without the trampoline, the trampoline would not have the same value without the doll. The toy trampoline is merely an accessory that enhances playing with the doll. *Cf. Toy Biz III* at 1302 (“A standard dictionary definition of ‘accessory’ is ‘a thing of secondary or subordinate importance.’”) (citing *Merriam Webster’s Collegiate Dictionary* 7 (10th ed.1997)); 1 OED at 74 (defining “accessory” as “something contributing in a subordinate degree to a general result or effect; an adjunct, or accompaniment”). Customs may describe a toy article as a “set” and still reject the “toy set” classification under HTSUS 9503.70.80. Consistent with the court’s earlier observations about the “toy set” provision of the HTSUS, no component of a “toy set” should dominate over another. Here, the “doll” component of the article clearly dominates (in terms of the place it has in the set) over the non-doll items in the set, such as the trampoline.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff’s motion for summary judgment with respect to action figures (alternately referred to as “X-Men,” “X-Force,” “X-Men Projectors,” “X-Men Steel Mutants,” “Spider-Man,” and “Fantastic Four”) is granted and Defendant’s cross-motion is denied. Plaintiff’s motion for summary judgment with respect to trading cards is granted and Defendant’s cross-motion is denied. Plaintiff’s motion for summary judgment with respect to the item “Jumpsie” is denied and Defendant’s cross-motion is granted.

A separate judgment will be entered accordingly.

⁴⁴ Explanatory Note X to GRI 3(b) provides that for purposes of this rule, the term “goods put up in sets for retail sale” means goods that:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings * * *;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

(Slip Op. 03-3)

THERMACOTE WELCO CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93-08-00431

[On cross-motions as to refund of duties voluntarily deposited, summary judgment for the defendant.]

(Decided January 7, 2003)

Wigman, Cohen, Leitner & Myers, P.C. (Edward J. Farrell) for the plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service (*Chi S. Choy*) of counsel, for the defendant.

OPINION

AQUILINO, *Judge*: In this action, the plaintiff importer seeks relief from denial by the U.S. Customs Service of a request for refund of duties voluntarily deposited to the extent those deposits proved to be in excess of its liability therefor, as determined by the International Trade Administration, U.S. Department of Commerce (“ITA”).

I

Following joinder of issue, the parties have interposed cross-motions for summary judgment. They have done so in the belief that their pleadings show that there is no genuine issue as to any material fact within the meaning of USCIT Rule 56(c) and that each is entitled to judgment as a matter of law. Plaintiff’s Statement of Material Facts Not in Dispute, submitted pursuant to Rule 56(i) [since relettered (*h*)], avers, among other things, that:

1. The [twelve] entries in question consist of low-fuming brazing rod (LFB) from New Zealand.
2. At the time of each of these entries there was in place a suspension of liquidation of entries of LFB from New Zealand pursuant to outstanding antidumping and/or countervailing duty orders.
3. The U.S. Customs Service failed to collect the deposit of countervailing and/or antidumping duties required by the relevant suspension order on each of the entries in question.
4. At the request of * * * Customs * * * plaintiff voluntarily tendered deposits of countervailing and/or antidumping duties * * * with the understanding that the entries were not liquidated.
5. The entries were in fact mistakenly liquidated * * *.
6. The voluntarily tendered deposit amounts exceeded Plaintiff’s antidumping/countervailing duty liability as finally determined by the U.S. Department of Commerce.
7. * * * Customs * * * refused to refund the excess of Plaintiff’s deposits over its liabilities.

Defendant’s response to this statement admits paragraph 1 and denies paragraph 6. That response also:

2. Admits that the entries in issue were made and there were outstanding antidumping and/or countervailing duty orders directed

to low-fuming brazing rod from New Zealand; denies that liquidation of the entries was suspended * * *.

3. Admits that the Customs Service did not collect antidumping or countervailing duties on the entries in issue; avers that the plaintiff or its broker, D.J. Powers, indicated on the entry summaries (CF7501) that the entries were consumption entries not subject to antidumping or countervailing duties; avers further that the plaintiff or its broker did not deposit antidumping or countervailing duties on the entries in issue when the entry summaries were filed * * *.

