

Decisions of the United States Court of International Trade

Slip Op. 05–95

CONAIR CORPORATION, PLAINTIFF, v. UNITED STATES, DEFENDANT

Before: Richard K. Eaton, Judge

Court No. 02–00383

[Plaintiff's motion for summary judgment granted; Defendant's cross-motion for summary judgment denied]

August 12, 2005

Neville Peterson LLP (Michael K. Tomenga, Catherine Chess Chen, George W. Thompson and Lawrence J. Bogard) for Plaintiff Conair Corporation.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office (*James A. Curley*); *Yelena Slepak*, of counsel, Office of Assistant Chief Counsel for United States Bureau of Customs and Border Protection, for Defendant United States.

OPINION

Eaton, *Judge*: Before the court are cross-motions for summary judgment pursuant to USCIT R. 56. By its motion, plaintiff Conair Corporation (“Conair”) challenges the classification of its tabletop fountains by the United States Customs Service (“Customs”)¹ under the Harmonized Tariff Schedule of the United States (2000) (“HTSUS”). Customs classified the tabletop fountains (“Serenity Ponds”) under HTSUS subheading 3926.40.00 as “Other articles of plastics and articles of other materials of headings 3901 to 3914 . . . Statuettes and other ornamental articles,” subject to a tariff rate of 5.3 percent *ad valorem*. Conair argues that the merchandise

¹ Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Reorganization Plan Modification for the Dep't of Homeland Security, H.R. Doc. 108–32 at 4 (2003).

is properly classifiable under HTSUS subheading 8413.70.2004² as “Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof; . . . Other centrifugal pumps . . . Other . . . Submersible pumps,” subject to no tariff. By its cross-motion, defendant, the United States (“Government”), on behalf of Customs, maintains that the merchandise is properly classified pursuant to HTSUS subheading 3926.40.00 and asks the court to deny Conair’s motion and dismiss this action. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000). For the reasons set forth below, the court grants Conair’s motion for summary judgment and denies that of the United States.

BACKGROUND

Plaintiff is an importer of seven different models of Serenity Ponds. On November 4, 1999, it submitted a letter to the Customs National Commodity Specialist Division (“NCS”) in New York requesting a tariff classification ruling for a specific model of these tabletop fountains. Ultimately the NCS classified the merchandise under HTSUS subheading 3926.40.00. *See generally New York Letter NY F83276* (March 15, 2000).

On July 10, 2000, Conair filed a Request for Reconsideration of Customs’ classification, asserting that the Serenity Ponds were properly classifiable under HTSUS subheading 8413.70.20. Customs denied this request. *See Headquarters Ruling Letter HQ 964361* (August 6, 2001) (“HQ 964361”); *see also id.* at 5 (“After a careful consideration of this issue, we determine that the calming pond is essentially a plastic decorative article. Accordingly, based upon our determination that the essential character of the calming pond is as a [sic] article of plastic, we find that it is provided for in heading 3926. . . .”). Thereafter, Conair timely filed protests challenging Customs’ classification of the subject merchandise. Customs denied each of the protests and Conair commenced the present action.

STANDARD OF REVIEW

This court may resolve a classification issue by means of summary judgment. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). 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

²Conair, in its briefs, claims the Serenity Ponds are properly classified under HTSUS subheading 8413.70.2040. The court, however, believes that Conair intended to cite to subheading 8413.70.2004, which encompasses “[s]ubmersible pumps.” *See Conair Corp. v. United States*, Court No. 02-00383 at 2 (May 27, 2002) (summons identifying “protest claim” as “8413.70.2004.”); *Conair Corp. v. United States*, Court No. 02-00383 at 7-8 (Aug. 12, 2002) (complaint stating “Plaintiff requests [that] . . . the U.S. Customs Service . . . reliquidate the subject entries under subheading 8413.70.2004 of the HTSUS. . .”).

genuine issue as to any material fact. . . .” USCIT R. 56(c). Summary judgment of a classification issue “is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb*, 148 F.3d at 1365 (citing *Nissho Iwai Am. Corp. v. United States*, 143 F.3d 1470, 1472 (Fed. Cir. 1998); *IKO Indus., Ltd. v. United States*, 105 F.3d 624, 626–27 (Fed. Cir. 1997); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994)). Where jurisdiction is predicated on 28 U.S.C. § 1581(a), Customs’ interpretation of an HTSUS tariff term, a question of law, is subject to *de novo* review. See 28 U.S.C. § 2640(a); see also *E.T. Horn Co. v. United States*, 27 CIT ___, ___, Slip Op. 03–20 at 4 (Feb. 27, 2003) (quoting *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466–67 (Fed. Cir. 1998)). The court employs a two-step process when analyzing a classification issue: “first, construe the relevant classification headings; and second, determine under which of the properly construed tariff terms the merchandise at issue falls.” *Bausch & Lomb*, 148 F.3d at 1365 (citing *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)).

DISCUSSION

Here, “there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb*, 148 F.3d at 1365. The parties agree that the Serenity Ponds: (A) “are designed to ‘create a tranquil atmosphere at home or in the office,’ ” Def.’s Resp. to Pl.’s Statement of Material Facts (“Def.’s Resp. Facts”) para. 1; (B) are intended to appeal to the consumer’s visual and auditory senses, Def.’s Statement of Material Facts Not in Dispute (“Def.’s Mat. Facts”) para. 2; Pl.’s Resp. to Def.’s Statement of Material Facts Not in Dispute (“Pl.’s Resp. Facts”) para. 2; and (C) are “comprised of: (1) a water reservoir or base; (2) an electric, submersible, centrifugal pump that sits in the base; (3) plastic tubing; (4) a power cord; and (5) various objects, such as simulated rocks, simulated bamboo, natural polished stones, through which and/or over which pumped water flows.”³ Statement of Material Facts Not in Dispute (“Pl.’s Mat. Facts”) para. 1; Def.’s Resp. Facts para. 1.

³ The parties also agree that the “bowl-shaped base” for each of the fountains is made out of plastic. See Statement of Material Facts Not in Dispute (“Pl.’s Mat. Facts”) para. 2; Def.’s Resp. Facts para. 2 (stating that the Government “[a]dmits the remaining allegations of this paragraph to the extent supported by the product literature in Plaintiff’s Exhibit 1.”); see also Memo of Points and Authorities in Supp. of Pl.’s Rule 56 Mot. For Summ. J. (“Pl.’s Memo.”), Ex. 1 (containing Serenity Pond Advertising Literature and Instruction Booklet). The parties further agree that, with the exception of the wind chime assembly, the various sculptures—such as the simulated rocks and the simulated bamboo—are made of plastic. See Pl.’s Mat. Facts; Pl.’s Memo., Ex. 1; Def.’s Resp. Facts.

Merchandise entering the United States is classified under the HTSUS by Customs. “The legal text of the [HTSUS] consists of the General Rules of Interpretation; the Additional U.S. Rules of Interpretation; the General Notes; Sections I through XXII, inclusive (encompassing chapters 1–99, through the 8-digit level, article descriptions and tariff and other treatment accorded thereto); the Chemical Appendix; the Pharmaceutical Appendix; and the Intermediate Chemicals for Dyes Appendix.” United States International Trade Commission, *Preface to the 12th Edition HTSUS*, 2 (2000). Classification 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).

