Decisions of the United States Court of International Trade

Slip Op. 03–140

THE PILLSBURY COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 98–03190

[Judgment in part for plaintiff.]

October 27, 2003

Neville Peterson LLP (*John M. Peterson*, *George W. Thompson*, *Mollie R. Coyne*) for plaintiff The Pillsbury Company.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge; *Saul Davis*, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Edward M. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant United States.

OPINION

GOLDBERG, Senior Judge: Plaintiff The Pillsbury Company ("Pillsbury") filed this action to challenge the denial of its substitution unused merchandise drawback claims (the "drawback claims") made pursuant to 19 U.S.C. § 1313(j)(2) (2000). The drawback claims were made with respect to asparagus imported from Mexico, and asparagus grown in Washington State and exported to Canada. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

I. BACKGROUND

From 1991 through 1993, Pillsbury imported into the United States asparagus from Mexico (the "designated asparagus"). The Customs Service ("Customs")[1] classified the subject items under sub-

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[1] The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

heading 0709.20.90.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") as "Other vegetables, fresh or chilled: asparagus." Customs assessed duties at liquidation on the imported asparagus, and Pillsbury paid the assessed duties. In addition, in 1992 and 1993, Pillsbury exported from the United States to Canada asparagus grown in Washington State (the "substitute asparagus").

During this period, the asparagus season began in January and February of each year when asparagus first came on the market from Mexico. At the beginning of the asparagus season, demand outpaced the market's supply of asparagus. Thus, the asparagus offered in January obtained a high price of $100 per thirty-pound crate. Transcript of Trial Proceedings on Oct. 2–4, 2002 ("Tr.") at 53. By late April, the Washington State asparagus entered the market. There was a significant volume of asparagus on the market by the time the Washington State asparagus were being produced. The later Washington State asparagus received the lowest price of the season, as little as $25 per crate. Tr. at 53–57, 281, 382.

As the asparagus were harvested, they were sold either to wholesale and retail markets that resell the asparagus in its fresh condition (the "fresh market") or to processors who froze or canned the asparagus (the "processed market"). The designated asparagus were fresh when imported, and the substitute asparagus were fresh when exported. Processors and the fresh market purchasers received the same quality asparagus on any given day, packed to different specifications. Tr. at 354. Occasionally, a fresh market wholesaler or retailer would purchase asparagus for the fresh market, and later freeze or can the asparagus. Tr. at 183–84. Whether asparagus was processed or sold on the fresh market depended upon the price of asparagus: if the price of asparagus was high, then the asparagus would rarely be sold to canners because canners could not recover the high price paid for the fresh asparagus; if the price of asparagus was low, then the canners purchased and processed the asparagus because they could recover the price paid for the asparagus.

Pillsbury timely filed 249 substitution unused merchandise drawback claims with the Port Director of Customs in Chicago in 1994 and 1995. A substitution unused drawback claim is for exports of goods that are "commercially interchangeable" with the imported goods. In the instant case, Pillsbury requested a refund of the duties paid on the designated asparagus when the substitute asparagus were exported.

Pillsbury's drawback claims were denied in November 1996. In January 1997, Pillsbury filed protests 3901–97–100290, 3901–97–100299, 3901–97–100306, 3901–97–100319, and in February 1997 filed protest 3901–97–100389[2], disputing Customs' refusal to pay drawback on the subject claims. On November 16, 1998, Customs denied Pillsbury's protests, stating:

> Lead Protest 3901–97–100320. Ruling 227491, dated 10/9/98, held that there is insufficient evidence to find that the imported asparagus and the substituted exported asparagus were "commercially interchangeable."

Protest Nos. 3901–97–100290, 3901–97–100299, 3901–97–100306, 3901–97–100319, 3901–97–100389.

Pillsbury filed its summons with the Court of International Trade on December 4, 1998, challenging Customs' denial of Pillsbury's protests. Upon the parties' joint motion for trial, the Court held trial in Seattle, Washington and New York in October 2002.[3]

II. STANDARD OF REVIEW

Customs's decision enjoys a statutory presumption of correctness, and the burden of proving otherwise rests upon the party challenging such decisions. 28 U.S.C. § 2639(a). However, the presumption of correctness "does not add evidentiary weight; it simply places the burden of proof on the challenger." *Anhydrides & Chems., Inc. v. United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). The presumption of correctness applies only to the factual basis of such decisions, and not to their legal component, with respect to which the Court of International Trade exercises *de novo* review. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

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[2] Customs failed to date stamp the February 1997 protest from Pillsbury when it was received. Although Pillsbury produced a copy of a letter dated just within the ninety day time limit for filing a protest, Customs insisted that without the stamp date Pillsbury's protest was not timely made. Tr. at 4–6, 432–33. Customs' error is the sole cause of Pillsbury's inability to prove the timeliness of its February protest; therefore, the Court rules that the protest was timely filed.

[3] In its opening statement, counsel for the government made certain allegations attacking the good faith intentions of the plaintiff. Government counsel alleged that counsel for Pillsbury had somehow participated in the grading process and that the participation was "done specifically for purposes of litigation." Tr. at 33, 34. The accusation was that "the actual grading process for this litigation was set-up by [Pillsbury's] attorneys with the intent of setting it up for Customs, for the litigation, and not as a commercial practice." Tr. at 38. Government counsel later clarified that the set-up was by another law firm for another legal matter. Tr. at 40.

The subject of the allegation had years before been settled. The current litigation was filed some four years after the matter referred to by government counsel. The matter was clearly irrelevant; hardly "a set-up" as alleged.

The Court can only conclude that the government was trying to improperly influence the Court into believing that the plaintiff entered with unclean hands. This type of behavior is unacceptable.

III. DISCUSSION

The sole issue of law presented in the instant case is whether Pillsbury's designated asparagus and substitute asparagus are "commercially interchangeable" within the meaning of the substitution unused drawback statute, 19 U.S.C. § 1313(j)(2). 19 U.S.C. § 1313(j)(2) provides that:

> (j) Unused Merchandise Drawback—
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> * * *
>
> (2) If there is, with respect to any imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic), that—
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> (A) Is commercially interchangeable with such imported merchandise;
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> (B) Is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision; and
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> (C) Before such exportation or destruction—
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> (i) Is not used within the United States, and
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> (ii) Is in the possession of, including ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback under this paragraph, if that party
>
> (I) Is the importer of the imported merchandise, or
>
> (II) Received from the person who imported and paid any duty due on the imported merchandise a certificate of delivery transferring to the party the imported merchandise, commercially interchangeable merchandise or any combination of imported and commercially interchangeable merchandise (and any such transferred merchandise, regardless of its origin, will be treated as the imported merchandise and any retained merchandise will be treated as domestic merchandise);
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> Then upon the exportation or destruction of such other merchandise the amount of each such duty, tax and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99% of that duty, tax, or fee.

19 U.S.C. § 1313(j)(2).

Section 1313(j)(2) was enacted as part of Section 632 of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182 (Dec. 8, 1993). The substitution unused merchandise drawback system set forth therein replaced the former system of "substitution same-condition drawback." The old system required that the imported and exported goods be "fungible," that is, "merchandise which for commercial purposes is identical and interchangeable in all situations." *See, e.g.*, 19 U.S.C. § 1313(j) (1988), 19 C.F.R. § 191.2(b)(1) (1990). The new system is "less restrictive," only requiring that the imported and substitute goods be "commercially interchangeable." *See* H. Rep. No. 103–361, 103rd Cong., 1st Sess. 131 (1993).

The Court of Appeals for the Federal Circuit defined "commercially interchangeable" in *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999). The Federal Circuit stated that:

> Indeed, we are convinced that Congress intended "commercially interchangeable" to be an objective, market based consideration of the primary purpose of the goods in question. Therefore, "commercially interchangeable" must be determined objectively from the perspective of a hypothetical reasonable competitor; if a reasonable competitor would accept either the imported or the exported good for its primary commercial purpose, then the goods are "commercially interchangeable" according to 19 U.S.C. Section 1313(j)(2).

Texport, 185 F.3d at 1295 (internal citations omitted) (hereinafter the "*Texport* test"). Thus, the Court must determine whether a reasonable hypothetical competitor would accept either the imported or the exported asparagus for asparagus's primary commercial purpose. If the answer is yes, then the imported and exported asparagus are commercially interchangeable.

In the context of the instant case, a reasonable hypothetical competitor of Pillsbury will import and export asparagus for the fresh market and the processed markets. The primary purpose for asparagus is for human consumption as food. Customs argues that this definition is too broad, and that the definition implies that apples, peaches, and all other food products would be commercially interchangeable with asparagus. Since the *only* purpose for asparagus is for human consumption as food, and the drawback claims are limited to asparagus, the Court finds no barrier to concluding that the primary purpose for asparagus is for human consumption as food.

To determine whether both the imported and exported asparagus would be accepted by the hypothetical reasonable competitor of Pillsbury, there are several factors to consider. The Federal Circuit has identified the following evidentiary factors:

> Evidence relevant to this question would, of course, include "governmental and recognized industrial standards, part numbers, tariff classification, and relative values." See, e.g., H.R.

> Rep. 103–361, at 131 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2681. This analysis might also include evidence of arms-length negotiations between commercial actors, the description of the goods on bills of sale or invoices . . . as well as other factual evidence presented by the parties that the Court of International Trade considers relevant.[4]

Texport, 185 F.3d at 1295.

Texport also cautioned that the appropriate comparison is between the imported designated asparagus in its condition *as imported*, and the exported substitute asparagus in its condition *as exported*. *Texport*, 185 F.3d at 1291 (Title to the exported jet fuel had passed to the purchaser, and thus whatever the buyer did to the jet fuel after that point was "out of Customs' province of inquiry into commercial interchangeability."). Changes to the merchandise effected after importation or exportation are outside the scope of the *Texport* test. Therefore, it is irrelevant whether Pillsbury's customer sells the asparagus on the fresh market, or cans, freezes, or jars it.

Thus, commercial interchangeability is determined by an "objective, market-based consideration of the primary purpose of the goods in question." *Texport*, 185 F.3d at 1295. Based on the relevant facts, the Court must determine whether a reasonable hypothetical competitor would accept both the substitute exported asparagus and the designated imported asparagus based on government and industry standards, tariff classifications, relative values of the exported and imported asparagus, the invoice descriptions, and the preparation and packaging of the asparagus.

A. *Government and Industry Asparagus Standards*

Pillsbury introduced evidence that all of the imported asparagus in this action were USDA Grade No. 2 or better.[5] However, the *Texport* test is based on an "objective, market based consideration." There was little credible evidence that the market contracts to purchase asparagus on the broad "Grade 2 or better" standard. Al-

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[4] The legislative history cited by the Federal Circuit in *Texport* specifically mentions government and industry standards, part numbers, the tariff classification, and relative values as relevant evidence to determine commercial interchangeability. However, this list is not intended to be exhaustive, nor is any one item in the list dispositive.

[5] Standards established by the U.S. Department of Agriculture ("USDA") are used throughout the asparagus industry in the United States. Tr. at 51, 185. The USDA No. 1 standard requires that the asparagus stalk be at least one-half inch in diameter. No less than two-thirds of the stalk length must be of green color. A ten-percent stalk tolerance is permitted, meaning that ten percent of the lot does not need meet the requirements for the USDA No. 1 standard. The USDA No. 2 standard requires that the asparagus stalk be at least five-sixteenths inch in diameter and not less then one-half of the stalk must be green. The USDA No. 2 standard also permits a ten-percent stalk tolerance. US Standards for Grades of Fresh Asparagus, 7 C.F.R. § 2851.3721. The USDA standards do not have any requirements for the length of the asparagus spear. Tr. at 49.

though the USDA Grade specifications weigh in favor of ruling that the designated and substitute asparagus are commercially interchangeable, less weight is given to this factor and more weight is given to the industry standards.

Instead of relying on USDA standards, the designated and substitute asparagus were traded on contract standards specific to individual labels.[6] The record evidence demonstrates that many of the contract standards were stricter than USDA Grade No. 2, and were often more stringent than USDA Grade No. 1. The contract standards also had various requirements for the length of the asparagus spear, which the USDA grading does not specify. Despite the differences in contract standards, the evidence shows that the actual lengths of the designated and substitute asparagus spears were roughly the same.

Evidence of different contract standards would indicate that the designated and substitute asparagus are not commercially interchangeable. However, this factor must be analyzed in the context of a reasonable hypothetical competitor of Pillsbury, and the primary purpose of asparagus for human consumption. A hypothetical reasonable competitor of Pillsbury will import asparagus both for the processed and fresh markets, the final destination dependent upon the supply and price of the asparagus. The primary purpose of asparagus is for human consumption, a purpose that is not altered by canning, freezing, jarring, or selling asparagus on the fresh market. A reasonable hypothetical competitor of Pillsbury would accept the designated and substitute asparagus for either the fresh market or for the processed market.

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[6] The designated asparagus were imported under a variety of Pillsbury labels, each label with its own commercial grading specifications. Empacadora imported asparagus under the Green Giant, County Kist, King Spear, and Mr. Lucky labels. Green Giant's specifications were the most stringent, and were much stricter than the USDA Grade No. 1 standards. Pillsbury's County Kist label had stricter requirements than USDA No. 2. County Kist required 85 percent green with a 10-percent tolerance, although no spear could be more than 1/3 white in color. Tr. at 144–49. Asparagus packed under the King Spear and Mr. Lucky labels were permitted to have more white material on the spears that those spears packed under the Green Giant or County Kist labels. Tr. at 189, 190–91, 195, 200–02. King Spear and Mr. Lucky labels only required 66 percent of the stalk length to be green. Tr. at 147. Each label would, at times, request different diameters of asparagus representing jumbo, extra large, large, standard, and small. Tr. at 207.

The substitute asparagus were not graded. Instead, a "usable percentage" was calculated based on the Dayton grade specifications. Tr. at 451. The Dayton grading system, as applied by Pillsbury to the substitute asparagus, was as follows: (1) "A" spears are those with a 3/4 inch or larger diametermeasured 5-1/2 inches from the tip; (2) "B" spears are spears with a 5/16 to 3/4 inch diameter measured 5-1/2 inches from the tip; and (3) "C" spears are both A and B spears with a minor defect. The A, B, and C spears must have a minimum of 5-1/2 inches of green color. "Culls" are defective fresh asparagus, with broken, flowered or spread spears. Although culls are still fresh asparagus and are edible, they are not acceptable for the fresh or processed markets. They are less than 3/8 inch in diameter when measured 5-1/2 inches from the tip. Tr. at 396–97; Plaintiff's Exhibit 30 (Asparagus Raw Product Grade Specifications, Dayton, Washington).

B. *Tariff Classification*

The asparagus shipped to Canada and the imported Mexican asparagus are both classified under HTSUS 0709.20.90.00. This weighs in favor of concluding the asparagus is commercially interchangeable.

C. *Relative Values of the Designated and Substitute Asparagus*

The relative values of the designated and substitute goods are usually a reliable indicator of whether goods are commercially interchangeable. In the instant case, however, the relative values are much less useful. The values of the imported and exported asparagus, as reflected in the invoices, cannot be directly compared. Several witnesses testified that asparagus prices early in the season are much higher than the asparagus prices when Washington State is in production. The price difference is not due to quality differences, but rather is due to the supply of asparagus in the marketplace.

An additional element to the price difference is the packing costs. The packing costs for asparagus were a significant percentage of the cost of the asparagus. Tr. at 144, 242–244. Packing types and costs are different for asparagus destined for the fresh market and asparagus for the processed market. It was more expensive to pack asparagus for the fresh market because they were packed in non-reusable crates, the asparagus were of uniform size and length, and the asparagus were often bunched.[7] Tr. at 159, 233–36, 295–96. Although not typical, customers who ordered the asparagus bunched for the fresh market would accept unbunched asparagus. Tr. at 102–03, 126, 336. The substitute asparagus were shipped in totes or lugs, rather than disposable cardboard boxes or wooden crates, because the totes and lugs can be recycled, and thus packing costs were reduced. Tr. at 394, 424. Asparagus shipped to the processed market were usually shipped in reusable totes or lugs, which constituted a very small portion of the asparagus price.

Because the evidence at trial showed that price differences in asparagus are not based on the quality of the asparagus, but rather on the supply of asparagus in the market, this factor does not detract from the conclusion that the designated and substitute asparagus are commercially interchangeable. Instead, because testimony at trial showed that the asparagus quality did not vary throughout the asparagus growing season, this factor reinforces the conclusion that

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[7] Bunched asparagus are typically 18 to 20 asparagus spears, roughly equivalent to a pound of asparagus, banded together in a bunch.

the designated and substitute asparagus are commercially interchangeable.

D. *Invoice Descriptions*

The designated asparagus and the substitute asparagus were described in the commercial invoices as "fresh asparagus." *See, e.g.*, Drawback Entry Number TH7–0092135–6 (May 8, 1995). This is not surprising since all asparagus, even culls, are "fresh asparagus" until processed.

E. *Preparation and Packaging of Asparagus*

An important factor in determining the commercial interchangeability of the subject asparagus is the preparation and packaging of the asparagus.

When harvested, the designated asparagus was cut to a length of eight to ten inches in the field. After the initial field cut, the picker gathered a handful of asparagus and made another "butt cut" to make the length of the asparagus uniform. There was also an initial culling process in the field, whereby the obviously defective asparagus were left in the field. Tr. at 92. The designated asparagus were washed, graded, sized, machine trimmed to length specifications, packaged in crates, labeled, and hydrocooled for preservation. Tr. at 62–65, 68–69, 82, 247. The designated asparagus were packed either loose or bunched. Tr. at 65, 182. The designated asparagus that are the basis of the disputed drawback claims were sold both to the fresh market and to processors. Tr. at 72, 144, 183–84.

The substitute asparagus were processed less than the designated asparagus. The substitute asparagus were trimmed twice in the field by the pickers, and then placed in bins, similar to the harvesting of the designated asparagus. There was also an initial culling process in the field whereby the obviously defective asparagus were left in the field. After the substitute asparagus were brought to the shed they were simply hydrocooled, and no further processing was done. Tr. at 387–95.

Clearly, there were several differences in the preparation and packaging of the designated and substitute asparagus. Customs maintains that because the designated asparagus were washed, graded, sized, machine trimmed, packed in crates, and labeled, the designated asparagus were no longer commercially interchangeable with the substitute asparagus, which were only culled and trimmed in the fields, and hydrocooled. Nonetheless, the asparagus remained fresh asparagus. Also, witnesses testified that some designated asparagus originally destined for the fresh market were redirected to the processed market. Any bunching or crating of asparagus did not change the condition of the asparagus, or disqualify it from a particular use. Functionally, the level of processing and the type of packaging did not restrict the asparagus to a specific market. Thus, the processing and packaging of asparagus have little impact on their commercial interchangeability.

Based on the Court's examination of government and industry standards, tariff classification, relative values, invoice descriptions, preparation and packing of asparagus, and all other testimony and admitted exhibits, the Court concludes that the designated and substitute asparagus are commercially interchangeable. A reasonable, hypothetical competitor of Pillsbury would accept either the imported Mexican asparagus or the exported Washington State asparagus for human consumption, its primary purpose.

G. *Calculation of Drawback*

Although the designated and substitute asparagus are commercially interchangeable, Pillsbury cannot receive the full amount of the claimed drawback. At trial, it was established that the usual commercial practice was to trim asparagus to a length that left an 18-percent "trim." Testimony at trial indicated that one inch of an asparagus spear is roughly equal to 18 percent of the total weight of the asparagus spear. In the instant case, Pillsbury shipped asparagus in lengths of 7-1/2 to 10 inches to Fraser Valley. This amounts to 2 to 4-1/2 inches of trim, or waste, being shipped to Canada. The documents attached to the drawback claims reflect the large amount of waste: they indicate that approximately 50 percent of the asparagus weight shipped to Canada was waste.[8] What Fraser Valley did with the asparagus is irrelevant to the issue of commercial interchangeability. It is relevant, however, to the issue of the amount of drawback claimed given that Fraser Valley only paid for the 5-1/2 inches of usable asparagus.[9]

Fraser Valley paid for the "usable poundage," or the weight of the first 5-1/2 inches of each asparagus spear. In a normal commercial situation, 6-1/2 inches of asparagus would be shipped to Fraser Valley to protect the end of the asparagus spear from becoming tough. Thus, the amount of asparagus exceeding 6-1/2 inches in length was excess waste, essentially packing material. The weight of the asparagus spear beyond the 6-1/2 inch length is not eligible for drawback. Accordingly, Pillsbury is eligible to claim drawback for 6-1/2 inches of each asparagus spear.