4. Admits that at the request of * * * Customs * * * the plaintiff voluntarily tendered antidumping or countervailing duties for Entry Nos. 85-164232-9 and 85-164230-3; denies there was any understanding between * * * Customs * * * and the plaintiff's broker that the entries had not been liquidated at the time the voluntary tenders were made * * *.

5. Admits that the entries were liquidated on the dates stated in [plaintiff's] Exhibit A; denies that the entries were mistakenly liquidated.

* * * * *

7. Admits that * * * Customs * * * refused to allow the refunds requested by the plaintiff; denies the remainder of the statement.

Defendant's own Statement of Material Facts Not in Dispute adds that:

2. Neither antidumping nor countervailing duties were deposited when the entry summaries were filed[;] estimated regular duties were deposited[] for the entries in issue.

3. An entry code of "01" appears in Box 2 on each entry summary (CF7501) for the entries in issue.

4. A bulletin notice of liquidation for each entry in issue appeared on or about the date of liquidation.

None of these averments is controverted by the plaintiff. Indeed, after reviewing the papers in this action, the court concludes that there is no issue of material fact which requires trial. The dispositive issue(s) are matters of law that can be resolved by this opinion. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original).

The thrust of defendant's cross-motion for summary judgment is that this action be dismissed for lack of subject-matter jurisdiction. Sometime subsequent to entry and to liquidation, Customs requested that plaintiff's broker, D.J. Powers Company, Inc., tender voluntarily antidumping/countervailing duties at the deposit rates on at least some of the entries¹, whereupon monies were advanced for all twelve entries now at bar. *See* Plaintiff's Brief, Exhibit B.

¹The Customs Import Specialist in the port of entry declares:

Handwritten notes on the entry summaries for Entry Nos. 85-164232-9 and 85-164230-3 indicate that I requested voluntary tender for these two entries. There were no such notes on the entry summaries for Entry Nos. 85-164231-6 and 86-122741-7.

Defendant's Cross-Motion for Summary Judgment, Declaration of Conchita L. Fielding, p. 2, para. 6.

The plaintiff claims to have learned that those entries had been liquidated on the various dates listed on the schedule of entries² when they and many others were processed for refunds in conjunction with an administrative review conducted by the ITA pursuant to 19 U.S.C. §1675. See Plaintiff's Brief, p. 2. Its request for refunds of excess amounts tendered was denied by Customs on the ground that "no regulatory authority exist[ed] for processing the[m] for a refund."³ The plaintiff thereupon lodged a protest of this decision with Customs, which was denied. This action ensued.

II

The Court of International Trade has exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930. 28 U.S.C. §1581(a). See also 28 U.S.C. §2631(a). The plaintiff pursues this action under 19 U.S.C. §1520(c)(1) or, in the alternative, under section 1520(a)(2). Those provisions of that act were as follows at the times of entry, liquidation and tender of additional duties herein:

§ 1520. Refunds and errors

(a) Cases in which refunds authorized

The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

* * * * *

(2) Fees, charges, and exactions.—Whenever it is determined in the manner required by law that any fees, charges, or exactions, other than duties and taxes, have been erroneously or excessively collected; * * *.

* * * * *

(c) Reliquidation of entry

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; * * *.

While the court may have subject-matter jurisdiction over an action such as this pursuant to 28 U.S.C. §1581(a)⁴, when, as here, the government contests that jurisdiction, the plaintiff must establish that the statutory requirements have been satisfied.⁵

² See Plaintiff's Brief, Exhibit A.

³ Defendant's Cross-Motion for Summary Judgment, Letter of Customs Import Specialist Brenda H. Gibson.

⁴ See, e.g., *Everflora Miami, Inc. v. United States*, 19 CIT 485, 885 F.Supp. 243 (1995), *aff'd*, 86 F.3d 1174 (Fed.Cir. 1996).

⁵ *Id.*

A

The plaintiff takes the position that its section 1520(c)(1) protest was timely. It argues that because liquidation occurred prior to the tender of the antidumping/countervailing-duty deposits, the liquidation is irrelevant. Instead, the date of exaction is controlling as a “statutory alternative to the date of liquidation”. Plaintiff’s Brief, p. 4. Furthermore, that moment of exaction in this matter was not the date of the voluntary tender(s), rather

the date on which Customs informed Plaintiff that it would not refund the difference between the countervailing and antidumping deposits made by Plaintiff and the countervailing and antidumping liabilities finally found by the Department of Commerce.