In a classification dispute, the court begins its analysis with GRI 1.⁴ If the proper classification cannot be determined by reference to GRI 1, it becomes necessary to refer to the succeeding GRIs in numerical order. See *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) (citation omitted); *Carl Zeiss*, 195 F.3d at 1379 (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)). If, however, the proper classification is determined by reference to GRI 1, the court may not consider any subsequent GRI. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

In determining the proper classification, “[t]he Court may also refer to the Explanatory Notes, which constitute the World Customs Organization’s official interpretation of the HTSUS.” *Bauer Nike Hockey USA, Inc. v. United States*, 27 CIT ___, ___, 305 F. Supp. 2d 1345, 1351 (2003) (citing *Baxter Healthcare Corp. of P.R. v. United States*, 22 CIT 82, 89 n.4, 998 F. Supp. 1133, 1140 n.4 (1998)). The Explanatory Notes, although not legally binding, are “intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting [the] subheadings.” *Rollerblade, Inc.*, 112 F.3d at 486 n.3 (citation omitted). Therefore, “close textual analysis of the language of the headings and the accompanying explanatory notes” is required in order to determine the proper classification of merchandise. *Bauer Nike Hockey*, 27 CIT at ___, 305 F. Supp. 2d at 1351.

A. Application of the General Rules of Interpretation

1. General Rule of Interpretation 1

Conair argues that the “subject tabletop fountains operate by pumping liquid water, which produces the sound of flowing water.”

⁴ GRI 1 states: “The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes” *Id.*

Memo. of Points and Authorities in Supp. of Pl.'s Rule 56 Mot. for Summ. J. ("Pl.'s Memo.") at 16. This movement of water is made possible "solely by means of a pump for liquids." *Id.* at 17. Based on these statements, Conair contends that the Serenity Ponds are "*prima facie* classifiable within HTSUS Heading 8413 by application of GRI 1. . . ." *Id.* at 16. Heading 8413 encompasses "Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof." In making its claim, Conair insists that HTSUS Heading 8413 is an *eo nomine*⁵ provision that "covers an article in all its forms." Pl.'s Memo. at 17 (citations omitted). Thus, for Conair, even though the Serenity Ponds consist of more parts than merely the pump, "the subject merchandise answers only to the terms of Heading 8413 and is *prima facie*, described therein." *Id.* at 18.

Conair further maintains that since the Serenity Ponds are *prima facie* classifiable under HTSUS Heading 8413, the Chapter Notes preclude them from being classified under Customs' chosen Heading 3926. This is because note 2(p) to Chapter 39 HTSUS states that Chapter 39 "does not cover: . . . Articles of Section XVI (machines and mechanical or electrical appliances)." *Id.* Section XVI includes Chapter 84. Therefore, Conair urges the conclusion that, since the Serenity Ponds are *prima facie* classifiable under Chapter 84, the Chapter Notes provide that the Serenity Ponds may not be classified under Chapter 39.

The Government faults Conair's assertion that classification of the Serenity Ponds is possible under GRI 1. "The pump, which is a component of the tabletop fountain, is *prima facie* classifiable under heading 8413. . . . The plastic articles (*i.e.*, simulated plastic rock) and polished stones, which also are components of the fountain, are not 'pumps for liquids . . .,' do not function as pumps for liquids, and thus are not described in heading 8413." Def.'s Br. in Rep. to Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Def.'s Rep.") at 2. Therefore, according to the Government, because each of the components is not *prima facie* classifiable under Heading 8413, classification cannot be determined pursuant to GRI 1. *See id.* at 2-3.

The court finds that, although Conair is correct in its assertion that the pumps are *prima facie* classifiable under HTSUS Heading

⁵ An *eo nomine* designation is "one which describes [a] commodity by a specific name, usually one well known to commerce." *Casio, Inc. v United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996) (alteration in original) (quoting Black's Law Dictionary 535 (6th ed. 1990)); *see also Chevron Chem. Co. v United States*, 23 CIT 500, 505, 59 F. Supp. 2d 1361, 1367 (1999) (stating that "[a]n *eo nomine* provision that names an article without terms of limitation, absent evidence of a contrary legislative intent, is deemed to include all forms of the article.") (citation omitted).

8413, it is incorrect in claiming that classification may be resolved by reliance upon GRI 1. Each Serenity Pond consists of a pump, a decorative sculpture made of plastic (*e.g.* simulated rocks or bamboo),⁶ and natural stones.⁷ While the pumps themselves are properly classified under Heading 8413, the remaining parts of the Serenity Ponds are appropriately classified elsewhere. Because each component, when considered individually, is *prima facie* classifiable under a different HTSUS heading, reliance on GRI 1 is inappropriate. Therefore, it becomes necessary to refer to the succeeding GRIs in numerical order. *See Pillowtex Corp. v. United States*, 171 F.3d 1370, 1375 (1999) (“Having exhausted the headings and the notes, pursuant to GRI 1, we may now consider the next GRI provision, GRI 2.”).⁸

2. General Rules of Interpretation 2 and 3

The Government argues that, upon reference to the GRIs in numerical order, the court should conclude that the Serenity Ponds must be classified under GRI 3. The Government further contends that “[s]ince [the] fountains therefore are composite goods, and each component is classifiable under a different heading, the imported fountains cannot be classified according to GRI 1, and it is necessary to look to GRI 2 and 3 to determine classification.” Def.’s Br. in Opp’n to Pl.’s Mot. for Summ. J. and in Supp. of Its Cross-Mot. for Summ.

⁶ It should be noted that one of the Serenity Pond models features a wind chime display made of metal and plastic parts.

⁷ The parties, in their briefs, assert contradictory characterizations of the stones included with the Serenity Ponds. The plaintiff characterizes the stones as accessories that are not necessary to the operation of the pond. The Government, however, asserts that the stones are adapted to the ponds and are, therefore, not accessories, but rather additional components of the fountains. In the alternative, the Government asserts that the stones are put up for sale as a “set” as that term is provided for in GRI 3(a) and (b). Because the court finds that the Serenity Ponds are composite articles whose essential character is established by their pumps, a discussion of the parties’ characterizations of the stones is not warranted.

⁸ Plaintiff’s reliance on *JVC Co. of America, Division of U.S. JVC Corp v. United States*, 23 CIT 523, 62 F. Supp. 2d 1132 (1999), *aff’d* 234 F.3d 1348 (Fed. Cir. 2000) as support for its contention that GRI 1 may be used to classify composite goods is misplaced. In *JVC*, the Court of Appeals for the Federal Circuit held that the term “television cameras” was broad enough to allow for classification of camcorders, which consisted of a camera and a video cassette recorder. The situation in *JVC* is distinguishable from the present case because the definition of television cameras referenced by the Court stated that “[t]he units often have built-in . . . video cassette recorders . . . for completely self-contained operation . . .” *JVC Co. of Am., Div. of U.S. JVC Corp., v. United States*, 234 F.3d 1348, 1353 (Fed. Cir. 2000) (citing 18 McGraw-Hill Encyclopedia of Science and Technology 216 (8th Ed. 1997)). The Court also noted that the Explanatory Notes included cameras with built in video recorders. *Id.* at 1352. The plaintiff in the present case has not produced a definition of a pump that includes sculptural plastic components.