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[8] The Court is not in a position to determine the exact percentage of waste based on the documents submitted to the Court.

[9] Pillsbury claims that Fraser Valley paid a higher per usable pound price to offset the fact that Fraser Valley was only paying for a percentage of the shipped weight. No evidence was presented at trial to show that Fraser Valley paid a higher per usable pound price. Since Pillsbury did not meet its burden of establishing a higher asparagus price for Fraser Valley, the Court is unwilling to infer that a higher price was charged.

IV. CONCLUSION

The preponderance of the record evidence establishes that Customs erred in denying Pillsbury's claims for drawback. The record evidence also establishes that Pillsbury is only entitled to a portion of the claimed drawback, as discussed *infra*.

Slip Op. 03–141

LUOYANG BEARING FACTORY, PLAINTIFF AND DEFENDANT-INTERVENOR, *v.* UNITED STATES, DEFENDANT, AND THE TIMKEN COMPANY, DEFENDANT-INTERVENOR AND PLAINTIFF.

Consol. Court No. 99–12–00743

[Commerce's *Remand Results II* are affirmed. Case dismissed.]

Hume & Associates, PC (*Robert T. Hume*) for Luoyang, plaintiff and defendant-intervenor.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Ada E. Bosque*); of counsel: *Amanda L. Blaurock*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (*Terence P. Stewart* and *Wesley K. Caine*) for Timken, defendant-intervenor and plaintiff.

Dated: October 27, 2003

OPINION

I. Standard of Review

TSOUCALAS, Senior Judge: The Court will uphold Commerce's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

II. Background

On April 14, 2003, this Court issued an opinion and order directing the United States Department of Commerce, International Trade Administration ("Commerce"), to:

(a) point to specific evidence demonstrating that the type of steel at issue (i.e., hot-rolled bearing quality steel bar) purchased by the PRC trading company was subsidized; and

(b) examine if, and only if, Commerce finds that the PRC trading company import prices do not constitute the "best available information," whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the "best available information" over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones.

Luoyang Bearing Factory v. United States ("*Luoyang II*"), 27 CIT ____ , ____ , 259 F. Supp. 2d 1357, 1366 (2003).[1]

On July 14, 2003, Commerce submitted its Final Results of Redetermination Pursuant to Court Remand ("*Remand Results II*"). On August 12, 2003, Luoyang submitted comments to this Court regarding the *Remand Results II*. *See* Comments on Final Results Pursuant to Remand ("Luoyang's Comments"). Timken also submitted comments to this Court on August 13, 2003. *See* Comments of Timken, Def.-Intervenor, to Commerce's Final Results of Remand Redetermination ("Timken's Comments"). Subsequently, on August 28, 2003, Luoyang submitted rebuttal comments, which were followed by Timken's rebuttal comments on September 2, 2003. *See* Rebuttal Comments to Def.-Intervenor's Comments on Commerce's Final Results of Remand Determination ("Luoyang's Rebuttal") and Rebuttal Comments of Timken, Def.-Intervenor, to Luoyang's Comments on the Department of Commerce's Final Results of Remand Re-Determination ("Timken's Rebuttal"). Finally, on September 10, 2003, Commerce submitted its response to Luoyang's comments. *See* Def.'s Resp. to Luoyang's Comments to the Final Results of Redetermination Pursuant to Remand ("Commerce's Resp.").

III. Contentions of the Parties

A. Luoyang's Contentions

Luoyang argues that Commerce's *Remand Results II* do not satisfy the Court's remand order. *See* Luoyang's Comments at 2–15. In particular, Luoyang contests: (1) Commerce's subsidy suspicion policy as

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[1] The Court's opinion and order in *Luoyang II*, 27 CIT ____ , 259 F. Supp. 2d 1357, stems from the Court's opinion and order in *Luoyang Bearing Factory v. United States* ("*Luoyang I*"), 26 CIT ____ , 240 F. Supp. 2d 1268 (2002), familiarity with which is presumed.

an explanation offered by Commerce to disregard the PRC trading company data to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of tapered roller bearing ("TRB") cups and cones, see *id.* at 3, 4–10; and (2) Commerce's decision to use export data from Japan to India to value TRB cups and cones. *See id.* at 10–14.

With respect to Commerce's subsidy suspicion policy, Luoyang asserts that since Commerce's subsidy suspicion policy was never raised in the *Final Results of 1997–1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Final Results*"), 64 Fed. Reg. 61,837 (Nov. 15, 1999), the Court cannot consider Commerce's argument because it is not on the record. *See* Luoyang's Comments at 3, 4–5 (citing *Hoogovens Staal BV v. United States*, 22 CIT 139, 143, 4 F. Supp. 2d 1213, 1218 (1998).[2] Luoyang further asserts that "Luoyang was never given an opportunity to refute the subsidy allegation." Luoyang's Comments at 5. Moreover, Luoyang maintains that "Commerce provided no specific evidence of subsidies[,]" Luoyang's Comments at 6, and "Commerce failed to conduct any investigation" regarding the subsidies.[3] *Id.* at 7. Finally, Luoyang asserts that if the Court permits Commerce to apply its subsidy suspicion policy, then: (1) "Commerce should also . . . appl[y] the policy to the Indian import data used for the surrogate scrap steel value[,]" Luoyang's Comments at 8; (2) "the Court will acknowledge that Commerce can adopt arguments not addressed during the administrative proceeding[,]" *id.*; and (3) "Commerce's NME regulations will be changed

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[2] The Court in *Luoyang II*, 27 CIT at _____ , 259 F. Supp. 2d at 1364, addressed an identical argument posed by Luoyang by stating that "if Luoyang's argument is taken to its logical conclusion, any explanation offered by Commerce to comply with [the] Court's opinion and order . . . would be deemed a form of *post hoc* rationalization."

[3] Citing to two countervailing duty determinations relied on by Commerce to support Commerce's reason to believe or suspect that the steel purchased by Luoyang from the PRC trading company was manufactured in a certain country whose steel was subsidized, Luoyang argues that "Commerce did not review the [subsidy] programs in detail and did not attempt to tie any specific [subsidy] program to Luoyang's steel producer." Luoyang's Comments at 6. Luoyang then points to the fact that Commerce recently revised downward a certain subsidy rate for a certain steel producer in the certain country at issue for Luoyang's proposition that "even a cursory review of the evidence, without any investigation, establishes that any benefit Luoyang's steel producer could have received were no more than *de minimis*." *Id.* at 6–7. Moreover, to support its position that Commerce failed to provide specific evidence of subsidies and that Commerce failed to conduct any investigation regarding the subsidies, Luoyang points to evidence provided in the TRBs XIV administrative review. *See* Luoyang's Comments at 7 n.14.

The Court will not entertain arguments posed by Luoyang relating to an administrative record that is not before the Court. *See Hoogovens Staal BV v. United States*, 24 CIT 242, 248, 93 F. Supp. 2d 1303, 1308 (2000) (stating that "the records before Commerce in subsequent review periods are not part of the record of a prior review" and citing *Hoogovens*, 22 CIT at 144, 4 F. Supp. 2d at 1218).

[since] [n]early every country has subsidy programs that are generally available and Commerce will be prevented from using prices from those countries." *Id.*; *see also id.* at 8–10.

Next, Luoyang argues that "Commerce's preference for a single surrogate country should not trump the statutory requirement to use the 'best available information.'" Luoyang's Comments at 10. In particular, Luoyang argues that "the Japan to India values are not the best available and do not reflect prices 'in' India." *Id.* at 11. Luoyang maintains that Indonesian import data constitutes the best available information for valuing the bearing quality steel bar used in the production of TRB cups and cones. *See id.* at 12–13.[4]

B. Commerce's Contentions

Commerce responds that pursuant to the Court's opinion and order in *Luoyang II*, 27 CIT at ___ , 259 F. Supp. 2d at 1364–65, Commerce "relied upon its own CVD findings to determine that there was particular, specific, and objective evidence to uphold its reason to believe or suspect that the price at issue was subsidized." *Remand Results II* at 5. Commerce maintains that consistent with Congress' instructions and absent the requirement to conduct a formal investigation, the generally available information revealed that export and industry-specific subsidies were broadly available and "subsidies were utilized by the steel industry and were countervailable."[5] Commerce's Resp. at 4 (citing *Remand Results II* at 8). Commerce, therefore, asserts that Commerce "possessed reason to believe or suspect that the market-economy supplier, an exporter and member of a subsidized industry, would . . . benefit from the subsidies and that . . . the prices of the steel inputs obtained from the supplier would be distorted." Commerce's Resp. at 4–5; *see also id.* at 7.

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[4] Luoyang continues to argue as it did in *Luoyang II*, 27 CIT at ____ , 259 F. Supp. 2d at 1360 n. 4, that "Commerce failed to disregard aberrational data" in the *Remand Results II*. Luoyang's Comments at 13. As the Court stated in *Luoyang II*, the Court will not address this argument since it is outside the scope of this remand redetermination and particularly since this Court in *Luoyang Bearing Factory*, 26 CIT at ____ , 240 F. Supp. 2d at 1285, held that "the Court disagrees with Luoyang that the Court should order that Commerce exclude the values for January 1998 and March 1998 from the export data from Japan to India. Luoyang may not usurp Commerce's role as fact-finder and substitute Luoyang's analysis for the result reached by Commerce."

[5] Responding to Luoyang's argument that a negative finding for one steel supplier undermined Commerce's subsidy suspicion policy reasoning, Commerce explains:

> The negative determination referenced involved only one large steel producer, while the two affirmative orders demonstrate that other smaller steel companies from the country in question had above *de minimis* subsidy levels. [Commerce] find[s] the rates for the smaller steel companies to be more predictive and representative of the steel producers in the country in question. In light of these affirmative determinations for other steel producers, [Commerce's] negative finding for the one large company merely stands for the proposition that one steel producer received *de minimis* subsidies.

Remand Results II at 18.

Commerce further explains that since Commerce found that the PRC trading company import prices did not constitute the "best available information," Commerce, pursuant to the Court's opinion and order in *Luoyang II*, examined Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia). Commerce maintains that although Commerce found export data from Japan to India and export data from Japan to Indonesia to be both acceptable values, Commerce, in its discretion elected to use export data from Japan to India in order to value the subject merchandise at issue. *See* Commerce's Resp. at 8–9 (citing *Tehnoimportexport, UCF America Inc. v. United States*, 16 CIT 13, 18, 783 F. Supp. 1401, 1406 (1992)).

C. Timken's Contentions

Timken generally agrees with Commerce and maintains that Commerce complied with the Court's remand instructions. *See* Timken's Comments at 1, 8, 9; *see also* Timken's Rebuttal at 1–11.

IV. Analysis

The Court finds that Commerce complied with the Court's opinion and order in *Luoyang II*, 27 CIT ____ , 259 F. Supp. 1357, directing Commerce to point to specific evidence demonstrating that the type of steel at issue (i.e., hot-rolled bearing quality steel bar) purchased by the PRC trading company was subsidized. In particular, in *Remand Results II*, Commerce found that:

> the type of subsidies maintained by the government of the country in question, and relied on in making [Commerce's] determination to reject the PRC trading company prices, *are not specific to any particular product or type of steel.* This is demonstrated by the CVD investigations relied on by [Commerce] which show that *the same subsidy programs exist regardless of the type of steel products being produced and exported. Furthermore, the export subsidy programs maintained by the government in question were offered to domestic companies engaged in foreign trade. Enrollment in these export subsidy programs was not based on the merchandise produced or a particular industry but was only contingent on a company's export performance.*

Id. at 6 (emphasis added); *see also* Commerce's Resp. at 3–5. Based upon this information, Commerce established an adequate rebuttable presumption that the steel at issue (i.e., hot-rolled bearing quality steel bar) was subsidized. Specifically, since Commerce had information that the subsidies were not specific to a particular product or type of steel, Commerce made a logical inference supported by substantial evidence that Commerce had reason to believe or suspect that the steel purchased by the PRC trading company was subsidized. It then became Luoyang's burden to overcome this presumption. Contrary to Luoyang's assertion that it was never given an opportunity to refute Commerce's subsidy allegation, Luoyang had the opportunity during *Remand Results I* and *Remand Results II*, but failed to rebut Commerce's presumption.

Next, the Court also finds that Commerce complied with the Court's opinion and order in *Luoyang II*, 27 CIT ___ , 259 F. Supp. 1357, directing Commerce to examine whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the "best available information" over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones only if Commerce finds that the PRC trading company import prices do not constitute the "best available information." In *Remand Results II*, Commerce stated:

> Consistent with the [Court's] instructions . . . [Commerce] ha[s] now analyzed the Indonesian import data from HS category 7228.30 and [export data from Japan] to Indonesia . . . from HS category 7228.30.900. Based on this examination, [Commerce] find[s] the Indonesian HS number, as with the Indian import HS number, to be a basket category that encompasses a broad range of hot-rolled bars and rods of alloy steel, in addition to the bearing quality steel bars and rods used in TRB cup and cone production. . . . As for the Japanese export statistics, [Commerce] find[s] that they provide a breakdown of the broad six-digit HS category 7228.30 into several narrowly defined sub-categories. Although the Japanese HS category 7228.30.900 (Bars and Rods, of Other Alloy Steel) does not specifically isolate bearing quality steel as does the [United States] HTS category 7228.30.20, this Japanese category would include the type of bearing quality steel bar that is used to manufacture the TRB cup and cone. Therefore, [Commerce] find[s] the Indonesian import data, as a basket HS category, to be less reliable in comparison to the more narrowly defined Japanese export data (HS number 7228.30.900). . . .
>
> In comparing the [export data from Japan] to Indonesia . . . to the [United States] benchmark range ($642/MT to $834/MT), [Commerce] find[s] that the average [export data from Japan to Indonesia] value, $702/MT, provides a reasonable measure for this input. Because the Japanese tariff category is the narrowest category which could contain bearing quality steel, and because it is consistent with values contained in [Commerce's] [United States] benchmark category, [Commerce] believe[s] that these data are reliable for valuing steel used in the production of cups and cones.
>
> Therefore, the record of the underlying proceeding contains two acceptable values for bearing quality steel, [export data

> from Japan] to India and [export data from Japan] to Indonesia. Moreover, the two values are equally good in terms of their contemporaneity with the [period of review], the fact that they are both based on public information, and they are exclusive of duties and taxes. . . . Therefore, relying upon [Commerce's] preference for valuing factors in a single country (19 CFR § 351.408(c)(2) [1998]), [Commerce] determine[s] that the best information available for valuing bearing quality steel is [export data from Japan to India].

Remand Results II at 14–16 (citations omitted).

The Court further finds that contrary to Luoyang's argument that Indonesian import data constitutes the best available information for valuing the bearing quality steel bar used in the production of TRB cups and cones, *see* Luoyang's Comments at 12–13, Luoyang may not usurp Commerce's role as fact finder and substitute their analysis of the data for the result reached by Commerce. Moreover, the Court finds that Commerce's decision to choose export data from Japan to India over export data from Japan to Indonesia was reasonable. *See Tehnoimportexport*, 16 CIT at 18, 783 F. Supp. at 1406 ("When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly.").

Based on the foregoing and upon reviewing the parties' submissions, the Court finds that Commerce complied with the Court's opinion and order in *Luoyang II*, 27 CIT ____ , 259 F. Supp. 2d 1357.

V. Conclusion

The Court affirms Commerce's *Remand Results II*. This case is dismissed.

Slip Op. 03–142

BAUER NIKE HOCKEY USA, INC., f/k/a BAUER USA, INC. PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Before: Pogue, Judge

Court No. 00–00325

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

Decided: October 27, 2003

Burak, Anderson, & Melloni, PLC (*Jon T. Alexander*, *Michael B. Rosenberg*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, *Amy M. Rubin*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Sheryl A. French*, Attorney, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff, BAUER NIKE Hockey USA Inc., f/k/a Bauer USA, Inc. ("Bauer Nike" or "Plaintiff") challenges a decision of the United States Bureau of Customs and Border Protection ("Customs" or "Defendant")[1] denying Plaintiff's protests filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (2000). At issue is the proper tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202 (1994), of Plaintiff's imports of ice hockey pants.

Bauer Nike claims that the subject merchandise is classifiable under subheading 9506.99.25, HTSUS, covering "[i]ce-hockey and field-hockey articles and equipment, except balls and skates, and parts and accessories thereof."[2] Goods classifiable under subheading 9506.99.25 were free of duty for the years 1998, 1999, and 2000 during which the subject merchandise was entered at the port of St. Albans, Vermont.

Customs classified the merchandise under a residual or "basket" provision, subheading 6211.33.00, HTSUS, covering "Other garments, men's or boy's . . . : Of man-made fibers."[3] Goods classifiable

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[2] Merchandise classifiable under subheading 9506.99.25, HTSUS, includes:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof . . . :
. . .	
9506.99	Other:
. . .	
9506.99.25	Ice-hockey and field-hockey articles and equipment, except balls, and parts and accessories thereof.

Subheading 9506.99.25, HTSUS (1998).

[3] Merchandise classifiable under subheading 6211.33.00, HTSUS, includes:

6211	Track suits, ski-suits and swimwear; other garments:
. . .	
	Other garments, men's or boys' . . . :
6211.33.00	Of man-made fibers.

Subheading 6211.33.00, HTSUS.

under that subheading were subject to duty rates of 16.6% (1998), 16.5% (1999), and 16.4% (2000) *ad valorem*.

Bauer Nike protested Customs' classification. In response, Customs' issued Headquarters Ruling ("HQ") 962072 (Aug. 12, 1999), classifying the subject merchandise under subheading 6211.33.00.

Before the Court are cross-motions for summary judgment pursuant to USCIT Rule 56. The Court has jurisdiction pursuant to 19 U.S.C. § 1515 (1994) and 28 U.S.C. § 1581(a) (1994). For the reasons that follow, the Court finds that the subject merchandise is properly classified under subheading 6211.33.00, HTSUS, as "[t]rack suits, ski-suits and swimwear; other garments: Other garments, men's or boys' . . . : Of man-made fibers," and grants summary judgment for Defendant.

Standard of Review

Customs' classification is subject to *de novo* review by this Court pursuant to 28 U.S.C. § 2640.[4] 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. *Bausch & Lomb, Inc.*, 148 F.3d at 1365. The Court will, nevertheless, consider the reasoning of a Customs' classification ruling, to the degree that the ruling presents the "power to persuade." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

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[4] As there are no factual disputes as to what constitutes the subject merchandise here, the statutory presumption of correctness is inapplicable to Customs' classification. *See Intercontinental Marble Corp. v. United States*, 27 CIT _____ , _____ n.3, 264 F. Supp. 2d 1306, 1309 n.3 (2003).

about the nature of the subject merchandise, there exists a genuine issue of material fact and a trial is warranted.