Id. The plaintiff attempts to rely on *New Zealand Lamb Co. v. United States*, 40 F.3d 377 (Fed.Cir. 1994). In that case, estimated duties had been deposited with the Service for each of eight entries, as well as monies estimated to cover countervailing duties. Upon liquidation, the latter were found to be greater than those estimated. Customs marked the entries as liquidated for the higher duty amounts and posted the appropriate bulletin notices for each. The company tendered the additional countervailing duties but not interest that had accrued on them. After the 19 U.S.C. §1514 90-day period of limitation had run, the Service billed New Zealand Lamb for the interest, which was paid. Ninety days later, the company filed a protest with Customs, which denied it. The Court of International Trade thereafter concluded that the Service’s failure to charge the interest by the time of the liquidation meant that the entries liquidated without interest were final. *New Zealand Lamb Co. v. United States*, 16 CIT 1039 (1992). The court of appeals vacated that ruling, concluding that “there was no decision regarding interest—so as to trigger the running of the ninety-day limitations period—until Customs actually billed New Zealand Lamb for interest on March 23, 1990”. 40 F.3d at 381.

*** [T]hat interest on the underpayment of duties is a charge ***. We do not see how there can be a decision on a charge—at least for purposes of starting the running of a limitations period—until the party levying the charge announces that the charge is being levied and states the amount of the charge, or the method of computing the charge. In the case of interest that means there is no decision until the party being assessed either is informed of the amount of interest that is due or is told what the rate of interest to be applied against the principal amount is. Until this is done, the party assessed is not informed of all elements of the charge: liability and quantum, either or both of which it may wish to protest.

Id. at 382 (citations, footnote omitted).

The defendant responds at bar that “*New Zealand Lamb* is factually different from this case, and its *ratio decedendi* cannot be applied here.” Defendant’s Brief in Reply, p. 2 (italics in original). Stated another way, this court “lacks jurisdiction because the protest (or request to reliqui-

date) was untimely, and Thermacote's claim otherwise fails to satisfy the requirements of §1520(c)(1)." Defendant's Brief, p. 3.

(1)

It is appropriate to note that the courts have concluded that the provisions of section 1520 are "not remedial for every conceivable form of mistake or inadvertence adverse to an importer, but rather * * * offer[] 'limited relief in the situations defined therein'". *Godchaux-Henderson Sugar Co. v. United States*, 85 Cust. Ct. 68, 74, C.D. 4874, 496 F.Supp. 1326, 1331 (1980)(emphasis in original), quoting *Phillips Petroleum Co. v. United States*, 54 CCPA 7, 11, C.A.D. 893 (1966). That is,

[s]ection 1520(c)(1) does not afford a second bite at the apple to importers who fail to challenge Customs' decision within the 90-day period set forth in § 1514. * * * We emphasize that under no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514.

AT&T International v. United States, 18 CIT 721, 726, 861 F.Supp. 95, 100 (1994), quoting *ITT Corp. v. United States*, 24 F.3d 1384, 1387 n. 4 (Fed.Cir. 1994). The regulations promulgated in conjunction with that statute provided, in pertinent part:

Correction of clerical error, mistake of fact, or inadvertence.

(a) *Authority to review and correct.* Even though a valid protest was not filed, the district director, upon timely application, may correct pursuant to * * * 19 U.S.C. 1520(c)(1)[] a clerical error, mistake of fact, or other inadvertence meeting the requirements of paragraph (b) of this section, by reliquidation or other appropriate action.

(b) *Transactions which may be corrected.* Correction pursuant to * * * 19 U.S.C. 1520(c)(1)[] may be made in an entry, liquidation, or other Customs transaction if the clerical error, mistake of fact, or other inadvertence:

- (1) Does not amount to an error in the construction of a law;
- (2) Is adverse to the importer; and
- (3) Is manifest from the record or established by documentary evidence.