J. (“Def.’s Memo.”) at 4–5; *see* GRI 2,⁹ 3.¹⁰ Finally, the Government states that “GRI 2, insofar as relevant here, provides in subsection (b) that classification of goods consisting of more than one material or substance must be determined according to the principles of GRI 3.” *Id.* at 5. The court agrees with this analysis.

The Government is also correct in its contention that, contrary to one of Conair’s alternative arguments, reference to the first sentence of GRI 3(a) does not end the inquiry. That sentence, incorporating the concept of “relative specificity,” is inapplicable in the present case because it comes into play when a good, as a whole, is *prima facie* classifiable under two or more headings. *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1252 (Fed. Cir. 2004). Here, the Serenity Ponds are made up of parts or components each of which is *prima facie* classifiable under a different heading. The second sentence of GRI 3(a) provides that where “two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . 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.” Thus, the second sentence of GRI 3(a) leads to GRI 3(b).

In cases such as the present one, where classification pursuant to GRI 3(a) is not possible, the concept of “essential character” found in GRI 3(b) may direct the court to the proper resolution. *See Better Home Plastics Corp. v. United States*, 119 F.3d 969, 970–71 (Fed. Cir.

⁹ GRI 2 provides that:

(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled [; and] (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

¹⁰ GRI 3 provides that:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, 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[;] (b) Mixtures, 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[; and] (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

1997) (stating that “[p]ursuant to GRI 3(b), goods not classifiable under GRI 3(a) are classified by the ‘component which gives them their essential character.’”). As there remain few cases addressing the meaning of essential character under the HTSUS, this Court continues to rely on cases decided under its predecessor, the Tariff Schedule of the United States (“TSUS”). See *Better Home Plastics Corp. v. United States*, 20 CIT 221, 224, 916 F. Supp. 1265, 1267 (1996) (stating that the TSUS “did utilize” the concept of essential character. Furthermore, in light of the absence of reported cases defining essential character under the HTSUS, courts may “look to case law under the TSUS for guidance.”); see also *Structural Indus., Inc. v. United States*, 29 CIT ___, ___, n.6, 360 F. Supp. 2d 1330, 1336, n.6 (2005) (stating that the definition of essential character under the TSUS has provided guidance to courts interpreting tariff terms under the HTSUS.). Thus, in order to determine the essential character of composite merchandise under the TSUS, this Court has sought to determine which component is indispensable to the merchandise. See *Oak Laminates Div. of Oak Materials Group v. United States*, 8 CIT 175, 180, 628 F. Supp. 1577, 1581 (1984) (stating that “[i]ts essential character is that which is indispensable to the structure, core or condition of the article, *i.e.*, what it is.” (citation omitted)). This inquiry is “factual in nature” and therefore will depend significantly on the circumstances of each individual case. See *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004); see also *Can. Vinyl Indus., Inc. v. United States*, 76 Cust. Ct. 1, 2, 408 F. Supp. 1377, 1378 (1976) (stating that determination of essential character is not an “exact science.”), *aff’d* 64 C.C.P.A. 97, 555 F.2d 806 (1977). In weighing the multiple factors that may be present in any one case, the court must also be cognizant that

[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or *by the role of a constituent material in relation to the use of the goods.*

World Customs Organization, Harmonized Commodity Description and Coding System 4, Explanatory Note, Rule 3(b) (VIII) (2d ed. 1996) (emphasis added) (“Explanatory Note”).

The parties disagree as to which component imparts the essential character of the Serenity Ponds. The Government contends that the plastic decorative sculpture, *i.e.*, the simulated rocks or the plastic bamboo, is the component which imparts the essential character. In support of this conclusion, the Government observes that “[e]ach style of fountain is named separately and can be distinguished from the others based on differences in the design of the plastic components.” Def.’s Resp. at 14. In other words, for the Government, the essential nature of each Serenity Pond results from the individual

plastic sculpture that differentiates each style of the merchandise from the other models. Next, the Government points out that the pump is not visible to the consumer and, therefore, plays no significant part in creating the “visual or decorative value of the article.” Def.’s Memo. at 9. Instead, “it is the plastic components of the article that are visible and aesthetically appealing to a consumer.” *Id.* at 7. Finally the Government states that, “[a] view of the imported fountain can be enjoyed by an observer even when the pump is not in operation.” *Id.* at 8. Thus, in making its arguments, the Government relies on the visual aspect of the merchandise to make its case.

Conair disputes the Government’s contention and asserts that the essential character of the Serenity Ponds is imparted by the pump:

While the appearance of the fountain’s contoured plastic may be one factor in a consumer’s determination as to which model of Serenity Pond to buy, the decision to buy a Serenity Pond in the first place is based entirely on the presence of the submersible pump and its ability to generate the sound of flowing water. Indeed, it is difficult to imagine that a consumer would buy an article advertised as a “fountain,” . . . if the article could not produce flowing water.

Pl.’s Opp’n to Def.’s Cross-Mot. for Summ. J. and Resp. to Def.’s Opp’n to Pl.’s Mot. for Summ. J. at 20.

As previously noted, here “there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb*, 148 F.3d at 1365. “[I]f there is no genuine dispute over the nature of the merchandise, [the Court] adjudges on summary judgment the proper classification under which it falls, the ultimate question in every classification case and one that has always been treated as a question of law.” *Id.* at 1366.

That being the case, the court turns to the proper classification of the Serenity Ponds. In reaching the ultimate question, the court finds that the Serenity Ponds’ essential character is imparted by the pump. The parties agree that the Serenity Ponds are “designed to ‘create a tranquil atmosphere at home or in the office,’” Pl.’s Mat. Facts para. 1; Def.’s Resp. Facts para. 1, and that they are “intended to appeal to the visual and auditory senses” of the consumer. Def.’s Mat. Facts para. 2; Pl.’s Resp. Facts para. 2. To the extent that the Serenity Ponds succeed in creating this tranquil atmosphere, it is necessarily the water flowing over the simulated landscape that stimulates the visual and auditory senses. Indeed, any appeal to the auditory senses is present only when the pump is transporting water to the top of the Serenity Pond, thus allowing it to flow over the simulated rocks.

This conclusion is borne out by an examination of the Serenity Ponds themselves.¹¹ In Customs classification cases, “the merchandise itself is often a potent witness.” *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citing *Marshall Field & Co. v. United States*, 45 C.C.P.A. 72, 81 (1958)). This examination leads to the conclusion that consumers would not purchase the Serenity Ponds for the purpose of enjoying the visual aspects of the plastic sculpture. It is only when the pump is running and the water is flowing that the Serenity Ponds could be said to have any “visual or auditory” appeal or create anything approaching “a tranquil atmosphere.” That is, the water flowing over the sculptured plastic rocks gives them a more attractive look and also produces the sound of flowing water. Although the pump may not be visible, it is nonetheless indispensable to making the merchandise “what it is.” *Oak Laminates*, 8 CIT at 180, 628 F. Supp. at 1581.