Undisputed Facts

In the instant case, the parties agree that the merchandise at issue is described as "hockey pants," or "ice hockey pants" represented by model numbers HP88, HP100, HP500, HP1000, HP3000 and HP5000. Compl. of Bauer Nike at 2; Pl.'s Resp. to Def.'s Stat. Mat'l Facts para. 1–2; Def.'s Stat. Mat'l Facts para. 1–2; Def.'s Mem. Supp. Mot. Summ. J. at 1 ("Def.'s Mem."). The hockey pants are made entirely of synthetic materials. Pl.'s Resp. to Def.'s Stat. Mat'l Facts para. 3; Def.'s Stat. Mat'l Facts para. 3. "The basic design of the hockey pants is comprised of . . . : an exterior nylon or polyester shell and an assemblage of interconnected hard plastic guards [or plates] surrounded by soft [polyester, nylon or] foam padding . . . attached to a belt beneath the exterior shell [or pants]." Laperriere Aff., Pl.'s Ex. 3 at 2; HP5000 (Large) Mat'l Specs, Pl.'s Ex. 6 at 2–3 (indicating that the model's: floating pad is composed of nylon; thigh guard is composed of polyester knit fabric and "P.U. foam;" spinal padding is composed of nylon and polyester as well as other materials; belly pad is composed of nylon and foam; and hip pads and tail pad are composed of polyester as well as other materials); Pl.'s Mem. Supp. Cross-Mot. Summ. J. and Opp'n to Def.'s Mot. Summ. J. at 3 ("Pl.'s Mem."); Def.'s Reply to Pl.'s Opp'n Def.'s Mot. Summ. J. and Resp. Pl.'s Cross-Mot. Summ. J. at 3 ("Def.'s Reply") (stating that Defendant does not dispute Plaintiff's description of "the history, materials, design and injury-reducing properties" of the ice hockey pants). Additional foam padding is sewn inside the shells of certain models. Laperriere Aff., Pl.'s Ex. 3 at 2; Def.'s Reply at 3. The shell of models HP88, HP100, HP500, HP1000 and HP3000 is permanently sewn to the internal belt, guards, and pads, whereas the shell of model HP5000 is attached to the internal belt, guards and pads by a series of metal buttons. *See id.* The belt, guards and pads are interconnected by polyester or nylon straps, webbing, mesh or braiding, *see* Pl.'s Mem. at 4, in order for the internal belt to hold the guards and pads in the correct position. Laperriere Aff., Pl.'s Ex. 3 at 3; Def.'s Reply at 3. The internal belt, guards and pads comprise approximately eighty percent of the total weight of the hockey pants, *see* Def.'s Reply at 3; Pl.'s Mem. at 5; *see also* Bauer Nike HP5000 Design Specifications, Pl.'s Ex. 5 (noting that a pair of model HP5000 pants weighs 2.30 kilograms), and are designed to provide protection to the wearer, *see* Def.'s Resp. to Pl.'s Stat. Mat'l Facts para. 5; Pl.'s Stat. Mat'l Facts para. 6, by absorbing and deflecting blows, collisions, and flying objects. Pl.'s Mem. at 14; Def.'s Reply at 3. Plaintiff markets the ice hockey pants under a "protective equipment" category, Pl.'s Stat. Mat'l Facts para. 1; Def.'s Resp. to Pl.'s Stat. Mat'l Facts para. 1; *Protective Information Pamphlet* (1999), Pl.'s Ex. 10 at 2, but also indicates that the hockey pants have comfort, fit, and ventilation features. *See, e.g.*, Excerpts of Bauer Nike's Ice Hockey Collection Catalogues, Def.'s Ex. D at 2 (noting that model HP5000 provides "venting in the front of the pant, keeping the player cool. The result—the player sweats less and therefore less sweat is absorbed by the equipment so it stays light."), 3 (stating that models HP3000's and HP1000's three-piece thigh feature "provides a more comfortable fit"), 4 (advertising the model HP100 as containing "200 deniers lightweight nylon for added comfort," and describing model HP500 as containing spandex and a mesh gusset for "increase[d] stretch and ventilation for added comfort and coolness").[5]

As the parties agree as to the 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.

Issue Presented

The two competing headings at issue here are contained in Chapters 62 and 95 of the HTSUS. Chapter 62, encompassed in Section XI ("Textiles and Textile Articles"), covers "[a]rticles of apparel and clothing accessories, not knitted or crocheted," and "applies only to made up articles of any textile fabric other than wadding." Chapter 62, HTSUS. Note 1(t) to Section XI states that the section excludes articles of Chapter 95, or "toys, games, sports requisites and nets." Section XI, Note 1(t), HTSUS. Chapter 95 specifically covers "[t]oys, games and sports equipment; parts and accessories thereof." Chapter 95, HTSUS. Note 1(e) to Chapter 95 explicitly excludes "sports clothing . . . of textiles, of chapter 61 or 62" from classification in that chapter.[6] Chapter 95, Note 1(e), HTSUS.

Accordingly, the central question in this case is whether the subject merchandise constitutes an article of sports clothing that is composed "of textiles" and otherwise falls within the purview of chapter 62 as an article of apparel,[7] thereby excluding the merchandise from Chapter 95.

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[5] Defendant, however, avers that an importer's designation of its articles is irrelevant for classification purposes. *See* Def.'s Resp. to Pl.'s Stat. Mat'l Facts para. 1.

[6] The Notes to Chapter 95 state, in relevant part, that:

1. This chapter does not cover:

   (e) Sports clothing or fancy dress, of textiles, of chapter 61 or 62.

Chapter 95, Note 1(e), HTSUS.

[7] As neither party contends that the subject merchandise is classifiable under chapter 61, discussion is limited to chapter 62.

Parties' Contentions

Plaintiff argues that the ice hockey pants are properly classified as protective sports equipment under Heading 9506. Pl.'s Mem. at 14. In particular, Bauer Nike claims that Customs failed to consider whether the protection afforded by the ice hockey pants was significantly greater or essentially different from that offered by conventional textile trousers. Pl.'s Mem. at 25. Because the hockey pants are composed "predominately" of non-textile materials, including molded plastic guards and foam padding, and are designed to absorb the impact of blows and collisions, Bauer Nike contends that the hockey pants' protective features "go far beyond conventional textile trousers." *See* Pl.'s Reply Mem. Supp. Cross-Mot. Summ. J. at 14 ("Pl.'s Reply"); Pl.'s Mem. at 24–25, 39. Accordingly, Bauer Nike contends that the hockey pants are no longer wearing apparel. *See* Pl.'s Mem. at 25, 27. Any aesthetic appeal, comfort, durability or mobility attributable to the hockey pants, in Plaintiff's opinion, is "purely incidental, ancillary or subordinate to their sole function of protecting players from the severe and unique hazards of ice hockey." *Id.* at 38. Bauer Nike also contends that the subject hockey pants are dissimilar from the exemplars provided in Explanatory Note ("Explanatory Note" or "EN") 61.14[8] because the bulk of the hockey pants here is made of foam pads and hard plastic guards, rather than textiles. *See id.* at 40–41; Pl.'s Reply at 3. Instead, Bauer Nike maintains that the merchandise at issue is described directly by the exemplars listed in Explanatory Note 95.06(B)(13),[9] because the hockey pants "encompass[] padded or plated articles" and are specially designed to absorb blows and collisions to prevent bone fractures, organ ruptures and other hazards. Pl.'s Mem. at 41; *see* Pl.'s Reply at 3–4. Such features, Bauer contends, are indicative of protective sports equipment. Pl.'s Reply at 3 (citing *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 783, 981 F. Supp. 610, 616 (1997)). Bauer Nike's final contention is that U.S. Note 12(a) to Subchapter II of Chapter 99 ("U.S. Note

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[8] Explanatory Note 61.14 to the Harmonized Commodity Description and Coding System states, in relevant part, that:

> This heading covers . . .
>
> (5) Special articles of apparel used for certain sports . . . (e.g., fencing clothing, jockeys' silks, ballet skirts, leotards).

Harmonized Commodity Description and Coding System, EN 61.14 (2d ed. 1996) at 922.

[9] Explanatory Note 95.06 states, in pertinent part, that:

> This heading covers . . .
>
> (B) *Requisites for other sports and outdoor games* . . . e.g.: . . .
>
> (13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

EN 95.06 at 1716–17 (emphasis supplied).

12(a)")[10] fails to indicate Congressional intent to classify ice hockey pants as sports clothing, and as an expired provision, is inoperative. *See* Pl.'s Reply at 7, 9–10.[11] Plaintiff therefore argues that no deference should be extended to Customs' classification of the subject merchandise. Pl.'s Mem. at 15.

Customs responds that the subject merchandise was properly classified under Heading 6211. Def.'s Mem. at 6. As such, the agency contends that its Headquarters Ruling 962072 is entitled to deference. *Id.* at 11. Because the hockey pants are the "principal mid-body covering worn by a person engaged in playing ice hockey," Def.'s Reply at 26, Customs's first argument is that, even though the hockey pants contain padding and are specially designed and intended for use only while playing the sport of ice hockey, classification is proper under Heading 6211 because the term "garments" clearly and plainly describes the merchandise. Def.'s Mem. at 14–15. The hockey pants are "garments," Customs argues, because the pants are worn as the outermost layer covering the body and provide the wearer with, in addition to protection, decency, fit, comfort, ventilation, and style. *Id.* at 19; Def.'s Reply at 23. Next, Customs claims that Note 1(e) to Chapter 95 expressly excludes "*all* sports clothing" from classification in that chapter, regardless of the level of protection extended to the wearer, Def.'s Reply at 8 (emphasis supplied); consequently, the hockey pants at issue are also excluded from classification in Chapter 95. Def.'s Mem. at 20–22. Defendant's next contention is that the exemplars in Explanatory Note 95.06 (B)(13) are not *ejusdem generis*

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[10] U.S. Note 12(a) states that:

> 12. (a) For the purposes of subheading 9902.62.01—
>
> (1) The term "*sports clothing*" refers to:
>
> (A) ice hockey pants, provided for in subheadings 6113.00, 6114.30, 6210.40, 6210.50, 6211.33 or 6211.43; and
>
> (B) other articles of sports wearing apparel which because of their padding, fabric, construction, or other special features are specially designed to protect against injury (e.g., from blows, falls, road burns or fire).
>
> (2) The term "*sports clothing*" does not include protective equipment for sports or games such as fencing masks and breast plates, shoulder pads, leg guards, chest protectors, elbow and knee pads, cricket pads and shin guards.

U.S. Note 12(a), HTSUS (emphasis supplied).

[11] Plaintiff also argues that each model of the hockey pants at issue here is a composite good. Pl.'s Mem. at 22. Plaintiff's assertion lacks merit. Because both parties concede that the hockey pants consist of an exterior shell and an internal belt, pads and guards, and that those parts can be purchased separately, *see* supra pp. 5–6; Bauer Nike Girdle, Style Vapor 8, Pl.'s Ex. 16, Bauer Nike Shell, Pl.'s Ex. 17, Bauer Nike, Style Vapor 4, Def.'s Ex. I, the hockey pants here cannot constitute a composite good. EN IX to GRI 3(b) at 4 ("[C]omposite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, *provided* these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.") (emphasis supplied).

with the imported hockey pants. Def.'s Reply at 26. Rather, Customs contends that the hockey pants are similar to "fencing clothing," an exemplar provided in Explanatory Note 61.14, because both articles are special articles of apparel only used while participating in a certain sport and contain protective features. *See* Def.'s Mem. at 20–21. As such, Customs argues that the merchandise is classifiable as "sports clothing" under Chapter 62. *See id.* at 20. Last, Customs relies on U.S. Note 12(a) as evidence of Congressional intent that ice hockey pants are sports clothing classifiable under Chapter 62. Def.'s Reply at 24.

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, HTSUS; *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. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). Thus, if the application of GRI 1 provides the proper classification, the Court may not consider any subsequent GRI. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998) ("*Mita I*"). 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 (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) ("*Mita II*") (citation omitted)); *see also 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.") (citation omitted). 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.

As noted above, in this case, the critical distinction between the two alternative Headings, 6211 and 9506, is provided by Note 1(e) to Chapter 95, which excludes sports clothing from classification in that chapter and hence under Heading 9506. The phrase "sports clothing, . . . of textiles, of chapter 61 or 62," is not defined within the HTSUS or by the relevant legislative history. Based on a plain reading of the statutory language, the provision encompasses textile articles of "sports clothing" that are classifiable as wearing apparel under Chapter 62. *See Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1356 (Fed. Cir. 2003). Because the parties admit that the outer covering or shell of the ice hockey pants is made exclusively of nylon and polyester, several of the internal pads are partially composed of nylon or polyester and the belt, guards, and pads are internally interconnected by polyester or nylon straps, webbing, mesh or braiding, *supra* pp.5–6, the merchandise is made "of textiles."[12] The Court must therefore determine whether the ice hockey pants are (1) articles of sports clothing (2) classifiable as wearing apparel under Chapter 62.

A. "Sports Clothing"

Neither the HTSUS nor its legislative history defines the term "sports clothing." "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 II*, 21 F.3d at 1082 (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992)). The Court, in construing tariff terms, "may rely upon its own understanding, dictionaries and other reliable sources." *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (citation omitted).

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[12] Nothing in the language of the phrase "of textiles" requires that the textile portion predominate, particularly in terms of composition by weight (otherwise those requirements, as in other provisions of the HTSUS, would be specified), although certainly the characteristic must not be incidental. While Plaintiff does not directly claim that the ice hockey pants are not "of textiles," Plaintiff makes a related argument in discussing the exemplars of Chapter 62. *Infra* subsection B. There, Plaintiff argues that the ice hockey pants are dissimilar from the exemplars of that chapter, i.e., "fencing clothing, jockeys' silks, ballet skirts, [and] leotards," EN 61.14 at 922, because those items are entirely made of textiles, whereas the merchandise here is, in Plaintiff's opinion, "predominately" made of foam padding and plastic guards. Plaintiff has presented uncontradicted evidence indicating that the internal belt, pads and guards portion of the hockey pants weigh more than the shell portion. This evidence is not problematic, however, because Plaintiff concedes that the shell or pants as well as several internal pads are made partially of nylon or polyester and that the belt, guards and pads are interconnected by polyester or nylon straps, webbing, mesh or braiding. Accordingly, the phrase "of textiles" is satisfied under a plain reading.

In *H.I.M./Fathom, Inc. v. United States*, the Court defined "clothing" as a " 'covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.' " 21 CIT at 781, 981 F. Supp. at 615 (quoting *Webster's Third New International Dictionary* 428 (1993)). Because clothing is defined as a "garment," and neither the HTSUS nor its legislative history defines that term, it is necessary to ascertain its common meaning. The Court has defined the term "garment" as " 'an article of outer clothing (as a coat or dress) usu. exclusive of accessories.' " *H.I.M./Fathom, Inc. v. United States*, 21 CIT at 781, 981 F. Supp. at 615 (quoting *Webster's Third New International Dictionary* 936). Thus, based on a common understanding of the term "sports," the Court finds that "sports clothing" is defined as outer coverings or articles worn on the body while participating in sports.

The ice hockey pants here undeniably constitute articles of "sports clothing," as the merchandise is worn on the human body as pants exclusively while participating in the sport of ice hockey. Accordingly, the Court finds that the ice hockey pants at issue are articles of "sports clothing." The question remains, however, whether the textile ice hockey pants are classifiable as wearing apparel under Chapter 62, thereby triggering the preclusive effect of Note 1(e) to Chapter 95. *See Rubie's Costume Co. v. United States*, 337 F.3d at 1357.

B. "Wearing Apparel" under Chapter 62

The Federal Circuit recently defined the term "wearing apparel" in *Rubie's Costume Co. v. United States*, 337 F.3d at 1357, indicating that the term is " 'not an uncommon one in statutes, and is used in an inclusive sense as embracing all articles which are *ordinarily* worn—dress in general.' " *Id.* (quoting *Arnold v. United States*, 147 U.S. 494, 496 (1893) (defining "wearing apparel" under the predecessor classification statute, the Tariff Schedules of the United States ("TSUS")) (emphasis supplied)). The circuit court further defined "wearing apparel" as " 'clothes or coverings for the human body worn for decency or comfort[,] and common knowledge indicates that adornment is also an element of . . . wearing apparel.' " *Rubie's Costume Co.*, 337 F.3d at 1357 (quoting *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, 364 (1958)).

Plaintiff sets forth two additional definitions of the term "wearing apparel" as defined under the TSUS. *See* Pl.'s Mem. at 26. The first defines "wearing apparel" as articles worn not only "for reasons of decency, comfort, or adornment but also 'for protection against the elements and those worn for protection against more localized conditions prevailing in the environment of the home, workplace, school, or restaurant.' " *Id.* (quoting *Admiral Craft Equip. Corp. v. United States*, 82 Cust. Ct. 162, 163 (1979) (dismissing plaintiff's argument that wearing apparel does not cover articles worn by humans essentially for protective purposes as "obviously incorrect")). The second definition adds that " 'all wearing apparel is to a degree (often a high degree) designed and worn to provide comfort and protection, often for very specific situations.' " Pl.'s Mem. at 26 (quoting *Daw Indus., Inc. v. United States*, 714 F.2d 1140, 1143 (Fed. Cir. 1983)).

Because the subject merchandise also must be classifiable under Chapter 62, the scope of that chapter must be examined. Explanatory Note 61.14, which applies *mutatis mutandis* to garments covered by Heading 6211, provides that the heading also includes, "[s]pecial articles of apparel used for certain sports or for dancing or gymnastics (e.g., fencing clothing, jockeys' silks, ballet skirts, [and] leotards)." EN 61.14 at 922. Customs interprets this language narrowly, stating that "the term 'certain' limits the scope of . . . [H]eading [6211] to those articles of sporting apparel which, protective or otherwise, are as a general matter, worn only while engaging in the activity for which they were designed." Pl.'s Ex. 22, HQ 086973 (Apr. 30, 1990); *see also* HQ 951640 (July 16, 1992) (same); Def.'s Ex. J, HQ 951627 (Aug. 14, 1992) (stating that Heading 6114 "does not cover all wearing apparel which could be worn for sports, but only those sports clothes which are specially designed to be worn in a particular sport and which would not ordinarily be worn any other time"). For example, Customs has explained that "while football pants or baseball knickers might be classifiable in [H]eading 6211, such articles as tennis or rugby shorts, which are often worn off the court or playing field, would most likely not be so classifiable." Pl.'s Ex. 22, HQ 086973 (Apr. 30, 1990). Accordingly, it appears that an article of clothing is classifiable under Chapter 62 as a "special article[] of apparel used for certain sports" if the article is ordinarily worn on the human body, specially designed for a specific sport, and limited in use to that sport as evidenced by the construction of the garment. Def.'s Ex. K, HQ 957469 (Nov. 7, 1995); *see also* HQ 951640 (July 16, 1992) (classifying ice hockey official's pants under Heading 6114 because the pants were sports clothing and only worn while engaging in the sport, as evidenced by the fact that the pants were sized proportionally to the protective equipment worn underneath the pants).

The Court has further recognized that Chapter 62, HTSUS, also includes articles of apparel strictly worn for protective purposes. *H.I.M./Fathom*, 21 CIT at 782 n.3, 981 F. Supp. at 616 n.3. In *H.I.M./Fathom*, the Court acknowledged that "the garment provisions of the HTSUS include certain items the principal use of which is not comfort and adornment." *Id.* For example, the garment provisions cover " '[n]onwoven disposable apparel designed for use in . . . contaminated areas,' [articles] obviously not worn for pure decency, comfort or adornment but for protection." *See id.*; *see also* Def.'s Ex. M, HQ 959595 (Mar. 24, 1999) (classifying chainsaw protective vest containing an outer nylon shell coated in polyurethane and internal layers of pads comprised of polyester, polypropylene, and nylon as "other garments" because the vest provided protection to the wearer from particular hazards encountered in specific occupations, and was similar to the types of clothing named in the explanatory note to Heading 6211).

Accordingly, in the instant case, the hockey pants constitute articles of wearing apparel. The hockey pants are ordinarily worn as an outer covering on the body for comfort, fit, ventilation, and protective purposes only while participating in the sport of ice hockey. Moreover, the ice hockey pants are classifiable under Chapter 62. Because neither party disputes that the merchandise at issue is only used while engaging in ice hockey, as evidenced by the merchandise's protective, comfort, and ventilation features, and that the merchandise is specially designed for use in the sport of ice hockey, the ice hockey pants are "special articles of apparel used for certain sports." The merchandise at issue here is therefore covered by the express language of Heading 6114, and consequently, Heading 6211.

Contrary to Bauer Nike's contention, in light of the fact that the Court finds the hockey pants are special articles of apparel used for a certain sport, the subject merchandise is similar to the exemplars provided in Explanatory Note 61.14. In particular, the Court is not persuaded by Plaintiff's argument that because the bulk of the hockey pants is made of foam pads and hard plastic guards, rather than textiles, the merchandise at issue is dissimilar from the exemplars provided therein. Plaintiff's own evidence undermines its argument. While Plaintiff presented uncontradicted evidence that the internal belts, pads, and guards compose eighty percent of the merchandise's weight, Bauer Nike also submitted evidence indicating that the belt, pads and plates are held together by nylon or polyester straps, webbing, mesh or braiding. Moreover, several of the internal pads are made partially of nylon or polyester. Last, the shell or outer covering is made entirely of textiles. Such evidence casts doubt on Plaintiff's claim that the hockey pants are "predominately" made of foam pads and plastic guards.

Furthermore, like the hockey pants here, one of the exemplars, fencing clothing, also contains a protective feature that includes padding. Specifically, the "plastron" contains an internal textile pad covered by an outer textile material. Def.'s Ex. H, Clothing at 2 *available at* http://sitka.triumf.ca/morgan/faq_2.1.html (noting that a "plastron" is an article of fencing clothing); *The American Heritage Dictionary of the English Language* 1386 (3d ed. 1996) (defining "plastron" as "[a] quilted pad worn by fencers to protect the torso and side"). Because both articles contain an internal pad covered by a textile fabric, the two articles are similarly constructed.