(c) *Limitation on time for application.* A clerical error, mistake of fact, or other inadvertence meeting the requirements of paragraph (b) of this section shall be brought to the attention of the district director at the port of entry * * * within 1 year after the date of liquidation or execution. * * *

19 C.F.R. §173.4 (1988).

Two different types of transactions require the court's consideration herein, namely, the entering of plaintiff's merchandise without the payment of antidumping/countervailing duties or marking on the Customs Forms 7501 of the liability therefor; and then later the tendering of monies therefor in excess of that liability. While the first type is manifest from the record and did not develop from an error in the construction of

a law within the meaning of the above-quoted statute and regulations, clearly, it was not adverse to the importer and therefore eligible for correction under 19 U.S.C. §1520(c)(1), *supra*. Indeed, the plaintiff presses its subsequent, generous tender(s), which satisfy all three substantive standards for correction.

(2)

Hence, the plaintiff had to bring that predicament of its own making to the attention of Customs within one year after the date of liquidation. Here, there is no dispute that the entries were liquidated on the dates listed in plaintiff's exhibit A⁶, and there also can be no dispute on the record developed as to whether the Service was duly notified of the problem within a year of any of those dates. Clearly, Customs was not. Moreover, according to the parties' Rule 56 statements quoted above, "plaintiff voluntarily tendered" the funds now in controversy. Given their concurrence, it is indeed difficult to discern any actionable exaction within the meaning of 19 U.S.C. §1520, as discussed in part B of this opinion, *infra*.

Assuming nonetheless in this section of the opinion that "the request of * * * Customs" was the equivalent of an exaction⁷, plaintiff's pursuit of relief still appears to have commenced beyond the statutory period of limitation. In fact, as indicated above, the plaintiff purports to consider the start of that time to have been the date of the Service's refusal to make any refund of the excess monies rather than the date of the request for the tender of additional duties. But it offers no precedent in support of this thesis, nor has this court uncovered any. While both *New Zealand Lamb, supra*, and the subsequent case *Castelazo & Associates v. United States*, 126 F.3d 1460 (Fed.Cir. 1997), involved importer payment of interest upon delayed duties, which the court of appeals held to be a separate, protestable act when and if Customs

(i) informs the importer that interest is due and (ii) sets forth either the amount of interest that is due or the method of calculating that amount in terms of the rate⁸,

⁶According to 19 C.F.R. §159.9(c)(1) (1988), generally the bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. The entries for which the bulletin notice of liquidation has been prepared shall be stamped "Liquidated," with the date of liquidation, which shall be the same as the date of the bulletin notice of liquidation. This stamping shall be deemed the legal evidence of liquidation.

See *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 13 CIT 54, 706 F.Supp. 892, *aff'd*, 885 F.2d 858 (Fed.Cir. 1989); *LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 1426, 991 F.Supp. 668, 674 (1997).

The importer bears the burdens of examining all notices posted to determine whether its goods have been liquidated and of lodging any protest thereof in a timely manner. See, e.g., *Omni U.S.A., Inc. v. United States*, 11 CIT 480, 483, 663 F.Supp. 1130, 1133 (1987), *aff'd*, 840 F.2d 912 (Fed.Cir.), *cert. denied*, 488 U.S. 817 (1988). This burden is bolstered by the presumption that "public officials perform their duties in a manner consistent with law". *Commonwealth Oil Refining Co. v. United States*, 60 CCPA 162, 167, C.A.D. 1105, 480 F.2d 1352, 1356 (1973). See also *INS v. Miranda*, 459 U.S. 14, 18 (1982).

⁷The defendant attempts to undermine any such assumption for a number of reasons, to wit:

* * * Customs' letter was not a charge or exaction because it did not assess a specific sum of money relating to the entries in issue. *Halperin Shipping Co. v. United States*, 14 CIT 438, 442, 742 F.Supp. 1163, 1167 (1990). Moreover, because Thermacote's payment of the duties in issue was voluntary * * *, it was not an exaction. Furthermore, a refusal by Customs to refund duties has been held not to be a charge or exaction. *Carlingswitch v. United States*, 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981).

Defendant's Brief, pp. 4-5 (footnote omitted).