The direction given in the Explanatory Note to GRI 3(b) favors the court’s conclusion. “The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by . . . *the role of a constituent material in relation to the use of the goods.*” Explanatory Note, Rule 3(b) (VIII) (emphasis added). The pump’s role in relation to the use of the Serenity Ponds is essential.¹² While the plastic component contributes to the manner in which the water flows, and thus to the Serenity Ponds’ auditory and visual appeal, without the pump the water doesn’t flow at all. Therefore, it is the pump that is essential to the use of the goods. Thus, as it is the pump that imparts each Serenity Pond its essential character, in accordance with GRI 3(b) the Serenity Ponds are properly classified as if they consisted of that component.

¹¹ The court has also engaged in an examination of the Serenity Pond samples provided by Conair. Included among these samples are six models of the Serenity Ponds. The models provided as samples are: (1) CP1, (2) CP1R, (3) CP2, (4) CP4, (5) CP5, and (6) CP7.

¹² In response to the court’s request, each party has made a submission with respect to the value of the various components that make up the Serenity Ponds. *Conair Corporation v. United States*, Court No. 02–00383 (May 2, 2005), (order requesting additional information about the value of the pumps in relation to the goods); Plaintiffs *Declaration on the Cost of Components of Serenity Pond Models* (“Cost Declaration”) at 1–4; Defendant’s *Submission in Accordance With the Court’s Order of May 2, 2005* (“Def.’s Submission”). The essential character of goods may “be determined by the nature of the material or component, its bulk, quantity, weight or *value*, or by the role of a constituent material in relation to the use of the goods.” Explanatory Note, Rule 3(b) (VIII) (emphasis added). While there may be some doubt as to the accuracy of the plaintiff’s submission, *see* Def.’s Submission at 2, it appears that with respect to each fountain model, the pump is the most valuable single component, and in each case the value of the pump exceeded the value of the plastic simulated rocks or similar decorative feature. Cost Declaration paras. 3 & 4. Thus, the value of the pump would tend to confirm it as the component giving the Serenity Ponds their essential character.

B. HQ 964361 Entitled to No Deference

The Government contends that HQ 964361, denying the plaintiff's request for reconsideration, is entitled to judicial deference because of its power to persuade in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). Specifically, the Government states that

[i]n HQ 964361, Customs considered the competing claims to classification of the plaintiff's calming pond and serenity pond, and the applicable GRIs, tariff provisions, chapter notes and Explanatory Notes. Customs found that the imported ponds could not be classified under GRI 1 because the tariff provisions covering the various parts of the pond were "equally specific in relation to the good." Customs then considered the essential character of the ponds in light of the plaintiff's arguments that the ponds should be classified as pumps. Customs determined that the essential character of the ponds was not attributable to the pump but to the plastic articles.

Def.'s Opp'n at 15 (citations omitted).

In order to determine whether a particular ruling qualifies for *Skidmore* deference, the court engages in a four-factor analysis that weighs the "thoroughness evident in [the ruling's] consideration, the validity of [the ruling's] reasoning, [the ruling's] consistency with earlier and later pronouncements, and all those factors which give [the ruling] power to persuade. . . ." *Skidmore*, 323 U.S. at 140; see also *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (restating the *Skidmore* factors as "its writer's thoroughness, logic, and expertise, its fit with prior interpretations, and any other sources of weight.").

The court finds that the HQ 964361 is not entitled to deference because it lacks those qualities that would give it the power to persuade. First, HQ 964361, although presenting a thorough analysis of the relevant law, fails to demonstrate how that law applies to the facts of the present case. Instead, Customs relies on conclusory statements. For example, Customs states that "[e]ssential character has frequently been construed to mean the attribute which strongly marks or serves to distinguish what an article is. After a careful consideration of this issue, we determine that the calming pond is essentially a plastic decorative article." HQ 964361 at 5. Lacking from this conclusion, however, is any mention of the factors relied upon during the "careful consideration" in which Customs purportedly engaged. Customs later reiterates its conclusion with no further analysis: "As stated above, it is our position that the calming pond is es-

essentially a plastic decorative article.” *Id.* Finally, in reaching its ultimate conclusion, Customs provides no analysis whatsoever: “The calming pond serves a decorative function without the pump, e.g., when the pump is not on.” *Id.* At no point does Customs offer reasons for arriving at this conclusion. Thus, a review based on the four part test does not support the conclusion that the HQ 964361 deserves *Skidmore* deference. First, Customs’ brief and conclusory statements demonstrate little showing of thoroughness in the ruling’s consideration. Second, while the ruling contains a valid consideration of the proper law, rules and Explanatory Notes, it is lacking in any valid application of those matters to the facts. Third, although an attempt is made to demonstrate consistency with earlier rulings, there is nothing to indicate that those rulings were the result of analyses any more thorough than the one at issue here. Finally, HQ 964361 offers no further factors that would lend any additional power to persuade to the ruling. Thus, the Headquarters Ruling Letter is akin to the “dismissive analysis” found wanting in *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1210 (Fed. Cir. 2005). In light of Customs’ failure to engage in a thorough and well reasoned analysis, the court finds that HQ 964361 is not entitled to deference under *Skidmore*.

CONCLUSION

The court finds that because the essential character of the Serenity Ponds is imparted by the pump component, they are properly classified under subheading 8413.70.2004 of the HTSUS as “Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof; . . . Other centrifugal pumps . . . Other . . . Submersible pumps.” Therefore, the court grants Conair’s motion for summary judgment and denies that of defendant United States. Judgment shall be entered accordingly.

Slip Op. 05–96

ARVINMERITOR, INC., Plaintiff, v. THE UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION; MICHAEL CHERTOFF, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY; ROBERT C. BONNER, COMMISSIONER, UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION; GEORGE FREDERICK MCCRAY, CHIEF, INTELLECTUAL PROPERTY RIGHTS BRANCH, UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION, Defendants.

Court No. 05–00461

Memorandum & Order

[Motion of Eaton Corporation for leave to intervene as a party denied.]

Dated: August 12, 2005

Neville Peterson LLP (John M. Peterson, George W. Thompson, Curtis W. Knauss and Maria E. Celis) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marcella Powell), for the defendants.

Miller & Chevalier Chartered (Sturgis M. Sobin, Joel W. Rogers and Charles F.B. McAleer, Jr.) for proposed intervenor-defendant Eaton Corporation.

AQUILINO, Senior Judge: The plaintiff commenced this action with the filing of a summons and complaint on August 5, 2005, averring, among other things, jurisdiction of the court pursuant to 28 U.S.C. §1581(i)(3) and (4).

Upon initially concluding that it did in fact and law possess such jurisdiction, the court granted plaintiff's immediate application for an order, directing the defendants to appear and show cause on August 12, 2005 why a preliminary injunction should not enter against them herein and why this action should not be resolved upon an expedited schedule.

On August 11, 2005, a motion for leave to intervene as a party in opposition to plaintiff's prayers for relief was filed on behalf of Eaton Corporation, which has been a complainant pursuant to 19 U.S.C. §1337 before the United States International Trade Commission *sub nom. Matter of Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337–TA–503, and from which matter this action emanates.