In determining whether the hockey pants are "wearing apparel," Bauer Nike further contends that the Court must consider whether the protective functions of the subject merchandise go "far beyond that of general wearing apparel," such that the ice hockey pants are no longer wearing apparel for classification purposes. *See* Pl.'s Mem. at 27 (citation omitted). Such an inquiry, according to Bauer Nike, requires that the Court consider whether the ice hockey pants "provide significantly more, or essentially different, protection than analogous articles of clothing." *Id.* at 28 (citation omitted). Plaintiff relies on case law and various Customs' ruling letters to support its contention. *Id.* at 27–29; Pl.'s Reply at 13.[13]

The Court finds Bauer Nike's argument lacks merit for several reasons. First, the determinations on which Bauer Nike relies fail to assist the Court in adjudicating the legal issue presented here because they were developed in a different context. While each of the cited determinations discussed the term "wearing apparel," and the articles classified therein provided some degree of protection to the wearer, none of the determinations explain whether the merchandise at issue there constituted articles of "sports clothing" classifiable as wearing apparel under Chapter 61 or 62. *E.g.*, *Admiral Craft Equip. Corp.*, 82 Cust. Ct. at 162–63 (discussing whether disposal plastic aprons and lobster bibs were classifiable as "plastic wearing apparel" or "other plastic articles not specially provided for" under the TSUS); *Dynamics Classics, Ltd.*, 10 CIT at 667 (analyzing whether plastic exercise suits chiefly used for weight and girth reduction were classifiable as plastic "wearing apparel" or "other [plastic] articles not specially provided for" under the TSUS). The Court therefore finds it unnecessary to apply Plaintiff's proffered "wearing apparel" test.

Here, Customs' interpretation of the relevant provisions at issue is consistent with previous classification determinations of similar articles of sports clothing identified as hockey pants or ice hockey

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[13] In particular, Plaintiff cites to the following determinations: *Admiral Craft Equip. Corp.*, 82 Cust. Ct. at 163; *Dynamics Classics, Ltd. v. United States*, 10 CIT 666 (1986); *Daw Indus., Inc.*, 714 F.2d at 1143–44 (finding sheaths and socks used exclusively with prostheses were classifiable as other prosthetic articles, rather than "wearing apparel" under the TSUS); Pl.'s Ex. 23, HQ 965312 (Jan. 14, 2002) (concluding that buoyancy compensators were "dive equipment" under Heading 9506, rather than "wearing apparel" under Heading 6210, because the compensator's use went "far beyond that of a typical jacket or vest," the warmth and protection features were ancillary to the buoyancy function, and prior precedent of the Court classified scuba diving equipment under subheading 9506.29.0040, but noting that note 1(e) to Chapter 95 did "not operate to exclude [the merchandise] from Chapter 95 because . . . compensators [we]re not clothing"); Pl.'s Ex. 24, HQ 965196 (Nov. 21, 2001) (same); Pl.'s Ex. 27, HQ 952204 (Apr. 12, 1993) (classifying a swim sweater under Heading 6307 as other articles made up of textiles rather than a garment under Heading 6114)); Pl.'s Ex. 34, HQ 960166 (Aug. 28, 2002) (finding that a textile swimming aid was a garment classifiable under Heading 6112, rather than other made up articles of textiles under Heading 6307); Pl.'s Ex. 35, HQ 965313 (Jan. 14, 2002) (concluding that buoyancy compensators were "dive equipment" under Heading 9506, rather than "wearing apparel" under Heading 6211, because the compensator's use went "far beyond that of a typical jacket or vest," but noting that note 1(e) to Chapter 95 "does not operate to exclude [the merchandise] from Chapter 95 because . . . compensators [we]re not clothing"); Pl.'s Ex. 36, HQ 952483 (May 27, 1993) (classifying personal buoyancy vests under Heading 6307 as other made up articles, rather than a garment).

pants. *See, e.g.*, NY A87152 (Sept. 9, 1992) (classifying ice hockey pants composed of woven nylon fabric, a textile belt, and padding in the leg and above the waist as sports clothing under Note 1(e) to Chapter 95); Pl.'s Ex. 22, HQ 086973 (Apr. 30, 1990) (classifying ice hockey pants composed of nylon and internal padding as sports clothing under Note 1(e) to Chapter 95 and Heading 6114 because the pants were only worn while engaging in ice hockey). Consequently, neither the Supreme Court's articulation nor the three cases which further develop the "wearing apparel" standard supports the application of Plaintiff's proffered test here.

Accordingly, the Court concludes that the ice hockey pants are sports clothing classifiable as wearing apparel under Chapter 62. Note 1(e) to Chapter 95 therefore precludes classification of the subject merchandise from that chapter.

C. Articles of Equipment Classifiable under Chapter 95

The Court further finds Plaintiff's arguments that the ice hockey pants are articles of protective sports equipment classifiable under Heading 9506, HTSUS, unpersuasive. Heading 9506 covers "[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof." Customs' has interpreted this heading as encompassing "apparatus for use while engaging or participating in the sport; a physical necessity for the sport." HQ 951640 (July 16, 1992). Customs has noted, however, that Heading 9506 "embraces only certain forms of protective gear, and that sports clothing, regardless of the protection they afford the wearer, is still excluded." NY A87152 (Sept. 9, 1992).

The term "equipment" must also be defined in accordance with its common meaning, as the term is not defined by either the HTSUS or its legislative history. The Court has defined "equipment" as " 'Something with which a person, an organization, or a thing is equipped;' 'equip,' in turn, is defined as 'To supply with necessities such as tools or provisions.' " *Rollerblade, Inc. v. United States*, 24 CIT 812, 819, 116 F. Supp. 2d 1247, 1255 (2000) (quoting *The American Heritage Dictionary* at 622 (1996)), *aff'd* 282 F.3d 1349, 1354 (Fed. Cir. 2002); *see also Webster's Third New International Dictionary* 440 (defining "equipment" as "the equipping of a person or thing" and "equip" as "to provide with what is necessary, useful, or appropriate"). More recently, the Federal Circuit has defined "equipment" as "those articles that are necessary and specifically designed for use in athletics and other sports." *See Rollerblade, Inc. v. United States*, 282 F.3d at 1354. Customs has ruled that equipment "includes the requisites needed in connection with the play of sports and athletics, *that being the equipment essential to the play of the game, sport or athletic activity* or the equipment designed for use by the player in the training, practice and conduct of . . . sporting activities." NY D85049 (Dec. 14, 1998) (emphasis added). Equipment also plainly encompasses articles containing protective features. *See* EN 95.06(B)(13) at 1716–17 ("*Requisites for other sports and outdoor games* . . . e.g.: (13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin guards.") (emphasis supplied); *see also Slazengers, Inc. v. United States*, 33 Cust. Ct. 338, 339 (1954) (articles that serve "no other purpose but to aid in a safer and more efficient game . . . are within the designation of 'equipment.' "); HQ 956582 (Mar. 14, 1995) (classifying wrist protectors designed to perform a protective function as sports equipment, rather than sports clothing, under Heading 9506).

While the hockey pants provide protection to the wearer, and are specially designed for use in the sport of ice hockey, Plaintiff concedes that it is possible to engage in the sport of ice hockey without wearing the merchandise in question. Pl.'s Resp. to Def.'s Stat. Mat'l Facts para. 8. As such, the Court finds that the subject merchandise is not essential or necessary for participation in that sport. Consequently, Plaintiff's ice hockey pants are not articles of sports equipment, and are therefore not classifiable as such.

Bauer Nike's reliance on the exemplars provided in Explanatory Note 95.06(B)(13) to support its argument is also misplaced. Explanatory Note 95.06(B)(13) explains that "[p]rotective equipment for sports or games, [includes] fencing masks and breast plates, elbow and knee pads, cricket pads, [and] shin-guards." EN 95.06(B)(13) at 1717. While the hockey pants contain internal padding and guards, requisite materials for classifying merchandise as "protective equipment," *H.I.M./Fathom, Inc.*, 21 CIT at 783, 981 F. Supp. at 616 (noting that "equipment such as padding and guards" are included in chapter 95), unlike the exemplars, the pads and guards here are contained within an outer nylon or polyester shell or pant. Therefore, the hockey pants are constructed differently from the exemplars of Explanatory Note 95.06(B)(13). HQ 083859 (Apr. 25, 1989) (distinguishing ice hockey pants composed of an outer and inner shell in addition to internal padding sewn inside the article and a belt from the exemplars listed in Explanatory Note 95.06(B)(13) because the exemplars "may not be contained in an article of sports clothing to be included in chapter 95. [The exemplars] must be separate and apart from another article."); *see also* HQ 084622 (June 21, 1989) (same), *revoked on other grounds by* HQ 956289 (June 20, 1994). Consequently, the exemplars provided in Explanatory Note 95.06(B)(13) are distinguishable from the hockey pants at issue.

The Court is also not convinced that the type of protection afforded by the exemplars and the subject merchandise, alone, establishes that the ice hockey pants are *ejusdem generis* with the exemplars of sports equipment. Even though Customs has previously held that "sports protective equipment intended for inclusion within Heading 9506 . . . [includes] equipment having protective features with the sole or primar[]y function of directly absorbing the impact of blows, collisions or flying objects," Pl.'s Ex. 28, HQ 965236 (Dec. 5, 2001); *see also* Pl.'s Ex. 29, NY H87701 (Mar. 11, 2002), Pl.'s Ex. 31, NY D83060 (Oct. 6, 1998), those decisions did not consider the legal issue presented here, i.e., whether the subject merchandise constitutes sports clothing that is classifiable as wearing apparel under Chapter 62. In fact, Customs has previously classified similar articles presenting the same legal issue as well as affording the same protections as the merchandise in question here as sports clothing under Chapter 62. *See, e.g.*, NY A87152 (Sept. 9, 1992) (classifying ice hockey pants); Pl.'s Ex. 22, HQ 086973 (Apr. 30, 1990) (classifying analogous articles identified as hockey pants). The Court is therefore not persuaded by Bauer Nike's contention.

Last, U.S. Note 12(a) lends further support for the conclusion that the subject merchandise is not classifiable under Chapter 95 of the HTSUS as "sports equipment." U.S. Note 12(a) states that the term "sports clothing" contained in subheading 9902.62.01 refers to "ice hockey pants, provided for in subheadings 6113.00, 6114.30, 6210.40, 6210.50, 6211.33, or 6211.43" and "other articles of sports wearing apparel which because of their padding, fabric, construction, or other special features are specially designed to protect against injury (e.g., from blows, falls, road burns or fire)." U.S. Note 12(a), HTSUS (emphasis omitted).[14] Subheading 9902.62.01, a provision which expired on December 31, 1992, provided a temporary duty rate reduction to articles of "[s]ports clothing, however provided for in chapters 61 and 62." *See* subheading 9902.62.01, HTSUS; Customs and Trade Act of 1990, Pub. L. No. 101–382, § 426, 1900 U.S.C.C.A.N. (104 Stat.) 629, 688–89.The temporary rate permitted articles of "sports clothing" to enter the U.S. duty free, or at the "rate of duty that . . . applied to such articles under the [TSUS]." *See id.* Prior to the conversion into the HTSUS on January 1, 1989, articles of "sports clothing" as specifically defined above were generally classified as sports

[14] Subheading 6113.00 covers "[g]arments, made up of knitted or crocheted fabrics of [H]eading 5903, 5906 or 5907." Subheading 6113.00, HTSUS. Heading 5903 includes "[t]extile fabrics impregnated, coated, covered or lamented with plastics." Heading 5903, HTSUS. Heading 5906 encompasses "[r]ubberized textile fabrics, other than those of [H]eading 5902." Heading 5906, HTSUS. Subheading 5907.00 covers "[t]extile fabrics otherwise impregnated, coated or covered: painted canvas being theatrical scenery, studio back-cloths or the like." Subheading 5907.00, HTSUS. Subheading 6114.30 covers "[o]ther garments, knitted or crocheted: Of man-made fibers." Subheading 6114.30, HTSUS. While subheading 6210.40 encompasses "[o]ther men's or boys' garments: Of man-made fibers," subheading 6210.50 covers "[o]ther women's or girls' garments: Of man-made fibers." Subheading 6210.40, HTSUS; subheading 6210.50, HTSUS. Subheading 6211.33 covers "[o]ther garments, men's or boys': Of man-made fibers," and subheading 6211.43 encompasses "[o]ther garments, women's or girls': Of man-made fibers." Subheading 6211.33, HTSUS; subheading 6211.43, HTSUS.

"equipment" under the TSUS and afforded duty free tariff treatment. *See id.*; Mem. from U.S. Int'l Trade Comm. to The Committee on Finance of the United States Senate, *S.718, 101st Congress, A Bill to Amend the Harmonized Tariff Schedule of the United States to Provide Duty-Free Treatment for Certain Sports Clothing*, Def.'s Ex. N at 1, 4. It can logically be concluded, in light of the fact that Congress enacted a temporary duty rate reduction after the conversion into the HTSUS, that the articles explicitly defined in U.S. Note 12(a) as "sports clothing," including ice hockey pants,endured a change in classification under the HTSUS. To conclude otherwise would render the effect of the temporary duty rate reduction meaningless, as imports of equipment entered the U.S. duty free during the effective dates of that rate reduction. *See, e.g.*, subheading 9506.99.25, HTSUS (1990). Although U.S. Note 12(a) is legally inoperative, *see The Reform*, 70 U.S. 617, 629 (1865) ("[A] statute, temporary in its terms, cannot be enforced after the statute has expired."), and therefore has no binding effect on the Court, the note suggests that "sports clothing" as defined therein is not classifiable as "equipment" under the HTSUS.[15]

Conclusion

Because the ice hockey pants in question are articles of sports clothing classifiable as wearing apparel under Chapter 62, the Court finds that the subject merchandise is expressly precluded from classification in Chapter 95 under Note 1(e) to that chapter. Accordingly, Customs correctly classified Bauer Nike's ice hockey pants under subheading 6211.33.00, HTSUS.[16] As such, Bauer Nike's motion for summary judgment is denied. In turn, Customs' motion for summary judgment is granted, and judgment will be entered for Defendant.

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[15] The Court is also not persuaded by Plaintiff's reliance on two foreign classification decisions from Canada and the European Union. Pl.'s Ex. 32; Pl.'s Ex. 33. The decisions proffered by Plaintiff fail to define the legal terms at issue in this case, i.e., "sports clothing" and "equipment." Rather, the decisions merely determine that the merchandise there was equipment. *See Sarne Handbags Corp. v. United States*, 24 CIT 309, 316 n.16, 100 F. Supp. 2d 1126, 1133 n.16 (2000). Furthermore, as the decisions apply the local tariff provisions of the country rendering the determination, they fail to assist the Court in interpreting the tariff terms at issue here under the HTSUS.

[16] Plaintiff contends, in the alternative, that the merchandise should be classified under a GRI 3 analysis. Pl.'s Mem. at 20, 22. Because the Court classified the subject merchandise under GRI 1, the Court cannot reach this argument. *See Mita I*, 160 F.3d 710, 712 (Fed. Cir. 1998).

Slip Op. 03–143

BETHLEHEM STEEL CORPORATION, ISPAT INLAND INC., LTV STEEL COMPANY, INC., UNITED STATES STEEL, LLC, AND NATIONAL STEEL CORPORATION, PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND USINAS SIDERURGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERURGICA PAULISTA, COMPANHIA SIDERURGICA NACIONAL, THAI COLD ROLLED STEEL SHEET PUBLIC COMPANY LIMITED, ISCOR, LTD., NIPPON STEEL CORPORATION, NKK CORPORATION, KAWASAKI STEEL CORPORATION, SUMITOMO METAL INDUSTRIES, LTD., KOBE STEEL, LTD., NISSHIN STEEL COMPANY, LTD., EREGLI DEMIR VE CELIK FAB. T.A.S., AND SHANGHAI BAOSTEEL GROUP CORPORATION, DEFENDANT-INTERVENORS.

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

Cons. Ct. No. 00–00151

[Remanded to the ITC to redefine "internal transfers," clarify how it applied facts otherwise available, and reconsider whether the domestic industry has suffered material injury.]

Date: October 28, 2003

Dewey Ballantine, LLP (*Alan Wm. Wolff, Michael Henry Stein, Kevin M. Dempsey,* and *Andrew J. Conrad*) representing Plaintiffs Bethlehem Steel Corporation, United States Steel, LLC, and National Steel Corporation.

Lyn M. Schlitt, General Counsel, *James Lyons,* Deputy General Counsel, U.S. International Trade Commission (*Mary Jones*), representing Defendant United States.

Willkie Farr & Gallagher, LLP (*William H. Baringer*) representing Defendant-Intervenors Thai Cold Rolled Steel Sheet Public Company Limited, Usinas Siderurgicas de Minas Gerais S/A, Companhia Siderurgica Paulista, and Companhia Siderurgica Nacional.

O'Melveny & Myers, LLP (*Kristin Heim Mowry*) representing Defendant-Intervenor Iscor, Ltd.

Willkie Farr & Gallagher, LLP (*Matthew Robert Nicely, James P. Durling,* and *Jocelyn C. Flynn*) representing Defendant-Intervenors Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, Sumitomo Metal Industries, Ltd., Kobe Steel, Ltd., and Nisshin Steel Company, Ltd.

Law Offices of David L. Simon (*David L. Simon*) representing Defendant-Intervenor Eregli Demir ve Celik Fab. T.A.S.

Dorsey & Whitney, LLP (*Philippe M. Bruno*) representing Defendant-Intervenor Shanghai Baosteel Group Corporation.

OPINION

GOLDBERG, Senior Judge: This case concerns the final negative injury determinations of the International Trade Commission ("ITC") in several antidumping ("AD") and countervailing duty ("CVD") proceedings involving cold-rolled steel ("CRS") products from Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela (collectively, the "Final Determinations").

The Plaintiffs are a group of domestic steel producers: Bethlehem Steel Corporation; Ispat Inland Inc.; LTV Steel Company, Inc.; United States Steel, LLC; and National Steel Corporation. Neither Ispat nor National Steel are plaintiffs with respect to the investigation involving Japan.

The Defendant is the ITC. The Defendant-Intervenors are a group of foreign steel producers: Usinas Siderurgicas de Minas Gerais S/A; Companhia Siderurgica Paulista; Companhia Siderurgica Nacional; Thai Cold Rolled Steel Sheet Public Company Limited; Iscor, Ltd.; Nippon Steel Corporation; NKK Corporation; Kawasaki Steel Corporation; Sumitomo Metal Industries, Ltd.; Kobe Steel, Ltd.; Nisshin Steel Company, Ltd.; Eregli Demir ve Celik Fab. T.A.S.; and Shanghai Baosteel Group Corporation.

I. BACKGROUND

On June 2, 1999, certain domestic producers of CRS products, including the Plaintiffs, filed AD and CVD petitions with the Department of Commerce and the ITC. On July 30, 1999, the ITC published its preliminary determination. The ITC determined that there was a reasonable indication that the domestic industry was injured, or threatened with material injury, by CRS imports sold at less than fair value from Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela, as well as by subsidized imports from Brazil. The ITC terminated the CVD investigations with respect to Indonesia, Thailand, and Venezuela.

On December 1, 1999, the ITC began the final phase of its investigations. On January 20, 2000, the ITC held a public hearing. The parties filed pre- and post-hearing briefs shortly before and after this hearing. On February 18, 2000, the ITC filed its Final Staff Report. One week later, on February 25, 2000, the ITC made available to the parties all information on which they had not yet had an opportunity to comment, and allowed the parties until February 29, 2000, to submit final comments on this information.

On March 14, 2000, the ITC found by a 5–1 vote that the domestic industry was not materially injured, or threatened with material injury, by reason of allegedly subsidized CRS imports from Brazil, or by reason of allegedly dumped CRS imports from Argentina, Brazil, Japan, Russia, South Africa, or Thailand. *See Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, 65 Fed. Reg. 15,008, USITC Pub. 3283 (Mar. 20, 2000) ("March Determination"). Similar negative determinations were subsequently published on May 17, 2000 with respect to allegedly dumped CRS imports from Turkey and Venezuela, and on July 17, 2000 with respect to allegedly dumped CRS imports from China, Indonesia, Slovakia, and Taiwan. *See Certain Cold-Rolled Steel*

Products From Turkey and Venezuela, 65 Fed. Reg. 31,348 (May 17, 2000); *Certain Cold-Rolled Steel Products From China, Indonesia, Slovakia, and Taiwan*, 65 Fed. Reg. 44,076 (July 17, 2000). The analysis contained in the March Determination was adopted in both subsequent determinations.