⁸*New Zealand Lamb Co. v. United States*, 40 F.3d 377, 382 (Fed.Cir. 1994); *Castelazo & Associates v. United States*, 126 F.3d 1460, 1463 (Fed.Cir. 1997).

that degree of Service circumspection is not found in its simple, even apologetic, denial of refunds due to lack of any regulatory authority.⁹ Ergo, to be effective, any administrative protest had to have been lodged by the plaintiff much sooner in order to establish now this court's subject-matter jurisdiction hereof.

B

Since enactment of The Customs Courts Act of 1970, Pub.L.No. 91-271, 84 Stat. 274 (1970), the only method of challenging an allegedly invalid or illegal liquidation is through a timely administrative protest and subsequent court action, if necessary. *E.g.*, *United States v. A.N. Deringer, Inc.*, 66 CCPA 50, C.A.D. 1220, 593 F.2d 1015 (1979); *LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 1426, 991 F.Supp. 668, 674 (1997) ("whether legal or illegal, a liquidation not protested [under 19 U.S.C. §1514] within 90 days becomes final as to all parties"). The same approach to finality applies to 19 U.S.C. §1520. *E.g.*, *Omni U.S.A., Inc. v. United States*, 840 F.2d 912 (Fed.Cir.), *cert. denied*, 488 U.S. 817 (1988).

Furthermore, while it is clear that an excess of duties has been collected from the plaintiff, section 1520(a)(2), *supra*, on its face applies to fees, charges and exactions "other than duties", and the courts have declined to hold the refusal to refund a voluntary tender of the latter to be a charge or exaction within the meaning of the Tariff Act. *E.g.*, *Tikal Distributing Corp. v. United States*, 21 CIT 715, 718, 970 F.Supp. 1056, 1060 (1997); *Carlingswitch, Inc. v. United States*, 85 Cust.Ct. 63, 66, C.D. 4873, 500 F.Supp. 223, 227 (1980), *aff'd*, 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981). *Cf. Brother Int'l Corp. v. United States*, 27 CIT ____, ____, Slip Op. 03-1, p. 7 (2003) ("[t]he question generally turns on whether the payment is truly voluntary").

III

In view of the foregoing, plaintiff's motion for summary judgment cannot be granted. Defendant's cross-motion therefore must be, with summary judgment in its favor entered accordingly.

⁹See note 3, *supra*.

(Slip Op. 03–4)

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 January 7, 2003)

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*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, 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). This action is before the Court on cross motions for summary judgment made by Plaintiff and Defendant pursuant to USCIT Rule 56. For the reasons discussed below, the Court finds that the subject merchandise is properly classified under heading 4412.29.50, 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 perpendicular 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

¹Liquidation constitutes the final appraisal of the value of imported merchandise and determination of the appropriate classification and rate of duty. See 19 U.S.C. § 1500; 19 C.F.R. § 159.1 (2001).

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.⁴ See Pl.’s Statement of Facts at 5; Def.’s Resp. to Pl.’s Statement of Facts ¶ 21. The center layer consists of spruce slats or strips measuring approximately 5/16 inch thick, 1-1/16 inch wide, and 5-9/16 inch long. The slats or strips are laid lengthwise with minor but visible spacing between each piece and with their grain running perpendicular to the grain of the wood comprising the top and bottom layers. Order of Nov. 18, 2002.⁵ 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 bottom layer is perpendicular to the grain of the

² “Laminate” means “[t]o bond together two or more pieces of wood to make a single piece, using adhesive and pressure.” Random Lengths Publ’ns, *Terms of the Trade* 192–93 (4th ed. 2000). See also *Webster’s II New Riverside University Dictionary* 674 (1988) (“Webster’s”) (defining “laminated” 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 indicates that the top layer of the flooring is made of hardwoods “such as oak, ash, maple, or merbau.” Pl.’s Statement of Facts at 5. Botanically, hardwoods are angiosperms, which means that “the seeds are encased in the ovary of the flower.” U.S. Dep’t of Agriculture, Forest Service, Forest Prods. Laboratory, *Wood Handbook* ch.1 at 2 (1999) (“*Wood Handbook*”); see also *The American Heritage Dictionary of the English Language* 71 (3rd ed. 1996). Coniferous woods, by contrast, are gymnosperms, meaning that the seeds of the tree are not encased within an ovary. *Wood Handbook*, ch.1 at 2; *American Heritage Dictionary* at 808. Spruce is a coniferous wood. See, e.g., *American Heritage Dictionary* at 1745. Both parties to this action implicitly acknowledge that the hardwood layer of the subject merchandise is non-coniferous. See Pl.’s Statement of Facts at 2–3 (asserting that the subject merchandise is properly classified as “nonconiferous wood flooring”); Def.’s Resp. to Pl.’s Statement of Facts ¶ 3 (asserting that the subject merchandise may be classified as plywood with at least one outer ply of non-coniferous wood).