In accordance with USCIT Rule 7(b), counsel for the proposed intervenor certified in their motion papers that they had consulted with counsel for the plaintiff and for the defendants, whereupon the former stated that they did not oppose the motion, while government counsel consented to its grant.

At the call in open court today, August 12, 2005, of this action pursuant to plaintiff's order to show cause, the plaintiff and the defendants filed a Stipulation of Settlement and Dismissal pursuant to USCIT Rule 41(a)(1). Counsel for proposed intervenor Eaton Corporation appeared and were heard essentially in opposition to the terms and conditions of the settlement.

Rule 41(a)(1) provides in part that an action may be dismissed by the

plaintiff without order of court (A) by filing a notice of dismissal . . . at any time before service by the adverse party of an answer or motion for summary judgment, whichever occurs first, or (B) by filing a stipulation of dismissal. . . .

The issue thus arose herein as to the import of the prior filing of the motion to intervene, in particular given the lack of opposition thereto on the part of either the plaintiff or the defendants.

None of the advocates at the hearing shed much light on the issue, leaving the undersigned to conclude, after due deliberation, that a court always retains jurisdiction to supervise and administer its own docket, including the authority to decide a motion essentially adverse to the terms of a voluntary dismissal interposed beforehand on behalf of a person not yet granted leave to intervene in the action.

In the exercise of that jurisdiction, the court hereby denies the motion of Eaton Corporation to intervene as a party.

So ordered.

Slip Op. 05-97

UGINE & ALZ BELGIUM, N.V.; ARCELOR STAINLESS USA, LLC; and ARCELOR TRADING USA, LLC, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 05-00444

Opinion & Order

[Plaintiffs' preliminary application to enjoin Department of Commerce liquidation instructions to Bureau of Customs denied.]

Dated: August 17, 2005

Shearman & Sterling LLP (Robert S. LaRussa, Stephen J. Marzen and Ryan A.T. Trapani) for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director, and Jeanne E. Davidson, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Michael D. Panzera); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (Ada Loo and Arthur Sidney) and Bu-

reau of Customs and Border Protection, U.S. Department of Homeland Security (*Christopher Chen*), of counsel, for the defendant.

Collier Shannon Scott, PLLC (David A. Hartquist, R. Alan Lubberda, Kathleen W. Cannon and Adam H. Gordon) for proposed intervenor-defendants AK Steel Corporation, Allegheny Ludlum Corporation, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization, and United Steelworkers of America, AFL–CIO/CLC.

AQUILINO, Senior Judge: Jurisdiction of the court is pleaded to be pursuant to 28 U.S.C. §1581(i) over the subject matter of this action, which is the propriety of certain liquidation instructions that have been issued to the Bureau of Customs and Border Protection, U.S. Department of Homeland Security¹ by the International Trade Administration, U.S. Department of Commerce² in conjunction with its *Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa*; and *Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa*, 64 Fed.Reg. 25,288 (May 11, 1999), and its *Antidumping Duty Orders: Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 Fed.Reg. 27,756 (May 21, 1999).

I

In commencing this action via summons and complaint, counsel for the plaintiffs also filed applications for immediate injunctive relief. The court promptly thereupon conferred with them and counsel for the defendant (and the proposed intervenor-defendants) who consented to entry (on July 27, 2005) of a temporary restraining order, which, among other things, enjoins CBP

from implementing Liquidation Instructions issued by the [ITA] in conjunction with Message No. 5182203 (July 1, 2005)[.] Message No[.] 5189205 (July 8, 2005), Message No. 5189204 (July 8, 2005), Message No. 5199201 (July 18, 2005), or otherwise taking any action that results in the treatment of entries of Stainless Steel Plate in Coils hot rolled in Germany and not further cold rolled in Belgium as having a country of origin of Belgium for the purpose of assessing antidumping or countervailing duties[.]

The order covers listed entries of subject merchandise (“SSPC”) in the ports of Chicago (between July 29, 1999 and Oct. 31, 2001), Houston (between Oct. 26, 1998 and Feb. 23, 2002), Los Angeles (on April 13, 1999), Portland (between Feb. 10, 1999 and Jan. 29, 2002), Richmond (between Feb. 24, 1999 and July 17, 2001), Seattle (be-

¹ Referred to hereinafter as “CBP”.

² Referred to hereinafter as “ITA”.

tween March 4, 1999 and Jan. 13, 2000), and Philadelphia (between Sept. 8, 1998 and Feb. 25, 2002).

The defendant also consented to the motion of the above-named domestic interested parties and certified or recognized unions within the meaning of 19 U.S.C. § 1677(9)(C) and (D) for leave to intervene in this action as parties defendant. The plaintiffs have now filed papers in opposition to this motion to intervene, arguing, among other things, that this action

is one solely between [them], whose entries are at issue, and the Government.

For their part, [the] . . . Proposed Intervenors [] cannot identify any legally cognizable interest in this proceeding. Contrary to suggestion, this proceeding is not an appeal of administrative review proceedings. Proposed Intervenors' interested party status in such an appeal is thus entirely irrelevant. Nor is this proceeding one to determine whether or to what extent Proposed Intervenors are entitled to disbursements from the special accounts created by the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), 19 U.S.C. § 1675c. As the Government has argued before the World Trade Organization ("WTO"), the CDSOA is merely a disbursement program and "has nothing to do with imported goods or importers." . . . Ex. 1. The CDSOA deals only with the allocation and disbursement of already collected duties, not the Government's prior discretionary procedures to assess and collect those duties.

Memorandum in Opposition to Motion to Intervene, pp. 1–2. This opposition has engendered in turn a motion by the proposed intervenor-defendants for leave to respond to the plaintiffs, which motion is hereby granted. The response is, in part, that,

while domestic parties may not appeal a liquidation by Customs that has occurred, they can participate in a challenge to liquidation instructions issued by Commerce prior to liquidation. Arcelor cites no authority to the contrary. Proposed intervenors were interested parties in the proceedings that generated the challenged liquidation instructions, and indeed, Commerce sought comments from the domestic industry as well as Arcelor as to the appropriate scope and nature of those instructions. Proposed intervenors clearly have a cognizable interest in the instructions issued and the underlying decision that they represent.

Motion for Leave to Respond to Plaintiffs' Opposition to Motion to Intervene, pp. 2–3.

Upon consideration of the arguments, well-presented on both sides, the court concludes that the determinative factor is the direct participation before the ITA by the petitioners-cumproposed-parties-

at-bar in the agency promulgation of the liquidation instructions now at issue herein. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction [hereinafter "Plaintiffs' Memorandum"], Exhibit 9. That is, having been privy to and part of that administrative process, their motion for leave to formally join the judicial review of the results thereof can be, and it hereby is, granted.

II

According to the complaint and corporate disclosure statements on USCIT Form 13 filed in conjunction therewith, the first-named plaintiff is a corporation organized under the laws of Belgium, whereas the two Arcelor firms are creatures of the law of Delaware, U.S.A. All three corporations are wholly-owned subsidiaries of a Luxembourg corporation, Arcelor S.A. Their complaint avers:

German SSPC Mistakenly Entered as Belgian Merchandise

9. From September 4, 1998 to April 30, 2002, Arcelor imported into the United States SSPC that was hot rolled in Germany and not further cold rolled in Belgium. The country of origin of such merchandise is Germany.