After defining the domestic like product and the industry, and deciding to cumulate the imports from all of the subject countries, the ITC began the final phase of its antidumping and countervailing duty investigation. In the final phase, the ITC must determine whether the domestic industry is materially injured by reason of the subject imports. *See* 19 U.S.C. §§ 1671d(b), 1673d(b). To make this determination, the ITC must consider all relevant economic factors within the context "of the business cycle and conditions of competition" of the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). In determining that there was no material injury to the domestic CRS industry, the ITC analyzed the conditions of competition. As part of that analysis, the ITC looked to whether the captive production provision applied. March Determination at 15–18. If the captive production provision was applicable, then the ITC would "focus primarily on the merchant market for the domestic like product" to determine "market share and the factors affecting financial performance." 19 U.S.C. § 1677(7)(C)(iv).

The ITC concluded that the threshold requirements of the captive production provision were met—namely, that "domestic producers internally transfer[red] a significant share of their domestic production for captive consumption and [sold] a significant share on the merchant market." March Determination at 16. The ITC also found that the first two prongs of the captive production provision were met. *Id*. However, the ITC concluded that the third prong (that "the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article") was not met. *Id*. Therefore, the ITC did not apply the captive production provision. *Id*. at 18. Nevertheless, the ITC decided to consider captive production as a condition of competition because there was a significant volume of captive production. *Id*.

This appeal followed. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

II. STANDARD OF REVIEW

Under the applicable standard of review, the ITC's determinations must be upheld unless they are not supported by substantial evidence or otherwise not in accordance with law. The ITC's determinations are presumed to be correct; the burden is on the party challenging a determination to demonstrate otherwise. *See* 28 U.S.C. § 2639(a)(1); *Trent Tube Div. v. United States*, 14 CIT 780, 784 (1990).

III. DISCUSSION

The Plaintiffs challenge three aspects of the ITC's investigation. First, the Plaintiffs allege that the ITC improperly found that the captive production provision of 19 U.S.C. § 1677(7)(C)(iv) was inapplicable to the Final Determinations. *See* Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 17–43. Second, Plaintiffs argue that the ITC improperly relied on information upon which the parties were not given an opportunity to comment. *See id.* at 44–48. Third, Plaintiffs charge that the ITC's findings concerning certain conditions of competition, and the volume and price effects of CRS imports, were not supported by substantial evidence and otherwise in accordance with law. *See* Mem. Supp. Mot. J. Agency R. Under Rule 56.2 of Bethlehem, LTV, National Steel, & U.S. Steel at 10–45.

A. Applicability of the Captive Production Provision

As a general rule, the ITC considers the domestic industry as a whole in determining whether subject imports have caused material injury. *See* 19 U.S.C. § 1673d(b)(1)(A)(i) (2000). However, there is a narrow exception to this rule, commonly called the "captive production" provision, which provides that if certain conditions are met, the ITC must "focus primarily on the merchant market for the domestic like product" when determining market share and the economic factors impacting the affected domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iv) (2000). The captive production statute reads in pertinent part as follows:

> (iv) Captive production
>
> If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the [ITC] finds that—
>
> . . . .
>
> (III) the production of the domestic like productsold in the merchant market is not generally used in the production of that downstream article,
>
> then the [ITC], in determining market share and the [economic factors impacting the affected domestic industry], shall focus primarily on the merchant market for the domestic like product.

19 U.S.C. § 1677(7)(C)(iv). Thus, the captive production provision seeks to determine whether imports compete with U.S. production of the domestic like product in all its forms as a whole, or only with sales of the domestic like product in the merchant market.

In the March Determination, the ITC concluded that the threshold requirements of the captive production provision were fulfilled, and the first two criteria were met. March Determination at 16. However, the ITC answered in the negative to the third criterion. *Id.* The third criterion requires that "the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article[.]" 19 U.S.C. § 1677(7)(C)(iv)(III). The Plaintiffs challenge the ITC's finding with respect to the third criterion. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 21.

In the context of this investigation, there is no dispute that domestic producers of CRS products (the "domestic like product") transferred to related-party joint ventures approximately sixty percent of their total production (*i.e.*, "significant production") of CRS for further processing into galvanized/coated products (the "downstream articles"), particularly corrosion-resistant steel and tin-mill products. *Id.* at 19. The remaining forty percent of domestic production was sold into the merchant market to indisputably unrelated customers. *Id.* The threshold question is whether transfers to those related-party joint ventures qualify as "internal" transfers. If they do not, then the ITC's interpretation of the statute will be upheld. However, if the transfers to related-party joint ventures are internal transfers, then the factual question becomes whether, under sub-subparagraph (III), CRS sold in the merchant market is not generally used to produce downstream articles. If not, then the captive production provision does apply, and the ITC must focus its analysis primarily on the forty percent of domestic sales of CRS made to indisputably unrelated customers.

1. Whether Transfers to Related-Party Joint Ventures Are Internal Transfers as a Matter of Law

The ITC found that transfers of CRS for further processing to related-party joint ventures are not internal transfers for purposes of 19 U.S.C. § 1677(7)(C)(iv). March Determination at 17. In reaching its determination, the ITC focused on the fact that the related-party joint ventures in question were independent corporate entities jointly owned with foreign steel corporations. *Id.* The ITC reasoned that the statute speaks of "internal transfers," not "transfers to related parties." *Id.* The ITC also looked to the Statement of Administrative Action ("SAA"), which defines captive production as that done by "the same producer." *Id.*; *see also* URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–316, at 852 (1994). Given the separate corporate status of the joint ventures, the ITC found that in every instance the joint ventures and the domestic CRS producers were not the same producer. March

Determination at 17. Thus, transfers to them could not be internal transfers within the meaning of the captive production provision. *Id.*

To ascertain whether the ITC interpreted the captive production provision in accordance with law, the Court must first "determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). In determining Congress's intent, the Court "looks at the plain language of the statute, legislative history, and the canons of statutory construction[.]" *Dupont Teijin Films USA, LP v. United States*, 27 CIT ___ , Slip Op. 03–79 at 7 (July 9, 2003). If the statute is vague or silent, then the Court will extend *Chevron* deference to the ITC's interpretation. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). The "[C]ourt must defer to an agency's reasonable interpretation of a statute even if the [C]ourt might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

Whether the third prong of the captive production provision is met depends upon the measure of products "sold in the merchant market," and the measure of products "internally transferred" for production of downstream articles. 19 U.S.C. § 1677(7)(C)(iv). Congress did not define "sold" or "internally transferred" in the statute. It is clear that Congress intended to allocate all transfers of CRS to either the "sold" category or the "internally transferred" category. The captive production provision establishes a dichotomy between those situations where domestic producers "internally transfer significant production of the domestic like product for the production of a downstream article[,]" and those where they "sell significant production of the domestic like product in the merchant market[.]" *Id.* Therefore, as the ITC also found, the two categories of transactions must encompass all CRS transfers. To define "sold" and "internally transferred," the Court looks to the legislative history and other canons of statutory interpretation to ascertain Congress's intent.

The first term to define is "sold." The statute does not define "sold" or "sale." As in *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997), the Court will then resort to the common meaning of the word "sold." The ITC and Defendant-Intervenors argue that the Court should not rely on the common definition of "sold" because *NSK* is not applicable to this case. Def.-Intervenors' Opp'n at 15–16. While the ITC is correct that *NSK* involved a different product, hot-rolled steel, and was issued prior to the enactment of the captive production provision, the principles of the case are relevant. Under *NSK*, because Congress did not define "sold" to mean something other than its common meaning, the Court will defer to the common and accepted meaning of sale. *See NSK*, 115 F.3d at 974. Therefore, in this context, for the CRS to be sold in the merchant market, the title to the CRS must be transferred, consideration must be paid for the CRS, and the transfer of title must be to an unrelated party.[1] *Id.* at 975.

It is clear that Congress did not intend for transfers of CRS to joint ventures to be included within the parameters of "sold in the merchant market" if those transfers did not meet the three requirements of a sale. It is undisputed that joint ventures are related parties. The evidence presented by the Plaintiffs to the ITC shows that the CRS passed to the joint ventures was never sold to the joint ventures. Further, the ITC found that the joint ventures were related parties, although they were not the "same producers." March Determination at 17. Therefore, the Court will give no deference to the ITC's definition of sold.

The next stage of the inquiry is to determine whether the transfers to the joint ventures qualify as "internal transfers." The statute does not define internal transfers. There is no commonly understood meaning of internal transfers, and no party has provided one. Therefore, the Court will give deference to a reasonable interpretation by the ITC.

The ITC has defined internal transfer to mean a transfer between parts of the same corporation. March Determination at 17. Therefore, because the joint ventures have corporate structures separate from the domestic producers, they internally transfer significant production of the domestic like product for the production of a downstream article, and sell significant production of the domestic like product in the merchant market. If Congress had not clearly excluded the transactions to the related-party joint ventures from the sales category, this would be a reasonable definition of internal transfers.

The Court recognizes that the term "internal transfers" does not clearly include transfers to joint ventures. The statutory language refers to "internal transfers," although it could have easily referenced "transfers to related parties" if that was the intended result. Elsewhere in the statute Congress refers to "transfers to related parties," and Congress could easily have used the same language if it had intended to include transfers to joint ventures. Further, the SAA defines captive production as that done by the same producer. URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–316, at 852 (1994). Independent of Con-

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[1] The SAA's definition of merchant market sales further supports the common and accepted meaning of sale. As the ITC noted in the March Determination, the SAA defines merchant market sales as "sales of the domestic like product to unrelated customers." March Determination at 17; URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–316, at 852 (1994).

gress's use of the term "sold," the ITC would have reasonably defined internal transfers to include only transactions within the same producer, or the same corporation. However, because all transfers of CRS must be either sales to the merchant market or internal transfers, and Congress clearly excluded related-party joint venture transfers from the "sales to the merchant market" category, the ITC's definition of internal transfers is unreasonable.

Therefore, transfers of CRS to related parties where title has not transferred are internal transfers. The Court will remand the ITC's Final Determinations to re-examine the transfers to joint ventures. The ITC is directed to define internal transfers in a manner consistent with the statutory language and this Opinion. If the transfers are to related parties and title did not pass, or if compensation was not paid for the CRS, then the ITC's definition will have to categorize such a transaction as an internal transfer.

Plaintiffs make several other challenges to the ITC's interpretation of the captive production provision that will only be briefly addressed. First, the Plaintiffs argue that the ITC has previously found that transfers to joint ventures are internal transfers rather than sales, and that it has therefore unreasonably departed from its own precedent without explanation. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 22–25. Moreover, the Plaintiffs point out that in the present investigation the ITC's questionnaires defined "company transfers" as "[s]hipments made to related domestic firms," and defined "related firm" in turn as a "firm that your firm solely or jointly owned, managed, or otherwise controlled[.]" *Id.* at 24. Thus, because the ITC apparently treated transfers to joint ventures as internal transfers in the past and directed the Plaintiffs to do so in this review, its unexplained departure from that practice constitutes an abuse of discretion.

The ITC and Defendant-Intervenors argue that this is a novel issue, because the *NSK* case was decided before the captive production provision was even enacted. Def. ITC's Opp'n at 19–21. With regard to the substance of the Plaintiffs' argument, the ITC notes that even in 1993 it distinguished "internal transfers" from those to an "affiliated" company. *Id.* at 20 n.82.

The Court has already determined that the ITC's definition of "internal transfers" is unreasonable, in light of Congress's intention regarding the definition of "sold." Even so, the ITC did not depart from its own precedent by defining internal transfers as transfers within the same producer. As pointed out by the ITC, in the *NSK* case the ITC was defining "sale" under another statute.

Second, the Plaintiffs also contend that several of the transfers to joint ventures were actually tolling arrangements. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 25. The ITC counters that only a fraction of the transfers were made pursuant to tolling arrangements. It is unnecessary for the Court to make a factual finding regarding the number of tolling arrangements. The ITC has been instructed to reconsider whether any of the transfers were to related parties and whether title was transferred to the downstream processor. In the case of tolling arrangements, where title does not transfer, the transaction is an internal transfer rather than a sale. This analysis is subsumed within the Court's previous instructions to the ITC regarding the definition of "sold" and "internal transfer."

Third, the Plaintiffs argue that the SAA unambiguously requires that transfers to joint ventures be treated as internal transfers. *Id.* at 31–32. The relevant text in question provides: "Captive production refers to production of the domestic like product that is not sold in the merchant market and that is processed into a higher-valued downstream article by the same producer. Selling in the merchant market refers to sales of the domestic like product to unrelated customers." URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–316, at 852 (1994). The Plaintiffs zero in on the second half of this directive as "crystal-clear" proof that transfers to joint ventures must be internal transfers. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 31.

The ITC and Defendant-Intervenors argue that the domestic industry focuses on the second half of the language of the SAA, to the exclusion of the first half. Def. ITC's Opp'n at 8. According to the ITC, if, as the Plaintiffs argue, it is absurd to label related-party joint ventures "unrelated customers," then it is equally ludicrous to call them the "same producer," given their different corporate existence, and, in many cases, joint ownership with a foreign steel producer. *Id.* at 11–12. The ITC determined that by using the term "the same producer," rather than terms such as "related parties" which appear elsewhere in the SAA, Congress deliberately opted to restrict the exception for captive production to internal transfers within the same corporate entity. *Id.* The ITC and Defendant-Intervenors argue that in light of this inherent contradiction in the language of the SAA, the Court must defer to the ITC's reasonable interpretation. *Id.* at 12.

The SAA is ambiguous, at best. The SAA would exclude transfers to joint ventures from both captive production and sales in the merchant market. This unintended result occurs despite the SAA's attempt to define captive production as everything that is not a sale in the merchant market. The Court has already determined that Congress intended for transfers to related parties to be excluded from sales in the merchant market. Therefore, the Court will not rely on the ambiguous language of the SAA to define "sold" and "internal transfers."

Fourth, the Plaintiffs' final argument is that the ITC erred by making a completely unsupported factual finding that the joint ventures had the authority to purchase CRS from other sources and that the domestic producers may not have had distribution rights for all of the coated products for which they provided the substrate. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 34. The Plaintiffs emphasize that the ITC's sole basis for this assertion was the joint brief of the respondents, the foreign steel companies. *Id.* at 35. They claim that with regard to the joint venture tolling arrangements, this assertion is demonstrably false, because tolling operations by definition cannot sell the steel they process. *Id.* They further claim with respect to other joint ventures that the domestic producers' Securities and Exchange Commission corporate disclosure filings (10-K filings) show that at least three entities jointly owned with foreign producers are required to obtain one hundred percent of their substrate from the domestic joint venture partner; a fourth joint venture must obtain seventy-five percent of its substrate this way for the next decade; and that one of the domestic producers is the sole selling agent for one of these joint ventures. *Id.* at 36. The Plaintiffs also argue that although some of the joint ventures are co-owned with foreign steel producers, a fact much emphasized by the ITC, a number of others are jointly owned among only domestic producers, who supply one hundred percent of the CRS substrate to these entities. *Id.* at 37.

The ITC and Defendant-Intervenors observe that the majority of the joint ventures are co-owned with foreign steel companies. Def. ITC's Opp'n at 15. In addition, they counter with their own citations to 10-K filings tending to show that the domestic industry does not account for all of the substrate requirements of the joint ventures. *Id.* at 14–15.

The ITC's determination is supported by substantial evidence. The Plaintiffs are simply emphasizing the converse of the facts relied upon by the ITC in reaching its determination. However, the Court doubts that this fact will be of much relevance in determining whether the transfers were sales or internal transfers under the Court's instructions to the ITC to redefine "internal transfers."

2. Whether CRS Sold in the Merchant Market Is Used to Produce Downstream Articles

The ITC found that a significant portion of the merchant market purchases were devoted to producing the same downstream products as the majority of the captive production. March Determination at 17–18. The Plaintiffs argue that the ITC erred in reaching this conclusion because, in calculating the degree of overlap between captively-produced downstream products and downstream products produced from merchant market sales, it estimated the merchant market sales based on independent galvanizers' purchases from all sources, including imports. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 40. The Plaintiffs argue that this was unreasonable given that the sales figure in the denominator was limited to sales of the domestic like product alone. *Id.*

The Plaintiffs assert that this methodology directly violates the captive production statute, which states that "the production of the *domestic like product* sold in the merchant market is not generally used[.]" *Id.* at 40–41; 19 U.S.C. § 1677(7)(C)(iv)(III) (emphasis added). The Plaintiffs also claim that this methodology is inconsistent with the ITC's past practice in cases such as *Hot-Rolled Steel from Japan*. *Certain Hot-Rolled Steel Products from Japan*, USITC Pub. 3202, Inv. No. 731–TA–807 (June 1999). The Plaintiffs further claim that correcting this error, and using instead their evidence of actual sales of the domestic like product in the merchant market, would result in a lower overlap ratio. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 43.

The ITC and Defendant-Intervenors contest these points, arguing that the ITC's determination that the third prong of 19 U.S.C. § 1677(7)(C)(iv) was not satisfied is supported bysubstantial evidence. Def. ITC's Opp'n at 13–14. The ITC argues that it was entitled to use CRS purchased from all sources as the numerator, because there was no alternative data on the record for domestically produced CRS alone, and it was obliged to use the facts available. *Id.* at 18–19. The Plaintiffs' own figures proposed above are not acceptable as facts otherwise available because they encompass data only from the top producers. *Id.* at 19. The ITC also contests the accuracy of the Plaintiffs' proposed figures. *Id.* However, in reply, the Plaintiffs argue that the ITC did not follow the proper procedure for using facts available. Reply Br. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 37–45.

In antidumping and countervailing duty proceedings, the ITC is required to use "facts otherwise available" if "necessary information is not available on the record[.]" 19 U.S.C. § 1677e(a)(1). In addition, the statute requires the ITC to use facts otherwise available where an interested party or any other person: (1) withholds information that has been requested by the ITC; (2) fails to provide the requested information by the deadlines for submission of such information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m; (3) significantly impedes an antidumping or countervailing duty proceeding; or (4) provides information that cannot be verified as provided in section 1677m(i). *Id.* § 1677e(a)(2)(A)–(D). Section 1677e(a) cautions, however, that the use of facts otherwise available is subject to the limitations set forth in 19 U.S.C. § 1677m(d).

Section 1677m(d) governs "deficient submissions." It directs the ITC that if it determines that a response to a request for information does not comply with the request, then the ITC must promptly inform the entity submitting the response of the nature of the deficiency and give that entity an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the investigation. 19 U.S.C. § 1677m(d). Section 1677m(d) further provides that if the ITC finds the remedial response to be either "not satisfactory" or untimely, then it may, subject to section 1677m(e), disregard all or part of the original and subsequent responses. *Id.*

In its Final Determinations, the ITC did not once mention, let alone attempt to explain, its apparent decision to use facts otherwise available. Rather, in its brief, the ITC explains for the first time that it was entitled to use facts available because the "data [from the purchaser questionnaire responses was] not structured in such a way that it would be possible to completely segregate purchases of the domestic like product from purchases of subject imports." Def. ITC's Opp'n at 18. In a footnote, the ITC supports its decision to use facts otherwise available with a citation to 19 U.S.C. § 1677e(a). *Id.* at 19 n.74.

Although the ITC asserts in its brief that it was justified in using facts otherwise available, this assertion is clearly nothing more than a post hoc rationalization, given that the ITC never even mentioned the phrase "facts otherwise available" in its Final Determinations. This post hoc rationalization should be given no deference by the Court because an ITC decision must be sustained, if at all, on the same basis as the reasoning articulated in the Final Determination itself. *NTN Bearing Corp. of Am. v. United States*, 25 CIT ____ , 155 F. Supp. 2d 715, 736 (2001); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (admonishing that "courts may not accept . . . counsel's post hoc rationalizations for agency action; [rather,] an agency's . . . order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself"). Here, the ITC articulated no reasoning whatsoever in the Final Determinations regarding its decision to use facts otherwise available. As a result, there is no reasoning on which to sustain the ITC's decision to use facts otherwise available, and the Court owes no deference to the ITC's determination.