⁵ The Court by order of February 25, 2002, Slip Op. 02–21, originally granted Defendant’s motion for summary judgment and denied Plaintiff’s cross-motion. By order of July 30, 2002, the Court granted Defendant’s motion for rehearing and Plaintiff’s cross-motion for rehearing, and withdrew and vacated Slip Op. 02–21. By order of November 18, 2002, the Court resolved the parties cross-motions for an order specifying that no substantial controversy appears to exist as to the composition and design of the core layer of the subject imported flooring.

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 plywood, 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 and similar laminated wood,” and argues that the flooring meets the definition of plywood. Defendant argues in the alternative that even if the flooring is not plywood it is still classifiable as “veneered panels” or “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

Customs’ classification is subject to *de novo* review by this Court pursuant to 28 U.S.C. § 2640. 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. *Id.*

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. In a challenge to a tariff classification, summary judgment is appropriate when the dispute involves only the proper classification of the subject merchandise, not the nature of the merchandise itself. *Bausch & Lomb, Inc.*, 148 F.3d at 1365–66. 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 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 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).”⁶ Explanatory Notes at 622. These broad categories separate laminated products from products that are merely shaped.

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

⁶The 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.

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”⁷ 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 piece of rigid material, as wood adapted for a special use,” *Webster’s* at 185; “[a]ppplied to converted *softwoods* over 4 in. wide and less than 2 in. thick, and to *hardwoods* of any width and up to 1 ¼ 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

⁷ 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).

wood that is relatively wide in comparison to its thickness,” but also as “a composition material fabricated in large sheets; for example, plaster-board 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 loadbearing 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 1 ½ 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 court found that the lamination and assembly operations performed on the boards at issue did not constitute a further manufacturing process or 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 onepiece material”).

In *Border Brokerage Co. v. United States*, 52 Cust. Ct. 204 (1964), as in *McKenzie*, 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 still could 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 4410, 4411 or 4412 may be worked to form the shapes provided for in respect of the goods of heading 4409, 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.

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 621. 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; “[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,” *Har-court*; “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).

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 particle-board.’ 2. A sheet of paper,” *Terms of the Trade* at 298 (See pp. 26–27, *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;⁸ “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*.

The definitions indicate that “plywood” is composed of thin sheets of wood glued together with the grains of adjacent layers at right angles. The definitions of “veneer” and “sheet” indicate that the layers forming plywood are “continuous expanses” of material of a constant thickness. According to the Explanatory Note for heading 4408, HTSUS, 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.)”

⁸ “Film” is defined 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.” *McGraw-Hill Dictionary of Scientific and Technical Terms* at 753.

The subject merchandise consists of layers of wood glued together with the grains of adjoining layers at right angles. The center layer of the flooring, however, is comprised of slats or strips with “minor but visible spacing between each piece.” Order of Nov. 18, 2002. The separate slats cannot constitute a “sheet” because they do not form a continuous surface or expanse. As the center layer does not meet the definition of a “sheet,” the flooring cannot be considered plywood.

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* pp. 23–24. Under the HTSUS, veneer is no thicker than 6 mm., see heading 4408, HTSUS, 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,” *American Heritage Dictionary* at 1307; “[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 is attached. *Building Engineering*. [T]he lowermost part of a wall or other building member,” *Harcourt*; “[t]he lowest member of anything,” *Corkhill, The Complete 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.⁹ 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.¹⁰

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-

⁹“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).

¹⁰The 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.¹¹ *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 Britannica*, 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

¹¹ 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. As the hardwood top layer of the flooring panels provides an outer layer of non-coniferous wood, see *supra* note 4, the merchandise is properly classified under heading 4412.29.50, “Other, with at least one outer ply of non-coniferous wood: Other.”