10. Although the SSPC was not further cold rolled in Belgium, it was pickled, annealed, packaged, and shipped from Belgium. Accordingly, at the time of entry, Arcelor mistakenly declared the country of origin for the merchandise to be Belgium rather than Germany.

11. At the time Arcelor's German SSPC entered the United States, the Antidumping and Countervailing Duty Orders for SSPC from Belgium were in effect.

12. Arcelor paid cash deposits of antidumping and countervailing duties on the German hot-rolled SSPC that entered the United States at the rates specified in the Orders for Belgian SSPC.

13. Because the country of origin of the SSPC imported by Arcelor is Germany, that merchandise was not and never has been subject to the Antidumping and Countervailing Duty Orders for S[SPC] from Belgium and Arcelor should not have had to pay cash deposits of antidumping and countervailing duties.

14. Promptly after realizing its mistake, Arcelor filed disclosures and timely protests with Customs pursuant to 19 U.S.C. § 1514 to correct the country of origin.

15. For its part, Commerce mistakenly included the German SSPC in its calculation of the antidumping duty rates for Belgian SSPC in the first, second and third periods of review.

* * *

16. Consistent with its long-standing practice, in the Fourth Administrative Review of the Antidumping Duty Order for S[SPC] from Belgium, Commerce determined that SSPC hot rolled in Germany and not further cold rolled in Belgium is German. . . .

* * *

Commerce Instructed Customs to Liquidate Entries of Arcelor's German SSPC as Belgian Merchandise

* * *

20. On July 1, 2005, Commerce issued to Customs . . . Fourth Review Period Antidumping Duty Liquidation Instructions[]. Those instructions limited – to entries of SSPC made on or after May 1, 2002 – application of Commerce's determination that SSPC hot rolled in Germany and not further cold rolled in Belgium is not subject to the Antidumping Duty Order.

21. On July 1, 2005, Commerce issued a memorandum attempting to explain its reasons for issuing the Fourth Review Period Antidumping Duty Liquidation Instructions. . . . Commerce refused to state that all SSPC hot rolled in Germany and not further cold rolled in Belgium, imported by Arcelor, is German for country-of-origin purposes. . . .

22. On July 8, 2005, . . . Commerce issued . . . for . . . entries for the period 09/01/1998 through 12/31/1999 [] "Countervailing Duty Liquidation Instructions" [that] . . . instructed Customs to liquidate SSPC hot rolled in Germany and not further cold rolled in Belgium as merchandise subject to the countervailing duty order for SSPC from Belgium. . . . Commerce gave no reason why it instructed Customs to liquidate German merchandise as Belgian.

23. On July 8, 2005, . . . Commerce issued Countervailing Duty Cash Deposit Instructions for S[SPC] from Belgium [that] . . . instructed Customs that "[e]ffective 05/01/2002 . . . entries of SSPC hot rolled in Germany and not further cold rolled in Belgium are not subject to the suspension of liquidation and do not require cash deposits of estimated countervailing duties." . . .

24. On July 18, 2005, Commerce instructed Customs to liquidate German hot rolled SSPC entered between November 4,

1998 and April 30, 2000 as subject to the Antidumping Duty Order for SSPC from Belgium. . . . As with the Countervailing Duty Liquidation Instructions, Commerce gave no reason why it instructed Customs to liquidate German merchandise as Belgian.³

Whereupon the plaintiffs claim that the referenced liquidation instructions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under 5 U.S.C. §706(2)(A). They pray for a declaratory judgment to this effect, which would be the basis of injunction(s) against those instructions and a possible remand to the defendant in connection therewith.

A

The plaintiffs recognize, as they must, that a preliminary injunction is an extraordinary remedy and can only be granted upon showing:

- (1) A threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favor[s] issuance].

S.J. Stile Associates, Ltd. v. Snyder, 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981). That is, failure to bear the burden of persuasion as to any of these four factors is ground for denial of an application. *E.g.*, *American Stevedoring Inc. v. U.S. Customs Service*, 18 CIT 331, 335, 852 F.Supp. 1067, 1071 (1994), citing *Bomont Industries v. United States*, 10 CIT 431, 638 F.Supp. 1334 (1986), and *FMC Corporation v. United States* 3 F.3d 424, 427 (Fed. Cir. 1993). See Plaintiffs' Memorandum, p. 5, citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed.Cir. 1983).

(1)

Zenith is, of course, seminal authority with regard to the Trade Agreements Act of 1979, as amended, but the controlling issue therein was whether liquidation of the underlying entries would eliminate the only remedy for an incorrect ITA determination pursuant to that act's section 751 by depriving the Court of International Trade of the ability (*i.e.*, jurisdiction) to ensure antidumping duties in accordance with the correct margin for those entries. The court of appeals concluded that it would. See 710 F.2d at 809–10 and, for example, *SKF USA Inc. v. United States*, 28 CIT ___, ___, 316 F.Supp.2d 1322, 1327 (2004). But jurisdiction of the court is not necessarily in jeopardy. Indeed, as recited above, paragraph 14, the

³ Boldface headings in original; citations omitted.

plaintiffs claim to have filed timely protests with Customs pursuant to 19 U.S.C. §1514 which, one could assume, provide them with some current protective comfort.

Be those protests as they are, this action encompasses numerous entries that have yet to be liquidated, and which has been restrained, at least temporarily pending this preliminary opinion. In seeking to extend this injunctive relief, plaintiffs' argument with regard to irreparable harm is as follows:

. . . If Customs executes those [ITA] instructions, this action will become moot, Commerce's instructions will be insulated from judicial review, and Arcelor will lose its day in court. "Plainly, irreparable harm will occur . . . if Commerce's action is not subject to judicial review; and if plaintiff will be deprived of its right to contest antidumping duty assessments when the liquidation of entries currently held by Customs are liquidated." *Royal Business Machs., Inc. v. United States*, . . . 1 C.I.T. 24, 25 . . . [1980].

To be sure, Arcelor ha[s] pending protests before Customs. But "Customs merely follows Commerce's instructions" and "has a merely ministerial role in liquidating antidumping duties under 19 U.S.C. §1514(a)(5)." *Mitsubishi Elecs. America, Inc. v. United States*, 44 F.3d 973, 977 (Fed.Cir. 1994). Where, as here, "Commerce sent liquidation instructions to Customs, which then imposed antidumping duties as directed by Commerce as part of its ministerial functions," Commerce's liquidation instructions would not be subject to protest and "[t]he court has no jurisdiction pursuant to [28 U.S.C.] § 1581(a) for it was Commerce's instructions, rather than an independent decision by Customs, which determined the antidumping rate." *J.S. Stone Inc. v. United States*, 297 F.Supp.2d 1333, 1338 (CIT 2003).

Plaintiffs' Memorandum, pp. 5–6.