Moreover, in conducting its analysis of the third prong of 19 U.S.C. § 1677(7)(C)(iv), the ITC was obligated to attempt to collect the comprehensive data it needed regarding domestically produced CRS before resorting to facts otherwise available. Indeed, "[i]t is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." *Roquette Freres v. United States*, 7 CIT 88, 94, 583 F. Supp. 599, 604 (1984). In other words, the ITC "is obligated to make active, reasonable efforts to obtain relevant data." *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002).

Here, the ITC itself acknowledged in its preliminary determination that it did not possess sufficient information to analyze properly the third prong of 19 U.S.C. § 1677(7)(C)(iv). Specifically, the ITC stated as follows: "[W]e find that the record contains insufficient information to determine the applicability of factor . . . (III) of the captive production provision. . . . We will seek additional information, including data from purchasers, in any final phase of these investigations and will reexamine the applicability of the captive production provision at that time." *Certain Cold-Rolled Steel Products From Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela*, USITC Pub. 3214 at 23–24, Inv. Nos. 701–TA–393–396 and 731–TA–829–840 (July 1999). However, the ITC never sought any additional information from the Plaintiffs. This failure by the ITC to attempt to obtain relevant data prior to resorting to facts otherwise available renders its analysis of the third prong of 19 U.S.C. § 1677(7)(C)(iv) unsound.

Finally, 19 U.S.C. § 1677m(d) mandates that, before the ITC can resort to facts otherwise available, a party must be given prompt notice of any deficiency in the information it has submitted to the ITC, and it must be given an opportunity to remedy that deficiency. *See Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 837–38, 77 F. Supp. 2d 1302, 1312–14 (1999) (interpreting the requirements of 19 U.S.C. § 1677m(d)). The Final Determinations do not indicate in any way that the ITC notified the Plaintiffs that the data they had provided was deficient. Nor were the Plaintiffs given an opportunity to provide more comprehensive data regarding domestically produced CRS to the ITC. Simply put, it was improper for the ITC to ignore the requirements of 19 U.S.C. § 1677m(d) before resorting to facts otherwise available.

For the foregoing reasons, the Court cannot conclude that the ITC's use of facts otherwise available was warranted under 19 U.S.C. § 1677e(a). As a result, the Court remands the issue to the ITC to clarify how it complied with the statutory framework of both 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d) for applying facts otherwise available. If the ITC determines, on remand, that it did not adhere to all of the statutory prerequisite conditions, then the ITC must give the Plaintiffs an opportunity to remedy any deficiencies in their data. *See NTN Bearing*, 25 CIT at ____ , 155 F. Supp. 2d at 737–38 (remanding the case to Commerce under 19 U.S.C. § 1677e(a) because of "considerable uncertainty" in Commerce's *Final Results*).

B. Whether Parties Had Opportunity to Comment

The Plaintiffs' next major objection is procedural rather than substantive. The Plaintiffs argue that the ITC acted unreasonably by not giving them notice and opportunity to comment on the perceived shift in methodology regarding treatment of transfers to joint ventures. Mem. Supp. Rule 56.2 Mot. of Bethlehem, Ispat, LTV, & U.S. Steel at 44–48. On February 18, 2000, the ITC released its Final Staff Report, in which, consistent with all prior phases of the investigation, transfers to related-party joint ventures were treated as internal transfers. On February 25, 2000, the ITC made available to all parties all information on which they had not had an opportunity to comment, and permitted final comments to be submitted thereon by February 29, 2000. This final release of information allegedly contained no indication that the ITC intended to treat the transfers in question any differently. *Id.* at 46. However, on March 20, 2000, the ITC released the March Determination, in which it recalculated merchant market sales data by determining that such transfers were not internal transfers, that the captive production provision therefore did not apply, and that all such transfers were to be treated as sales to the merchant market. March Determination at 15–18. The Plaintiffs claim that this action represented an avulsive change in the ITC's practice, and that since the reports leading up to the Final Determinations contained no hint that such a change was contemplated, the Plaintiffs were effectively ambushed, as it would be unreasonable to expect them to devote any portion of the fifteen pages allowed for their final comments to addressing what they believed to be a settled issue. *Id.* at 47. They claim that this action contravenes the principles underlying the antidumping statutes, which require the ITC to provide the parties with the "essential facts" under consideration. *Id.* at 44–46.

The ITC, in the few short paragraphs it devotes to the issue, claims that the data upon which it relied in reaching its determination was entirely public and available for review and comment by the Plaintiffs. Def. ITC's Opp'n at 25–26. The ITC further argues that nothing in United States or international law obliges it to divulge in advance the weight that it intends to give each specific piece of evidence; otherwise, it would have to release a draft of its final determination for comment even before the Commissioners had voted on it. *Id.* at 26. Finally, the ITC observes that in *Allegheny Ludlum Corp. v. United States*, 24 CIT 858, 116 F. Supp. 2d 1276 (2000), the Court of International Trade found that the plaintiffs were not prejudiced by last-minute revisions to the final staff report made just before the Commissioners voted, since the staff report is only one of the documents comprising the record. *Id.* at 24–25.

In light of the Court's decision to remand this case to the ITC for it to reconsider its definition of "internal transfers," it is unnecessary for the Court to rule on the Plaintiffs' claim that they did not have an opportunity to comment on the ITC's perceived shift in methodology regarding the treatment of transfers to joint ventures.

C. The ITC's Findings Concerning Certain Conditions of Competition, and the Volume and Price Effects of CRS Imports

In determining whether a domestic industry has suffered "material injury," the ITC is directed by statute to consider (1) the volume of imports of the subject merchandise; (2) the effect of imports of that merchandise on prices in the United States for domestic like products; and (3) the impact of imports of subject merchandise on domestic producers of domestic like products. *See* 19 U.S.C. § 1677 (1994). The ITC determined with respect to each of these considerations that the domestic industry had not suffered material injury. March Determination at 15. Before this Court, the Plaintiffs challenge each of these determinations. *See* Mem. Supp. Mot. J. Agency R. Under Rule 56.2 of Bethlehem, LTV, National Steel, & U.S. Steel at 10–45.

The analysis of the conditions of competition, the effect of imports on prices of domestic like products, and the impact of imports on domestic producers of domestic like products, are the very economic factors and market share considerations that the captive consumption provision contemplates. The ITC is directed to reconsider whether the captive consumption provision applies; if it does apply, then the ITC will have to consider primarily the merchant market in its analysis of economic factors and market share. Therefore, the Court will not opine at this time whether the ITC's factual determinations are supported by substantial evidence.[2]

IV. CONCLUSION

For the reasons outlined above, the Court finds that the ITC's interpretation of 19 U.S.C. § 1677(7)(C)(iv)(III) is not in accordance with law. Accordingly, the Final Determinations are remanded to the ITC to define "internal transfers" consistent with the will of Congress. Additionally, the Court finds that the ITC did not observe the proper procedure for applying facts otherwise available in its calculation of the overlap between captively-produced downstream products and downstream products produced from merchant market sales. The Court remands the Final Determinations and instructs the ITC to clarify how it complied with the statutory framework of

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[2] The ITC's brief points out that the Plaintiffs rely heavily on only merchant market data, while the ITC was not restricted to the merchant market because it had determined that the captive production provision did not apply. Def. ITC's Opp'n at 27, 32. It is necessary that the ITC re-evaluate whether the captive production provision applies before the Court can determine if the ITC's determination was supported by substantial evidence.

both 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d) for applying facts otherwise available. If the ITC determines that it did not adhere to all of the statutory prerequisite conditions, then it must give the Plaintiffs an opportunity to remedy any deficiencies in their data. In addition, in light of the Court's instruction to the ITC to reconsider its definition of "internal transfers," the Court declines to rule on whether the Plaintiffs had an opportunity to comment on the perceived shift in methodology by the ITC. Finally, the Court will not rule on the sufficiency of the evidence prior to the ITC's re-weighing of the evidence under the Court's remand instructions.

The ITC is instructed to issue its findings on remand within 90 days of the date of the Order accompanying this Opinion.

SO ORDERED.

Slip Op. 03–144

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND LIGAS DE ALUMINIO S.A. DEFENDANT-INTERVENOR.

ELETROSILEX S.A., PLAINTIFF, *v.* UNITED STATES DEFENDANT, AND AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. DEFENDANT-INTERVENORS.

Before: MUSGRAVE, JUDGE

Consolidated Court No. 99–03–00149

ORDER

Upon consideration of the motion of Eletrosilex S.A. to Alter or Amend Judgment and for Stay of Judgment and the Department of Commerce's opposition thereto, it is hereby

ORDERED that the Judgment entered on June 27, 2003 in conjunction with Slip Op. 03–69 is stayed; and it is further

ORDERED that all further proceedings in this action are stayed pending the final determination of the dumping margins in the fourth administrative review of the antidumping duty order on silicon metal from Brazil, *sub nom. American Silicon Technologies v. United States*, Consolidated Court No. 97–02–00267.

Slip Op. 03–145

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

Before: Judge Judith M. Barzilay

Court No. 02–00361

[Defendant's Motion to Dismiss is Granted.]

Decided: October 30, 2003

Steptoe & Johnson LLP, Herbert C. Shelley, (J.William Koegel, Jr.), Alice A. Kipel, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice; *Barbara S. Williams*, Assistant Branch Director, International Trade Field Office; (*Amy M. Rubin*), Civil Division, United States Department of Justice, Commercial Litigation Branch; *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

BARZILAY, Judge: Before the court is the motion of Defendant the United States ("government") to dismiss Plaintiff Ammex, Inc.'s ("Ammex") amendment to its complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. On May 16, 2002, Ammex filed its original complaint with this court challenging the United States Customs Service's ("Customs")[1] November 21, 2001 revocation of its September 5, 2000 ruling letter authorizing Ammex to sell duty-free gasoline and diesel fuel from its Class 9 Customs-bonded warehouse and duty-free store at the Ambassador Bridge between Detroit, Michigan and Windsor, Canada ("Revocation Ruling"). *Compl.* ¶¶1, 2. In the complaint, Ammex invoked the court's jurisdiction under 28 U.S.C. § 1581(i), framing the issue as "whether fuel imports purchased by Ammex and sold from Ammex's duty-free store, for export only, may nevertheless be charged taxes and duties." *Id.* ¶5. The Revocation Ruling was based on the conclusion that gasoline and diesel fuel subject to section 4081 of the Internal Revenue Code, 26 U.S.C. § 4081, cannot qualify as duty-free under 19 U.S.C. § 1555(b)(8)(E) (2000) and 19 C.F.R. §§ 19.35(a) and 19.36(e) (2001).[2] *Id.* ¶¶1, 22. By leave of the court, Ammex amended

[1] Now, the Bureau of Customs and Border Protection.

[2] Section 1555(b)(8)(E) provides that the "term 'duty-free merchandise' means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory." In addition, a "class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the Customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country." 19 C.F.R. § 19.35(a). "Only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse." *Id.* § 19.36(e). " 'Conditionally duty-free merchandise' means

its complaint. In the amended complaint, Ammex added a challenge alleging that Customs had denied Ammex's protest against exclusion of a particular entry of diesel fuel from duty-free entry on February 21, 2002. *Am. Compl.* ¶2. Because Ammex maintains that there was a protestable decision and denial of a valid protest under 19 U.S.C. § 1514(a)(4) and § 1515[3] regarding the February 21, 2002 entry,[4] Ammex additionally invokes the court's jurisdiction under 28 U.S.C. § 1581(a) in the amended complaint. *Id.* ¶6. As Defendant seeks to dismiss only the amendment to the complaint and concedes jurisdiction under section 1581(i), the issue before the court is whether the court has jurisdiction under section 1581(a).[5] For the following reasons, the court finds that there is no jurisdiction under section 1581(a) in this case. Accordingly, Defendant's Motion to Dismiss is granted.

I.

A. Background.

This Court has so far issued two decisions relating to the dispute regarding fuel sold at Plaintiff's Ambassador Bridge facility.[6] In par-

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merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." *Id.* § 19.35(a). Finally, section 4081 of Title 26 provides that "[t]here is hereby imposed a tax . . . on . . . the entry into the United States of any taxable fuel for consumption, use, or warehousing." 26 U.S.C. § 4081(a)(1)(A).

[3] Protestable decisions include "the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws. . . ." 19 U.S.C. § 1514(a)(4). Section 1515 provides procedures for administrative review of protests, including denial of protests.

[4] Entry number G17–0048875–3.

[5] Under section 1581(a) of title 28, this Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section" 1515 of Title 19 of the United States Code. Under section 1581(i), this Court shall also have exclusive jurisdiction

> of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> **(1)** revenue from imports or tonnage;
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> **(2)** tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> **(3)** embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> **(4)** administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section. This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section

1516a(a) of Title 19 "or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement" and section 1516a(g) of Title 19.

[6] In addition, parties argued related issues before the United States Court of Federal Claims. *See Ammex, Inc. v. United States*, 52 Fed. Cl. 303, *reh'g denied*, 52 Fed. Cl. 555 (2002).

ticular, on August 25, 2000, entertaining Plaintiff's challenge to a 1998 Customs ruling (HQ 227385), which extended an earlier Customs decision, this Court held that diesel fuel and gasoline are eligible for sale from duty-free stores (including Ammex's facility) under 19 U.S.C. §§ 1555(b) and 1557(a)(1).[7] *See Ammex, Inc. v. United States*, 24 CIT ___ , ___ , 116 F. Supp. 2d 1269, 1273–76 (2000) ("*Ammex I*"). On September 5, 2000, Customs, by letter to Plaintiff, granted Plaintiff's request to expand its Class 9 duty-free warehouse to encompass gasoline and diesel fuel tanks located on the facility. On October 23, 2000, Ammex solicited another letter from Customs to certify that fuel sold in Ammex's duty-free store was exempt from taxes, which request Customs forwarded to the Internal Revenue Service ("IRS"). On January 8, 2001, the IRS issued an informal letter contending that under section 4081 of the Internal Revenue Code, 26 U.S.C. § 4081, a tax must be imposed on any taxable fuel entering the United States, including gasoline and diesel fuel for consumption, use, or warehousing. On November 21, 2001, after a notice and comment period and basing its decision on the IRS letter, Customs issued the ruling revoking its September 5, 2000 letter, which had permitted Ammex to sell duty-free gasoline and diesel fuel at the Ambassador Bridge facility. In subsequent litigation, Ammex challenged Customs' Revocation Ruling arguing that Customs should be held in contempt for failing to abide by this Court's opinion in *Ammex I.* The Court, however, found that the intervening IRS letter (and the new information contained therein) made the issue presented distinct from that litigated in *Ammex I. See Ammex, Inc. v. United States*, 26 CIT ___ , 193 F. Supp. 2d 1325 (2002) ("*Ammex II*"), *aff'd*, 334 F.3d 1052 (Fed. Cir. 2003). The *Ammex II* Court consequently held that Customs was not in contempt of the Court's *Ammex I* ruling, nor was the relitigation of the issue barred by *res judicata.* Because "Ammex is entitled to challenge the basis of Customs' decision to revoke its September 5 letter," but must do so "anew in the proper procedural manner," *Ammex II* at 1330, this action ensued.

Ammex's Ambassador Bridge facility is situated beyond a U.S. Customs exit point within two miles of the Canadian border. All entry into and exit from the facility is regulated and controlled by U.S. Customs. The facility is configured in such a way that any vehicle entering the facility must necessarily come from the United States and, exiting the facility, it must necessarily enter Canada. Ammex's store sells a variety of duty-free items, as well as retail gasoline and diesel fuel the duty-free status of which is now in dispute.

As part of the enforcement of the Revocation Ruling, which became effective as of February 21, 2002, Customs required that any

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[7] Section 1557(a)(1) provides for warehousing and withdrawal of merchandise from a warehouse.

Ammex entries of gasoline and diesel fuel on or after that date be made as Type Code 01 (consumption) entries, as opposed to Type Code 21 (warehouse) entries. On February 21, 2002, Ammex attempted to enter 11,235 gallons of diesel fuel from Canada as a warehouse entry. Customs denied the warehouse entry, but allowed the entry of fuel for consumption. On the entry/immediate delivery form (dated February 21, 2002) and entry summary form (dated February 22, 2002), Ammex included the following paragraph, at the bottom, set off by an asterix, and in capital letters:

> * AMMEX COMPLETES THIS "TYPE CODE/NAME" UNDER PROTEST. THIS MOTOR FUEL IS IN EXPORT TRANSIT AND DESTINED FOR EXPORT SALE AT AMMEX'S DUTY FREE STORE. THE CORRECT TYPE CODE/NAME IS: 21 WAREHOUSE.

Customs did not treat this objection as a formal "protest."

B. Parties' arguments.

Plaintiff asserts that its "fuel came from Canada under a U.S. Customs 'in transit' bond until deposited into Ammex's Class 9 bonded warehouse," and was covered by a U.S. Customs warehouse bond while in the warehouse. *Pl.'s Reply to Def.'s Mot. to Dismiss* ("*Pl.'s Reply*") at 3. Plaintiff further asserts that the fuel was placed in a " 'sterile area' approved and inspected by Customs, constructed for the specific purpose of exporting the fuel." *Id.* at 4. Plaintiff maintains that Customs' act on February 21, 2002 "improperly characterized the fuel as though for domestic consumption," and that "Customs' refusal to permit Ammex to make a warehouse entry for bonded export sale deprived the fuel of bonded export status." *Id.* at 5. Plaintiff thus claims that Customs' action on February 21, 2002 was a protestable decision. It furthermore asserts that it properly protested such action by including the paragraph on the entry documents.

In its motion to dismiss, the government first argues that there was no protestable decision. *Def.'s Mem. in Supp. of Mot. to Dismiss* ("*Def.'s Br.*") at 2–3. The government asserts that "[a]lthough the fuel may not have been allowed to be deposited into a Class 9 warehouse it was plainly not 'excluded' from entry or delivery." *Id.* at 2 (emphasis omitted). Moreover, the government argues that "[e]ven if Customs' redirection of fuel away from a Class 9 warehouse could be construed as a protestable exclusion, the 'protest' itself is facially deficient." *Id.* at 3. The government claims that the language Ammex included on the entry papers falls short of the statutory and regulatory requirements for valid protests and should not be allowed under precedents of the United States Supreme Court and United States Court of Appeals for the Federal Circuit. *Id.* at 3–4 (citing 19 U.S.C. § 1514(c)(1), 19 C.F.R. §§ 174.13(a)(6) & 174.21(b), *Davies v. Arthur*, 96 U.S. 148, 151 (1877) and *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999)); *Def.'s Reply to Pl.'s Opp. to Mot. to Dismiss* ("*Def.'s Reply*") at 8 (citing 19 C.F.R. § 174.12).

In its reply, Ammex responds by stating that "the statue governing entry of merchandise and Customs' own regulations confirm that protests are not limited to those decisions denying [physical] entry of merchandise into the United States." *Pl.'s Reply* at 7. According to Ammex, 19 U.S.C. § 1514(a)(4) is not so narrow as to exclude its "protest" at issue here. *Id.* at 8. As the term "entry" refers to a "documentation process," Ammex's argument implies that Customs' action in diverting the merchandise to a consumption entry is a protestable exclusion even if it did not involve a physical exclusion of the merchandise. *Id.*

Ammex next reiterates that its "protest" was proper and sufficient to inform Customs of "Ammex's objections and the nature of the decision being protested." *Id.* at 8. Specifically, Ammex claims that "the entry summary and Ammex's protest included 'the category of merchandise affected' by the protested decision and the 'nature of [Ammex's] objection and the reasons therefor.' " *Id.* at 10 (quoting 19 U.S.C. § 1514(c)(1)). According to Ammex, the "entry summary [further] provided the name and address of the protestant/importer, the number and date of the entry, and the nature of objection (type/code)," in compliance with 19 C.F.R. § 174.13. *Id.* In support of its arguments, Ammex points to this Court's past decisions in favor of construing protests liberally and of finding them valid. *Id.* at 11–12 (citations omitted). In particular, Ammex maintains that "it has been long-established that a protest is legally sufficient if it reasonably apprises the collector of the objection." *Id.* at 12 (citations omitted).