If this position were well-settled, then plaintiffs' formal protests could prove to be of no conclusive moment. But this court notes that all that was before the court in the cited *Royal Business Machines* matter was purported immediate concern by that plaintiff that the ITA might come to modify the scope of an outstanding antidumping-duty order, ergo the court's conditional language quoted above; and this court also notes that *J.S. Stone, Inc. v. United States*, 27 CIT ___, ___ and 297 F.Supp.2d 1333, 1338 n. 6 (2003), *aff'd*, 111 Fed.Appx. 611 (Fed.Cir. 2004), itself cites *Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed.Cir. 2002), as holding that,

when a plaintiff's goods are facially outside of the scope of an antidumping duty order, a scope determination by Commerce and participation in the antidumping review were unnecessary

predicates to a challenge of Customs imposition of antidumping duties. The Federal Circuit explained that . . . “the . . . misapplication of the order by Customs was properly the subject of a protest” under 19 U.S.C. §1514(a)(2) and reviewable by the CIT under 28 U.S.C. §1581(a). . . . Thus, misapplication of an antidumping order or the erroneous imposition of antidumping duties by Customs may be protested and suit brought before the court pursuant to § 1581(a). []

In fact, it was the undersigned’s opinion in *Xerox Corp. v. United States*, 24 CIT 1145, 118 F.Supp.2d 1353 (2000), to the opposite effect that was reversed and remanded by the court of appeals.

Accepting this appellate enlightenment makes it now difficult to conclude that plaintiffs’ procedural posture herein amounts to unequivocal irreparable harm.

(2)

As for whatever harm is actually at bar, this court can conclude that it weighs more on the plaintiffs than on either the defendant or the intervenor-defendants for the reasons so succinctly stated, to wit:

. . . The government holds cash deposits. If Arcelor does not succeed on its claims, interested parties are fully secured.

Plaintiffs’ Memorandum, p. 11. Perhaps this is why experienced counsel for the defendant and also for the intervenors have now filed papers, consenting, at least for purposes of orderly proceeding, to entry of a preliminary injunction. On behalf of the government, they state their

consent . . . , although we dispute that plaintiff *[sic]* has established a likelihood of success upon the merits of plaintiffs’ claims. Indeed, in our view, plaintiffs’ claims are wholly without merit, and plaintiffs stand no chance of prevailing upon the merits. However, a preliminary injunction will prevent the irreparable harm from liquidation of any entries that have not yet been liquidated. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed.Cir. 1983).

Defendant’s Response to Motion for Preliminary Injunction, p. 1. The other filing states that the

intervenors believe that plaintiffs do not meet *any* of the requirements to receive a preliminary injunction . . . [Also], it appears that granting a preliminary injunction against liquidation of all of the listed entries may be inappropriate, because it appears that some or all of the entries for which plaintiffs seek to enjoin liquidation have already been deemed liquidated as a matter of law under 19 U.S.C. § 1504(d). The request for an in-

junction is not timely made for any entries that have been liquidated as a matter of law.

Despite these defects in plaintiffs' application, proposed intervenors conditionally consent to the granting of a preliminary injunction for purely practical reasons — to allow the Government and the parties to fully research and brief these substantive issues, particularly concerning the history and liquidation status of the subject entries. . . .⁴

(3)

However salutary the concerns for orderly proceeding (and even accommodation) are, all who engage in international trade with the United States, and in subsequent administrative and judicial review thereof, must adhere, to the best of their respective situations, to the dictates of the governing law and related rules of practice. While the court can subscribe to plaintiffs' argument that the public has a compelling interest in judicial review of administrative action⁵, this subscription does not automatically favor them (or alleviate their perceived predicament⁶). That is, it is not clear from the record, such as it has been presented initially, that the public's interest compels entry now of a preliminary injunction in favor of the plaintiffs.

(4)

Whatever the harm and its precise balance between the various parties herein may be, this court and others have held that the severity of the injury the moving party will sustain without injunctive relief is in inverse proportion to the showing of likelihood of success on the merits. *E.g.*, *Wolverine Tube (Canada), Inc. v. United States*, 23 CIT 76, 78, 36 F.Supp.2d 410, 413 (1999), citing *Makita Corp. v. United States*, 17 CIT 240, 250, 819 F.Supp. 1099, 1108 (1993); *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984); *American Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981).

⁴ Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, pp. 1–2 (emphasis in original).

The court notes in passing that both responses set forth lists of entries that respective counsel apparently consider at least arguably at issue. According to the defendant's,

[o]n August 10, 2005, plaintiffs stated that they have no objection to our amendments to their original proposed preliminary injunction order.

Defendant's Response to Motion for Preliminary Injunction, p. 2.

⁵ Plaintiffs' Memorandum, p. 11.

⁶ *Cf. id.* at 4 n. 2:

. . . [S]ince Arcelor cannot know until after liquidation whether its remedy lies on review of Customs' protest decision or Commerce's liquidation instructions, an injunction must be granted now to preserve this Court's jurisdiction and Arcelor's right to judicial review.

The plaintiffs claim a “substantial likelihood of success” in challenging the ITA’s liquidation instructions because “they are flatly inconsistent with the agency’s long-standing practice and its subsequent determination in this proceeding”.⁷ Of course, the main issue at bar is whether that determination can be drawn into “this proceeding”. As the complaint itself indicates, *supra*, that subsequent determination was rendered as a result of the ITA’s fourth administrative review pursuant to section 751 of the Trade Agreements Act, 19 U.S.C. §1675, and not during the preceding three such reviews that covered the entries that are now subject to plaintiffs’ attempt at resurrection — in the aftermath of that fourth ITA review, which led the agency specifically to determine that its decision apply only to SSPC entries on or after May 1, 2002, *viz.*:

In the context of the fourth review, Respondent submitted information to the record showing that it had sold German SSPC to the United States. For the final results of the fourth review of this antidumping duty order, we determined that SSPC hot-rolled in Germany and not further cold-rolled in Belgium was not subject to the antidumping duty order on SSPC from Belgium. . . . As such, our analysis of Respondent’s sales of SSPC to the United States made during the POR for the fourth review did not include sales of German SSPC. During the fourth administrative review, neither the Petitioners nor the Respondent raised this country of origin issue with respect to any specific sales reviewed during prior administrative reviews of this order or the effect of the country of origin decision on unliquidated entries from prior closed reviews. As articulated in Comment 1 above, consistent with the *Torrington Remand*, we find that 1) our position regarding the German merchandise is fully articulated and final, 2) we did not calculate antidumping margins using German merchandise in the Fourth Administrative Review, and 3) the country of origin of merchandise hot-rolled in Germany was first raised in the Fourth Administrative Review. Therefore, we recommend applying our country of origin determination to entries covered by the fourth review and future entries, *i.e.*, to entries made on or after May 1, 2002.⁸

⁷ *Id.* at 6 (initial capital letters and boldface print of all the words deleted).

⁸ *Id.*, Exhibit 6, p. 7 (July 1, 2005) (Memorandum re Customs Instructions for the Final Results of the Fourth Administrative Review of the Antidumping Duty Order on . . . SSPC [] from Belgium)(citation to Comment 4 of the ITA Issues and Decision Memorandum of the Fourth Administrative Review of the Antidumping Duty Order on . . . SSPC [] from Belgium (Dec. 14, 2004), *ibid.*, Exhibit 1, available at <http://ia.ita.doc.gov/frn/summary/2004-dec.htm>, omitted).