On the issue of a protestable decision, the government replies by emphasizing that "actual release of imported goods into the commerce of the United States without any notice to redeliver being issued to the importer negates any contention that the merchandise was excluded." *Def.'s Reply* at 5 (emphasis omitted). The government bases this argument in part on the Court's decision in *Lowa, Ltd. v. United States*, which noted that the term "entry" is closely tied to "the act of releasing merchandise into the commerce of the United States." 5 CIT 81, 86, 561 F. Supp. 441, 445 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984). Thus, according to the government, the diversion of the merchandise from a Class 9 warehouse (and its entry as for consumption) was not a protestable "exclusion."[8]

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[8] Here, the government also argues that since Ammex was aware of the Revocation Ruling and its implications, its original insertion of "warehouse" and "21" for the entry type and code (on the entry/immediate delivery form dated February 21, 2002) should be considered a "typographical" error. *Def.'s Reply* at 3. Alternatively, it suggests that such action would constitute " a deliberate act in violation of a notice and comment ruling and in breach of the required standard of care" in filling out Customs forms. *Id.* at 3 n.3. The court need not address this inchoate claim.

On the issue of a valid protest, the government characterizes Ammex's argument as a plea to view the protest in the context of the parties' prior dealings. *Def.'s Reply* at 5; *Pl.'s Reply* at 2 (stating that "Customs' motion [to dismiss] implies that Ammex's protest is a stand-alone, isolated event"). The government argues that the parties' "prior dealings" and any other "collateral information" have no bearing on the question of whether there is a valid protest. *Def.'s Reply* at 5–6; *Koike*, 165 F.3d at 909 (cautioning against evaluating protests under "the surrounding circumstances" and taking into account Customs' purported "aware[ness] of the substance of the protesting party's claim"). While conceding that protests may be valid even when they are not on a Customs Form 19, the government urges that Customs' potential "awareness" of what and why Ammex protested should not be considered because the standard of testing a protest's validity "must be an objective one." *Def.'s Reply* at 10. To that end, the government argues that a "reasonable person viewing this statement might very well conclude not that the document is a protest, but that the filer intends to follow up the entry with the submission of a proper protest." *Id.* at 11 (emphasis omitted).

II.

The issue before the court is whether it has jurisdiction pursuant to 28 U.S.C. § 1581(a). Jurisdiction under section 1581(a) requires that there be a denial of a valid protest by Customs. Protests are governed by section 1514 of Title 19 of the United States Code, which provides in pertinent part that "decisions of the Customs Service . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in" this Court. 19 U.S.C. § 1514(a). Accordingly, the court must decide whether Customs' requirement that Ammex enter its diesel fuel entry on February 21, 2002 as for consumption (instead of a warehouse entry) constitutes a protestable decision and whether Ammex properly protested such decision. If the answer to either question is no, the court may not entertain the case under section 1581(a) because administrative remedies required by the statute would not have been exhausted. Because the court decides that there was no valid protest under section 1514(c)(1) and applicable regulations, the court need not reach the question of whether there was a protestable decision.[9] "[O]nce jurisdiction is challenged, the burden

[9] Protestable decisions include "the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws." 19 U.S.C. § 1514(a)(4). Plaintiff maintains its fuel was "excluded" by Customs when it required a consumption entry. The government contends that requiring proper entry pursuant to the Revocation Ruling is not an "exclusion." The parties also disagree as to what extent the term "entry" refers to a "documentation process" under 19 U.S.C. § 1484(a)(1), 19

rests on plaintiff to prove that jurisdiction exists." *United States v. Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982) (citations omitted).

Whether or not Customs' action was a protestable decision, Ammex's objection to the consumption entry on the entry documents nevertheless fails to meet the requirements of a valid protest. Pursuant to 19 U.S.C. § 1514(c)(1), "[a] protest must set forth distinctly and specifically—

> **(A)** each decision described in subsection (a) of this section as to which protest is made;
>
> **(B)** each category of merchandise affected by each decision set forth under paragraph (1);
>
> **(C)** the nature of each objection and the reasons therefor; and
>
> **(D)** any other matter required by the Secretary by regulation.

The implementing regulation provides that a "protest shall contain the following information:

> (1) The name and address of the protestant . . . ;
>
> (2) The importer number of the protestant . . . ;
>
> (3) The number and date of the entry;
>
> (4) The date of liquidation of the entry, or the date of a decision not involving a liquidation or reliquidation;
>
> (5) A specific description of the merchandise affected by the decision as to which protest is made;
>
> (6) The nature of, and justification for the objection set forth *distinctly and specifically* with respect to each category, payment, claim, decision, or refusal;
>
> (7) The date of receipt and protest number of any protest previously filed . . . ;

C.F.R. §§ 141.0a(a) and 141.68(a)(1), and to what extent it is linked to physical entry of merchandise under *Lowa, Ltd. v. United States*, 5 CIT 81, 561 F. Supp. 441 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984). Moreover, the parties do not suggest that the situation here may be evaluated under any other provision of section 1514(a). This court has not addressed the question of whether importers may challenge Customs' decision to require entry of goods under one type of entry over another as an exclusion under section 1514(a). Although not the case here, if importers cannot thus challenge Customs' action, they may be without recourse for relief—hardly a desirable result. Nevertheless, the court declines to enter this sketchily chartered territory in this case as it is clear that Plaintiff cannot invoke (a) jurisdiction having failed to file a valid protest. While not bearing on the court's ruling, it is also important to note that Plaintiff's challenge to the Revocation Ruling will continue to be heard under section 1581(i).

> (8) If another party has not filed a timely protest, the surety's protest shall certify that the protest is not being filed collusively to extend another authorized person's time to protest; and
>
> (9) A declaration, to the best of the protestant's knowledge, as to whether the entry is the subject of drawback, ..."

19 C.F.R. § 174.13(a) (emphasis added); *see also Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908–9 (Fed. Cir. 1999) (reaffirming the so-called specificity requirement of section 174.13(a)(6)). Moreover, "[i]f the protest relates to an administrative action involving exclusion of merchandise from entry or delivery under any provision of the Customs laws, . . . [the] protest shall clearly so state on its face." 19 C.F.R. § 174.21(b). With respect to form and number of copies of protests, the regulations additionally state that "[p]rotests against decisions of a port director shall be filed in quadruplicate on Customs Form 19 or a form of the same size clearly labeled 'Protest' and setting forth the same content in its entirety, in the same order, addressed to the port director." 19 C.F.R. § 174.12(b).

Ammex alleges that its objection contained in the entry papers constitutes a protest. Specifically, Ammex wrote:

> * AMMEX COMPLETES THIS "TYPE CODE/NAME" UNDER PROTEST. THIS MOTOR FUEL IS IN EXPORT TRANSIT AND DESTINED FOR EXPORT SALE AT AMMEX'S DUTY FREE STORE. THE CORRECT TYPE CODE/NAME IS: 21 WAREHOUSE.

However, this paragraph neither states the "reasons" for the objection, 19 U.S.C. § 1514(c), nor does it elaborate on the "justification for [the] objection set forth distinctly and specifically," 19 C.F.R. § 174.13(a)(6). Moreover, Ammex's objection does not "clearly" state that the grounds for the objection is an *exclusion* under § 174.21(b).[10] Nor are the entry summary form and entry/immediate delivery form sufficiently labeled as "Protest" and addressed to the appropriate Customs official to satisfy the requirements of 19 C.F.R. § 174.12(b). Ammex's objection merely states that the "type code/name" box was filled under protest. It is hardly possible to determine from the text of the objection why Ammex objected to the consumption entry, at least not without considering the history of the parties'

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[10] At oral argument the government conceded that the regulation does not require importers to use the specific word "exclusion" in a protest, if the content of the protest is otherwise clear. Whether refusing entry under a particular entry type (and simultaneously allowing it under a different entry type) constitutes an exclusion is an unsettled question. Precisely because it is an unsettled question, Ammex's attempt to protest as an exclusion Custom's requirement to enter its goods under a consumption entry cannot be sufficiently clear to alert the Customs official as to the nature of a possible protest, as required by the regulation.

dispute. The claim that "surrounding circumstances" could help to ascertain the content of protests was specifically rejected by the Federal Circuit in *Koike*. The *Koike* court dismissed the argument that the parties' prior communications could clarify protests and further advised that the "requirements for a valid protest that are contained in section 1514(c)(1) and the implementing regulation . . . are mandatory." 165 F.3d at 909. In other words, protests are not "akin to notice pleadings [that] merely have to set forth factual allegations without providing any underlying reasoning." *Id.* (citation and internal quotations omitted).

Plaintiff attempts to place its document within the ambit of the long line of cases taking a liberal posture as to what constitutes a valid protest. *See Pl.'s Br.* at 11–12 (citing, *inter alia*, *Mattel, Inc. v. United States*, 377 F. Supp. 955, 960 (Cust. Ct. 1974) ("the court, taking a liberal posture, has held that, however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section [1514] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought.")). In *Mattel*, for instance, even though the plaintiff's letters requested reliquidation under a different statutory provision, the court held them to be valid protests. In so holding, the decision reviewed cases deeming all manner of writings to be protests despite missing or unclear information. The *Mattel* case did not cite and the court's research has failed to discover any previous cases in which the court held that a valid protest was made based on brief comments typed on a Customs form designed for another purpose. The court declines to accept Plaintiff's implied invitation to extend the liberal construction of a protest to include such a document.[11]

As the government argues, the paragraph Ammex inserted on the entry papers could solely be viewed as an indication that a protest was about to follow (as opposed to constituting a valid protest in itself). Ammex did not file a proper protest after the entry and therefore may not preserve the court's jurisdiction under section 1581(a)

[11] At oral argument Ammex attempted to demonstrate that the entry documents contained all the required elements of a valid protest set forth in the statute and regulations. Even assuming that this contention has any merit when examining the documents after the fact, a ruling to the effect that Ammex filed a valid protest at the time of the entry on the same document used to effectuate that entry would contradict one of the basic tenets of customs law. It is the Customs official viewing the documents in the first instance who must recognize that a protest is being made, not the court or any other party. Customs officials cannot be expected to examine each entry paper to see whether or not it may constitute a protest. Each of Customs' forms fulfills a specific function, and an entry document is not a proper place to voice an objection to a Customs' action pertaining to an entry. This is not to suggest that only a Customs Form 19 must be used to file a protest. Under existing and long standing case law, a separate letter containing the information required in the regulations and clearly labeled as a protest could have sufficed so long as the letter was in conformity with the importer's obligations under the statutory scheme and "sufficient to notify the [duty] collector of [the objection's] true nature and character." *Davies v. Arthur*, 96 U.S. 148, 151 (1877).

in this case. As the Federal Circuit in *Koike* noted, "[b]ecause the statutory and regulatory requirements are jurisdictional, the consequence of failing to comply with them is harsh. Fortunately, however, the requirements are straightforward and not difficult to satisfy." 165 F.3d at 909. The court further notes that failing to satisfy the requirements of jurisdiction under section 1581(a) is not fatal to Ammex's case as Ammex's challenge to Customs' Revocation Ruling will be allowed to proceed under section 1581(i).[12] A separate order will be entered accordingly.

Slip Op. 03–146

SOLOMON UPSHAW, PLAINTIFFS, *v.* THE UNITED STATES, DEFENDANT.

Court No. 03–00424

[Motion to dismiss granted.]

Dated: October 30, 2003

Solomon Upshaw, Pro Se, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Harry A. Valetk*), *Ann Sullivan*, Office of the Associate Chief Counsel, United States Department of Homeland Security, Customs and Border Protection, of counsel, for defendant.

OPINION

RESTANI, Judge:

This Customs broker's license matter is before the court on defendant's motion to dismiss for failure to state a claim, and plaintiff Solomon Upshaw's cross-motion for judgment on the agency record. The court has jurisdiction pursuant to 28 U.S.C. § 1581 (g)(1).

Plaintiff has not specified in his motion papers what relief he seeks on the agency record, although in his complaint he asked that the court award him a Customs broker's license. The court cannot

[12] Ammex claims that this case can proceed both under sections 1581(a) and (i). Ammex notes that this Court has permitted actions to proceed under both sections 1581(a) and (i) where different parts of the claim fell under different jurisdictional provisions. *Id.* at 14 (citing *Hanover Ins. Co. v. United States*, 25 CIT ____ , Slip Op. 01–57 (May 16, 2001) and *Sharp Elec. Corp. v. United States*, 20 CIT 948 (1996)). Additionally, Ammex asserts that it "should be permitted to proceed with both claims in the interest of judicial economy." *Id.* at 14 n.3. Having found that there is no (a) jurisdiction in this case, the court need not reach this issue.

grant him a Customs broker's license or order the relevant Government agency to do so because he has not established that he passed the Customs broker's license examination. It is also unclear what relief he seeks with regard to his contention that he was unreasonably not permitted to take the October 2002 exam because his application was allegedly untimely. That examination has taken place. The court cannot order that he be allowed to take part. Further, another exam was given in April 2003, and there is no allegation that Mr. Upshaw was unreasonably barred from taking that examination. As there is no relief which the court can grant Mr. Upshaw on this record, his motion for judgment on the agency record is denied. The Government's motion to dismiss is granted.

Slip Op. 03–147

J.S. STONE, INC., PLAINTIFF, *v.* THE UNITED STATES, DEFENDANT.

Before: WALLACH, Judge

Court No.: 00–06–00263

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

Decided: October 31, 2003

Steven R. Sosnov, of Sosnov & Associates, for Plaintiff.
James A. Curley, Commercial Litigation Branch, Civil Division, Department of Justice.

OPINION

WALLACH, Judge.

I.
Preliminary Statement

This matter is before the court on cross-motions for summary judgment pursuant to USCIT R. 56. Plaintiff, J.S. Stone, Inc. ("Stone"), seeks a refund of antidumping duties for the difference between the cash deposit rate it received and the published rate determined for Sinochem International Chemicals Corp. ("SICC") in *Sebacic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 43,373 (Aug. 13, 1998). Plaintiff originally brought this action claiming jurisdiction under 28 U.S.C. § 1581(a) and (i) (1994), but later conceded that the court lacked jurisdiction under § 1581(a).[1]

Defendant challenges the jurisdiction of the court. Additionally, Defendant claims that the Department of Commerce ("Commerce") properly issued antidumping duty instructions to United States Customs Service[2] ("Customs"), which assessed antidumping duties on Plaintiff's entries at the cash deposit rate. For the foregoing reasons, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) and grants Defendant's Cross-Motion for Summary Judgment.

II.
Background

On July 19, 1993, Union Camp Corporation filed a petition with Commerce and the ITC, alleging that sebacic acid was being sold at prices below fair market value to the detriment of the domestic industry. *See Initiation of Antidumping Duty Investigation; Sebacic Acid from the People's Republic of China*, 58 Fed. Reg. 43,339 (Aug. 16, 1993). After investigation, it was determined that Union Camp's allegations had merit and Commerce published an antidumping duty order on sebacic acid from the People's Republic of China ("PRC"). *Antidumping Duty Order: Sebacic Acid from the People's Republic of China (PRC)*, 59 Fed. Reg. 35,909 (July 14, 1994).

Subsequent to the order, Commerce and the ITC conducted administrative reviews for shipments of sebacic acid from the PRC for the periods of July 13, 1994 through June 30, 1995; July 1, 1995 through June 30, 1996; July 1, 1996 through June 30, 1997; and July 1, 1997 through June 30, 1998 ("administrative review periods"). Plaintiff imported sebacic acid from SICC on October 4, 1996, November 4, 1996, and December 9, 1996, and deposited the estimated antidumping duties on the entries with Customs. At the time of importation, the Plaintiff's estimated duty rate was 43.72% *ad valorem*. On July 21, 1997, Commerce published a notice of opportunity to request administrative review of its antidumping order covering sebacic acid from the PRC for the period of investigation ("POI") from July 1, 1996, through June 30, 1997.[3] *Antidumping or Countervailing Duty*

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[1] Plaintiff stated that "[t]he parties are in seeming agreement that there is no jurisdiction under 28 U.S.C. sec. 1581(a). There are no Customs decisions to protest." Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Opposition") at 3.

[2] The United States Customs Service was renamed effective March 1, 2003, and is now organized as the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003).

[3] The notice stated that

> In accordance with section 351.213 of the regulations, an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. The Department has changed its requirements for requesting

Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 62 Fed. Reg. 38,973 (July 21, 1997) ("Notice"). Union Camp filed a petition with Commerce and the United States International Trade Commission ("ITC") requesting an administrative review of SICC. Additionally, SICC requested an administrative review.

As part of the review, SICC was required to report all of its sales of sebacic acid. Plaintiff neither requested an administrative review as an interested party nor participated in the review.[4] SICC did not report its sales to Plaintiff in its questionnaire responses for this administrative review.[5] As a consequence, Commerce did not review SICC's sales of sebacic acid to Plaintiff and SICC's sale prices to Plaintiff were not used by Commerce in computing the .11% dumping rate for SICC.

On April 9, 1998, Commerce published the Preliminary Results of its administrative review in *Sebacic Acid From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 17,367 (Apr. 9, 1998) ("Preliminary Results"). On August 13, 1998, Commerce published its final results which covered four exporters including SICC. *Sebacic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 43,373 (Aug. 13, 1998) ("Final Results").

On December 17, 1998, Commerce sent liquidation instructions to Customs. Customs was informed that suspension of liquidation was lifted and entries of sebacic acid sold by SICC to the four importers it identified during the review were to be liquidated at the exporter specific antidumping duty rate. Commerce sent another set of liquidation instructions to Customs on April 28, 1999, instructing Customs to liquidate Plaintiff's entries at the cash deposit or bonding rate. Subsequently, on June 9, 1999, SICC sent a letter to Commerce stating that through its "carelessness" it had forgotten to report sales of sebacic acid to J.S. Stone. Plaintiff's Statement in Response

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> reviews for countervailing duty orders. Pursuant to 771(9) of the Act, an interested party must specify the individual producers or exporters covered by the order or suspension agreement for which they are requesting a review. . . . Therefore, for both antidumping and countervailing duty reviews, the interested party must specify for which individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters.

Notice, 62 Fed. Reg. at 38,973.

[4] Pursuant to 19 U.S.C. § 1677(9)(A) (1994) an interested party is

> (A) foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise.

[5] The instructions for reporting sales data given to the exporters for July 1, 1995, through June 30, 1996, and July 1, 1996, through June 30, 1997, were the same. *See* Plaintiff's Motion for Summary Judgment Pursuant to CIT Rule 56 ("Plaintiff's Motion") at 7.

to Defendant's Statement of Material Facts at para. 8. Thereafter, on June 18, 1999, Customs liquidated Plaintiff's three entries and assessed anti-dumping duties at the cash deposit rate of 43.72% *ad valorem*. Commerce then sent a letter to Plaintiff, dated September 2, 1999, explaining why Plaintiff's entries were liquidated at the cash deposit rate. Plaintiff protested the assessment of the antidumping duties under 19 U.S.C. § 1514(a) and its protest was denied.

III.
Jurisdiction

Federal courts determine their own jurisdiction. *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986). A "mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling: federal courts are of limited jurisdiction, and may not alter the scope of either their own or another courts' statutory mandate." *Id*. In this case, the Plaintiff bears the burden of demonstrating that jurisdiction exists because the Defendant challenges the jurisdiction of the court. *See Hilsea Inv. v. Brown*, 18 C.I.T. 1068, 1070 (CIT 1994). However, it is also incumbent upon the court to independently assess the jurisdictional basis for cases that come before it. *See Ad Hoc Comm. v. United States*, 25 F. Supp. 2d 352, 357 (CIT 1998).

A.
Jurisdiction is Barred Under 28 U.S.C. § 1581(a)

When an interested party wants Commerce to assess the actual rather than the estimated dumping rate, it may request administrative review of the duties under section 751 of the Trade Agreements Act of 1979 ("1979 Act"). *See Mitsubishi Elecs. Am. v. United States*, 44 F.3d 973, 976–77 (Fed. Cir. 1994). If no request is made, Commerce instructs Customs to assess duties at the estimated rate. However if an administrative review is conducted, Commerce issues its final results and directs Customs to collect the appropriate antidumping duties.

The 1979 Act transferred the administration of the antidumping laws from the United States Treasury Department to Commerce. *Comm. To Preserve Am. Color Television v. United States*, 706 F.2d 1574, 1577 (Fed. Cir. 1983); Reorg. Plan No. 3 of 1979, § 5(a)(1)(c), 44 Fed. Reg. 69,273, 69,275 (Dec. 3, 1979). Customs' role in liquidating antidumping duties is ministerial. Customs has no authority to modify Commerce's determination and may liquidate entries only at the rate set by Commerce. *See Royal Business Machs., Inc. v. United States*, 1 CIT 80, 87 & n.18 (1980).

Plaintiff protested the assessment of antidumping duties under § 1514(a), and upon denial of the protest, brought suit under § 1581(a) and (i). Section 1514(a) is limited to "decisions of the Customs Service." Because Customs has no authority to modify Commerce's antidumping determination, only in limited circumstances may a plaintiff challenge Customs' imposition of antidumping duties on its entries.[6]

In this case, Commerce sent liquidation instruction to Customs, which then imposed antidumping duties as directed by Commerce as part of its ministerial functions. The court has no jurisdiction pursuant to § 1581(a) for it was Commerce's instructions, rather than an independent decision by Customs, which determined the antidumping rate.

B.
Jurisdiction Does Not Lie Under 28 U.S.C. § 1581(c).

Defendant claims that Plaintiff functionally challenges the results of the administrative review because it contests the application or inapplicability of the determination's results to its entries, a situation, it claims, where jurisdiction is proper only under § 1581(c). Under § 1581(c), the court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930. Pursuant to 28 U.S.C. § 2631(c) "[a] civil action contesting a determination listed in 516A of the Tariff act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose." Defendant argues that Plaintiff is precluded from challenging the results of the antidumping determination because, although it qualified as an interested party, it did not participate in the administrative proceedings.

The government's position in this case is similar to the claim it made in *Xerox Corp. v. United States*, 118 F. Supp. 2d 1353, 1354 (CIT 2000) ("*Xerox I*"). In *Xerox I*, the government claimed that the only method for parties to determine whether their goods were part of antidumping investigation was through a scope determination. This court stated that

> the ITA has and has had regulations . . . enabling importers like Xerox to file applications to determine whether particular products are within the purview of existing antidumping-duty orders. Also, Congress has provided for judicial review of such

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[6] For example, in *Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002) ("*Xerox II*"), the Federal Circuit held that when a plaintiff's goods are facially outside 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 where "the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, 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). *Xerox II*, 289 F.3d at 795. 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). *Id*.

> determinations. . . . Given, this approach, and the fact that Xerox did not follow it, the defendant takes the position that this court has no jurisdiction to grant any relief—pursuant to section 1581(a) or otherwise.

Xerox I, 118 F. Supp. 2d at 1354.

The CIT agreed with the government's characterization that the plaintiff in *Xerox I* could have participated in the administrative review in order to ensure that its goods were not facially part of the antidumping determination. However, the Federal Circuit reversed and held that a scope determination was not the sole appropriate method by which a party could challenge Customs' application of a dumping order to its goods when the party believed that Customs had misapplied the antidumping order. *See Xerox II*, 289 F.3d at 795.

Similar to the plaintiff in the *Xerox* cases, J.S. Stone failed to participate in the antidumping review. After the final results of the review were published, the government then made a decision regarding the amount of antidumping duties the parties owed. Commerce then determined which dumping rate applied to Plaintiff's entries and sent liquidation instructions to Customs. Defendant claims that the only method that Plaintiff has of ensuring that the proper dumping rate is applied to its goods is to participate in the antidumping review.

During oral argument, Defendant tried to distinguish the *Xerox* cases on two points. First, Defendant claimed that the cases were distinguishable because they involved a decision by Customs, not Commerce. Second, Defendant stated that the jurisdiction challenged by the government in the *Xerox* cases was § 1581(a) and the government had claimed that the only appropriate jurisdiction lay under § 1581(c), while here Plaintiff claims jurisdiction pursuant to § 1581(i) and the government again claims that the only proper jurisdiction lies under § 1581(c).

Because it is the substance and the nature of an action rather than its form that control jurisdiction, *see Williams v. Sec'y of Navy*, 787 F.2d at 557, these distinguishing factors in no way lessen the basic teaching of *Xerox II*—that the government mistakenly characterized an action as solely challengeable through an administrative review and subject to § 1581(c) jurisdiction, when another means of challenging the government's actions was available. Plaintiff's claim is thus best characterized as a challenge to Commerce's instructions to Customs, rather than as a challenge to the final results of the review. Like the plaintiff in the *Xerox* cases, J.S. Stone could have participated in the administrative review as an interested party. That it did not, does not prevent the court from reviewing Commerce's instructions to Customs. Commerce held that SICC's dumping rate did not apply to Plaintiff because it did not participate in the review. Plaintiff's challenge of Commerce's instructions to Customs, and the applicability of the Federal Register results to its entries, takes the matter out of the umbrella of § 1581(c) jurisdiction because § 1581(c) covers challenges to the results of antidumping determination. Since the determination is not challenged, Defendant errs in its belief that Plaintiff could only be afforded relief under this subsection.

C.
The Court Has Jurisdiction Pursuant to 28 U.S.C. § 1581(i).

The Court of International Trade is an Article III court of limited jurisdiction and "is empowered to offer complete relief in all actions within its jurisdiction except where particular forms of relief are explicitly barred." *Krupp Stahl AG v United States* 4 CIT 244, 247 (1982). Section 1581(i) gives this court "broad residual authority over civil actions arising out of federal statutes governing import transactions. . . ." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994); 28 U.S.C. § 1581(i). Section 1581(i) provides that

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)—(3) of this subsection and subsections (a)—(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930. . . .

28 U.S.C. § 1581(i).

The legislative history regarding section 1581(i)(4) indicates that this court is not "prohibited from entertaining a civil action relating to an antidumping proceeding so long as the action does not involve a challenge to a determination specified in 516A of the Tariff Act of 1930." House Judiciary Committee in H.R. Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760; *see Ceramica Regiomontana, S.A. v. United States*, 5 CIT 23, 25–28 (1983). Thus, Congress clearly envisioned "occasions when an aspect of an antidumping duty determination might fall within the court's jurisdiction under section 1581(i)." *Royal Business Machs., Inc. v. United States*, 69 CCPA 61, 74 (1981). However, in order to "invoke jurisdiction under § 1581(i), jurisdiction under the other provisions of § 1581 must be unavailable or manifestly inadequate." *Associacao Dos Industriais de Cordoaria e Redes v. United States*, 17 CIT 754, 757 (1993); *see Juice Farms v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995).

Commerce's instructions to Customs to liquidate Plaintiff's entries are not part of the antidumping determination. The court previously illustrated the distinction between a challenge to Commerce's liquidation instructions and a challenge to the antidumping determination in *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580, 583 (2001). In *Consolidated Bearings*, an importer brought an action challenging Commerce's liquidation instructions to Customs. *Id*. The court stated that "Commerce's liquidation instructions . . . are not subject to review under subsection 1581(a) because Commerce, not Customs, is the agency responsible for issuing the instructions and determining the amount of antidumping duty to be assessed." *Id*. Additionally, "Commerce's liquidation instructions . . . are not reviewable under subsection 1581(c) because they were not part of the final results. . . . Rather, such instructions are issued after relevant final determinations are published." *Id*.

Pursuant to 19 U.S.C. § 1516a(1) (1999), an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint. Judicial review in antidumping duty proceedings must commence within 30 days after the date of publication in the Federal Register of a final determination by the administering authority or the Commission under section 1675(c)(3) of this title. 19 U.S.C. § 1516a(1). As the court in *Consolidated Bearings* explained, Commerce's liquidation instructions come after the determination and may fall outside the time period that § 1581(c) permits contesting a determination by Commerce. *Consolidated Bearings*, 166 F. Supp. 2d at 583. Commerce's characterization would effectively prevent parties from seeking redress from mistakes made in its liquidation instructions to Customs when those instructions are sent after the final determination is published and beyond the time permitted for review under § 1581(c). Were the court to accept the Defendant's argument, parties would be unable to challenge an error in Commerce's liquidation instructions under § 1581(a),(c) or (i). This court declines to so hold. The court has jurisdiction to review Commerce's liquidation instructions to Customs pursuant to 28 U.S.C. § 1581(i).

IV.
Applicable Legal Standards

The standard of review applicable to civil actions brought pursuant to § 1581(i) is the same as for those actions brought under the Administrative Procedure Act. *See* 28 U.S.C. § 2640(e)[7]; *Shakeproof Indus. Prods. Div. of Illinois Tool Works, Inc. v. United States*, 104 F. 3d 1309, 1312 (Fed. Cir. 1997). The court reviews an agency's actions to determine whether they were "arbitrary, capricious, or infected by prejudicial legal error." *Shakeproof*, 104 F.3d at 1313. Under the arbitrary and capricious standard, a reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 153, 91 S. Ct. 814, 824–825 (1971).

Summary judgment is appropriate when "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). Rule 56 requires that the moving party produce evidence showing lack of any genuine issue of material fact. *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). The inferences drawn from the underlying facts are viewed in the light most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176, 177 (1962). The court does not "weigh the evidence and determine the truth of the matter," but rather determines

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[7] Section 2640(e) provides that "In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5."

5 U.S.C. § 706 (2000) states that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).

V.
Arguments

Plaintiff seeks a refund on the difference between the cash deposit rate it paid on antidumping duties and the rate determined for its exporter SICC. It asks for a money judgment pursuant to 28 U.S.C. § 2643(a)(1) (2000)[8] rather than reliquidation because its entries have already liquidated. Plaintiff does not challenge the agency's determination, rather, it argues that the final results published in the Federal Register are all that the law requires to establish its right to a refund of antidumping duties and that this right vested upon publication of the final results. Plaintiff's Motion at 15, 17. Plaintiff claims that the court is authorized to enter a money judgment against the United States in any civil action commenced under § 1581. 28 U.S.C. § 2643(a)(1). Plaintiff's Reply to Defendant's Supplemental Brief at 5 ("Plaintiff's Supplemental Brief").

Defendant argues that there is no merit to Plaintiff's claims because Plaintiff's entries were not reviewed by Commere during the antidumping determination and therefore the "all others" rate applies to Plaintiff's entries. Defendant's claim that this court lacks jurisdiction, because the determination was resolved administratively, is resolved by the court's grant of § 1581(i) jurisdiction. Defendant also claims that after liquidation of Plaintiffs entries, no remedy is available to the Plaintiff. Defendant's Supplemental Brief Submitted in Accordance with the Court's Order of June 13, 2003 at 5 ("Defendant's Supplemental Brief").

VI.
Discussion

A.
Commerce's Liquidation Instructions to Customs and Customs' Liquidation of Plaintiff's Entries Were in Accordance with the Law

Commerce's liquidation instructions to Customs instructed it to liquidate Plaintiff's entries at the cash deposit or bonding rate. It had previously instructed Customs to liquidate the entries of the importers identified by SICC at the rate published in the Final Results. Plaintiff argues that because "[t]here is no statutory or regulatory

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[8] Section 2643(a)(1) provides that [t]he Court of International Trade may enter a money judgment for or against the United States in any civil action commenced under section 1581 or 1582 of this title."

authority for the Department of Commerce to issue liquidation instructions to the Customs Service that are inconsistent with the final published results of the administrative review," it should have received SICC's published rate.

Defendant "admits there is no statutory or regulatory authority for the Department of Commerce to issue liquidation instructions to the Customs Service that are inconsistent with the final published results of an administrative review, but avers that Commerce did not issue liquidation instructions here that were inconsistent with the final published results." The Government says that having slept on its rights, Plaintiff is precluded from claiming SICC's rate.

Antidumping duties are "assessed when Commerce determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value and the ITC determines that the importation of such merchandise is causing or threatening to cause material injury to a United States industry, or is materially retarding the establishment of an industry in the United States." *INA Walzlager Schaefflerkg KG v. United States*, 108 F.3d 301, 304 (Fed. Cir. 1997). An administrative review of an antidumping order is governed by 19 U.S.C. § 1675 (1994), which provides:

> (1) In General
>
> At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order under this subtitle or a finding under the Antidumping Act . . . the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, . . .
>
> and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.
>
> (2) Determination of antidumping duties
>
> (A) In general
>
> For the purpose of paragraph (1)(B), the administering authority shall determine—
>
> (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and
>
> (ii) the dumping margin for each such entry.

(C) Results of determinations

> The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.

Id.

Should "an interested party [want] Commerce to assess duties at the actual, rather than the estimated [rate], it may request administrative review of the duties under section 751 of the 1979 Act." *Mitsubishi*, 44 F.3d at 976–77. Pursuant to the implementing regulation for administrative reviews, 19 C.F.R. 351.212 (1998), Commerce calculates an antidumping assessment rate for each importer of the subject merchandise covered by the review. However, if an antidumping review is not requested, antidumping duties are collected on the unspecified merchandise in the amount of the cash deposit paid at the time of importation, which is published as the "all others" rate in the Federal Register. *See Id.*; *see also Floral Trade Council v. United States*, 822 F. Supp. 766, 768–71 (CIT 1993). Section 351.212(c)(2) requires that Commerce instruct Customs to assess antidumping duties in accordance with § 351.212(c)(1), automatic assessment, at the rate equal to the rate equal to cash deposit of estimated antidumping duties required at the time of entry.

Normally, the only means an interested party has of ensuring that it receives the actual antidumping duty rate is through participation in the antidumping review. Plaintiff did not claim it could not have participated in the administrative review as an interested party; rather it says that "participation [in an administrative review] would be cost prohibitive." Plaintiff's Opposition at 3; Defendant's Reply at 2. If an importer decides not to participate in an administrative review, it bears the risk that Commerce may err in calculating the dumping margin.

The court is not unsympathetic to the plight small or financially strained businesses may face in choosing between participating in a costly administrative review, or choosing not to participate, and thus, risk receiving an uncontestable and perhaps erroneous rate. Small businesses may face a dilemma where they can neither afford to participate in an administrative review nor to pay an erroneous antidumping rate. Nevertheless, the cost-benefit analysis and risk assessment involved is one an importing business must make.

Stone also claims that SICC reported all its sales to Commerce in its 1994–1996 questionnaire responses. Thus, Plaintiff argues Commerce knew of the contract and chose to ignore it. Plaintiff's Statement in Response to Defendant's Statement of Material Facts.

Defendant averred in its Supplemental Reply Brief to Plaintiff's Opposition to the Cross-Motion for Summary Judgment that SICC did not report to Commerce any sales of Sebacic Acid to Plaintiff during the 1994–1995 or 1995–1996 reviews and provided a Declaration by the import compliance specialist, Brandon Farlander, who reviewed the relevant administrative records. See Supplemental Declaration of B. Farlander.

Plaintiff failed to submit competent evidence contravening that Declaration. It alleged, without supporting proof, that Defendant was aware of Plaintiff's entries. Plaintiff's claim is insufficient for the court to find a genuine issue of material fact.

The court must consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. In its letter dated to Plaintiff, September 2, 1999, Commerce said that "because SICC's sales to J.S. Stone are unreviewed sales, they are subject to automatic liquidation at the cash deposit rate. *See* 19 C.F.R. section 351.212(c)." The letter further stated that

> Although you claim the respondent would have corrected the problem had the Department advised the respondent of the omission earlier, it is the respondent's obligation, during the course of the proceeding to report all sales. If you wish to avoid automatic assessment or the use of adverse inferences in the future, you or the producer/exporter may request an administrative antidumping review, and follow the procedures to have your sales reviewed by the Department. *See* 19 C.F.R. section 351.212(c)(2); *see also* 19 C.F.R. sections 351.102(b) and 351. 301(c)(1).

Defendant's Opposition, Exhibit F.

The statutory framework for administrative reviews anticipates that there will be cases in which a company makes the required cash deposit of antidumping duties on its entries and yet requests no administrative review. When this occurs, the cash deposit rate ultimately becomes the rate at which the company is assessed antidumping duties. *See Federal-Mogul Corp. v. United States*, 822 F. Supp. 782, 787–88 (CIT 1993). The Federal Circuit has stated that "there is no requirement that assessment rates or duties be determined for each individual entry," *Thai Pineapple Canning Industry Corp. v. United States*, 273 F.3d 1077, 1086 (Fed. Cir. 2001).

If entries are unknown to Commerce because the exporter failed to disclose them during an antidumping review, Commerce may reasonably determine that the exporter specific rate does not apply. "It is the respondent's obligation to supply Commerce with accurate information," *Accai Speciali Terni S.P.A. v. United States*, 142 F. Supp. 2d 969, 982 (CIT 2001), and SICC's failure to disclose all of its sales prevented Commerce from including Plaintiff's entries in its calculations.[9]

Indeed, permitting Plaintiff to take advantage of an exporter specific rate when its entries were not reviewed would lead to an absurd result. Defendant points out that were the court to hold for Plaintiff, exporters whose merchandise is subject to an antidumping order and who are respondents in an administrative review might risk withholding sales information from Commerce in order to gain a commercial advantage by awaiting the review's outcome. Should it result in an antidumping duty rate lower than the cash deposit rate, the importer could then come forward and claim that its entries, although not examined by Commerce, were nevertheless entitled to the lower rate. Conversely, if the review result in a higher exporter specific rate than the cash deposit rate, the importer could allow its entries to be deemed liquidated at the cash deposit rate. Statutes must be construed in light of their purpose. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S. Ct. 337, 338–339–40, 84 L. Ed. 340, 344 (1940); *see also Sharp Elec. Corp. v. United States*, 124 F.3d 1447, 1449 (Fed. Cir. 1997). This result is not one that Congress could have reasonably intended.

Commerce adequately explained its rationale for instructing Customs to liquidate Plaintiff's entries at the cash deposit rate in its September 2, 1999, letter. Stone's failure to participate in the review, and SICC's failure to disclose its sales to Stone, permit Commerce to instruct Customs to liquidate the entries at the cash deposit rate.

B.
Plaintiff Received Adequate Notice of Its Opportunity to Participate as an Interested Party in the Administrative Review

Plaintiff claims that there was no way an importer could determine from the preliminary or final results published in the Federal Register that it was not included in the antidumping margin determinations. Plaintiff's Reply at 18. To support its claim, Stone cites *Transcom, Inc., v. United States*, 182 F.3d 876 (Fed Cir. 1999) in which the Federal Circuit explained that "[w]hat the statutory and regulatory notification provisions require is that any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced Commerce Department policy, whether particular entries in which it has an interest may be affected by the administrative review." *Id.* at 882–83. The court notes that in *Transcom Inc.*, the Federal Circuit also said:

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[9] It may be, that if SICC breached a duty to Stone, an answer may lie in the common law. That question, however, is not now before this court.

> "The notification requirement in the statute [19 U.S.C. § 1675] and the Customs regulations serves to notify any interested party that the antidumping rate on goods obtained from exporters named in the notice of initiation for an administrative review may be affected by the outcome of that review. Thus, [Plaintiff] and other importers knew at the time of the notice of initiation that any bearings they purchased for importation from one of the named exporters would be subject to a revised antidumping rate for a particular review period. *So apprised, [Plaintiff] or the other importers could participate in the administrative review in an effort to ensure that the calculation of antidumping duties on those products was correct.*"

Id. at 880 (emphasis added).

The notice Plaintiff seeks is not what the law requires. The mistake lies in its argument that it should receive notice that its entries might not be included in the review. Errors may be made during the course of an antidumping review, which is precisely why interested parties are allowed to participate and comment during Commerce's determinations. The law requires that the Plaintiff receive notice of the types of goods and exporters under review. *Id.* There was notice in the Federal Register that importations from SICC were subject to a revised antidumping rate. Plaintiff had adequate opportunity to participate in the review, but chose not to do so. It did not receive the type of inadequate notice found in *Transcom, Inc.*, where the parties were unable to determine if their entries might be affected by the administrative review. *See id.* at 882–83.

C.
Plaintiff is Not Entitled to Attorney's Fees and Costs Under the Equal Access to Justice Act.

The Equal Access to Justice Act, 28 U.S.C. § 2412 (2000) ("EAJA"), "permits judicial award of the costs as specified in 28 U.S.C. § 1920 in any civil action brought by or against the United States" to a prevailing party.[10] *United States v. Hitachi Am., Ltd.*, 101 F. Supp. 2d 830, 832 (CIT 2000). A "prevailing party" is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978). A prevailing party's application may be denied if

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[10] "[A] court shall award to a prevailing party other than the United States . . . expenses . . . in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances exist that make an award unjust." 28 U.S.C. § 2412(d)(1)(4).

"the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(a)(A); *United States v. Hitachi*, 101 F. Supp. 2d at 832.

Because Plaintiff has not prevailed, its claim for EAJA is denied.

VII.
Conclusion

Plaintiff received proper notice that its entries were subject to administrative review. Commerce adequately explained its reasons for instructing Customs to liquidate Plaintiff's entries at the cash deposit rate in its September 2, 1999, letter. Therefore, Commerce's decision to liquidate Plaintiff's unreported sales at the cash deposit rate after its exporter failed to disclose its sales permits Commerce to instruct Customs to liquidate its entries at the cash deposit rate.