And CBP was instructed accordingly. *See* Plaintiffs' Memorandum, Exhibit 2, para. 3 (July 1, 2005):

Based on the evidence reviewed by Commerce in conducting the administrative review of entries made during this period (05/01/02–04/30/03), the Department has determined that imports of SSPC hot rolled in Germany and not further cold rolled in Belgium are not subject to the antidumping duty order on SSPC from Belgium. Entries of this merchandise made on or after 05/01/02 should be liquidated without regard to antidumping duties.

Capitalization deleted. *Compare id. with id.*, Exhibit 10 (June 23, 2005)(ITA draft liquidation instructions) *and id.*, Exhibit 4, para. 5 (July 18, 2005) (antidumping-duty liquidation instructions for period 11/4/98 to 4/30/00) *and id.* Exhibit 5, para. 7 (July 8, 2005) (countervailing-duty liquidation instructions for period 9/4/98 to 12/31/99).

In support of their claim of "substantial likelihood of success" on the merits, the plaintiffs challenge the agency's position on two grounds, namely, (a) it is contrary to law, and (b), because their entries have not been liquidated, administrative finality does not prevent correction of the country of origin.

(a)

Their complaint, as recited above, is that, for their entries between September 4, 1998 and April 30, 2002, they "mistakenly" declared the country of origin to be Belgium rather than Germany, whereupon they paid cash deposits of antidumping and countervailing duties on their merchandise that entered the United States during those four years as specified in the underlying orders governing Belgium. Moreover, the plaintiffs claim that

[n]either Arcelor nor Commerce caught the mistake during the first three administrative reviews of the antidumping and countervailing duty orders on SSPC from Belgium. The mistake was identified and corrected in the fourth administrative review.

Plaintiffs' Memorandum, p. 2. Yet, they seem critical that the "only pertinent 'evidence' in the [fourth] administrative record . . . is evidence of the country in which the steel was hot rolled." *Id.* at 8. Nonetheless, they refer to other ITA proceedings involving steel wherein that alone was also the determinative factor for country of origin. Finally, they cite *Reenas Technology America, Inc. v. United States*, 27 CIT ___, Slip Op. 03–106 (Aug. 18, 2003), to the effect that "liquidation instructions that treat identical merchandise differently are arbitrary and capricious". *Id.* But that case, which contested an ITA instruction to liquidate entries of an unreviewed

reseller of such subject merchandise at the cash deposit rate, has been summarily reversed on appeal, *Renesas Technology America, Inc. v. United States*, Nos. 04-1473,-1474, 2005 WL 1540159 (Fed.Cir. July 1, 2005), based upon the opinion of the same date in *Nissei Sangyo America, Ltd. v. United States*, Nos. 04-1469,-1492, 2005 WL 1540161, at *1 (Fed.Cir. July 1, 2005), wherein the court of appeals stated that,

[b]ecause the arguments in favor of the appellee [imports] are foreclosed by the decisions in *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed.Cir. 2003) . . . , and *Consolidated Bearings Co. v. United States*, [412 F.3d 1266] (Fed.Cir. June 21, 2005) . . . , which collectively held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that Commerce in the past consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate, we *reverse* the decision of the Court of International Trade.

Emphasis in original.

If this then is the only court case the plaintiffs can cite, it provides no obvious support for their thesis herein.

(b)

As indicated above, the ITA provided the parties with draft customs instructions. *See* Plaintiffs' Memorandum, Exhibit 10. And both sides responded. *Compare id.*, Exhibit 8 *with id.*, Exhibit 9. The agency thereupon promulgated the instructions now at issue. *See generally id.*, Exhibit 6. Among other things, it referred to and relied on its Final Results of Redetermination on Remand⁹ that issued pursuant to the order of the court in *Torrington Co. v. United States*, 23 CIT 452 (1999), that the ITA apply to its

Final Scope Ruling - Antidumping Duty Order on Cylindrical Roller Bearings and Parts Thereof from Japan - Regarding a Certain Cylindrical Roller Bearing Produced by Koyo Seiko Co., Ltd., and Imported by Koyo Corporation of U.S.A. (Aug. 10, 1998), an effective date in accordance with the Court's holding in *Timken Co. v. United States*, 21 CIT 889, 972 F.Supp. 702 (1997), *aff'd sub nom. Koyo Seiko Co., Ltd. v. United States*, 155 F.3d 574 (Fed.Cir. 1998).

Judicial affirmance of those final results in their entirety¹⁰ led to the agency's repetition of the following statement therein in response to

⁹The plaintiffs have reproduced a copy of this redetermination and appended it to their memorandum as exhibit 7.

¹⁰*See Torrington Co. v. United States*, 24 CIT 306 (2000).

the [plaintiffs'] comments on its draft liquidation instructions herein:

In *Timken*, the Court held that unliquidated merchandise which entered the customs territory of the United States after the publication of the antidumping duty order, but before the issuance of the scope ruling, should be liquidated in accordance with the antidumping duty order. The CIT, however, stated that its holding was not intended to disturb the principles of administrative finality, i.e., require the re-opening or re-review of closed proceedings. Thus, while a scope determination once made is effective back to the publication of the antidumping duty order, the CIT's holding in *Timken* requires the Department to apply the scope determination only as far back as the principle of administrative finality warrants – back to *unliquidated entries of subject merchandise covered by any administrative review period open at the time the scope issue was first raised, and to all unliquidated entries on in-scope merchandise after that period.*¹¹

The plaintiffs attempt to undermine this reasoning by referring to the underlying *Timken* litigation cited above, but, on its face, *Torrington* stands as further refinement of the import of subsequent rulings as to the precise scope of an antidumping or countervailing-duty order. Whereupon the plaintiffs add that,

even if this Court were to adopt Commerce's *Torrington* re-determination, it would only limit the *inclusion* of "*subject merchandise covered by any administrative review period open at the time the scope issue was first raised.*" . . . It does not by its terms prevent *exclusion of non-subject merchandise* – such as German merchandise from orders covering Belgian merchandise. Since non-subject merchandise was (by definition) never subject to the antidumping and countervailing duty orders, entries of such merchandise cannot be liquidated as subject merchandise. Any instructions to do so would be contrary to law. As a result, Arcelor has a substantial likelihood of succeeding in its claim that Commerce has no legal authority to instruct Customs to liquidate German SSPC as Belgian merchandise.

Plaintiffs' Memorandum, p. 10 (emphasis in original; citation omitted).

This court cannot concur.

¹¹ Plaintiffs' Memorandum, Exhibit 6, p. 4 (emphasis added and citations omitted by ITA herein).

III

In sum, the court cannot and therefore does not conclude that plaintiffs' instant application satisfies all of the standards for grant of the extraordinary interim equitable relief that is a preliminary injunction. Before entry of an order to this effect, however, the plaintiffs may inform the court and opposing counsel on or before August 24, 2005¹², as to how they propose to proceed from now on in this matter.

¹²The court's temporary restraining order is hereby extended to the close of business on that day.

