Decisions of the United States
Court of International Trade

Slip Op. 06–166

NATIONAL FISHERIES INSTITUTE, INC., ET AL., Plaintiffs, v. **UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00683
PUBLIC

OPINION

[Granting in part and denying in part plaintiffs' motion for preliminary injunction relief]

Dated: November 13, 2006

Steptoe & Johnson LLP (*Eric C. Emerson*, *Gregory S. McCue* and *Michael A. Pass*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Chi S. Choy*, Bureau of Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

Stanceu, Judge: Plaintiffs National Fisheries Institute, Inc. ("NFI"), a non-profit trade association, and 27 of its members move, pursuant to USCIT Rules 7 and 65, for an order entering a preliminary injunction against United States Customs and Border Protection ("Customs" or the "Agency"). *Pls.' Mot. for Prelim. Inj.*, attached *Order* at 1; *First Am. Compl.* Attach. 1. Plaintiffs are commercial importers of seafood products, including shrimp products that are subject to six antidumping duty orders issued by the International Trade Administration, United States Department of Commerce ("Commerce"). *First Am. Compl.* at 1, 19–22. Plaintiffs seek a preliminary injunction essentially to preclude Customs, during the pendency of this case, from applying a particular Customs directive, as amended in 2004 and clarified in 2005, when determining the sufficiency of each plaintiff's basic importation and entry bond. *See Pls.'*

Mot. for Prelim. Inj. at 2–3. Plaintiffs, who challenge on the merits the individual bond sufficiency determinations by Customs, also request in their preliminary injunction motion that the court enjoin Customs from considering potential antidumping and countervailing duty liability in determining bond sufficiency and that Customs be directed by the court to allow replacement of any bond used to enter merchandise on or after the date of filing of *Plaintiffs' Motion for Preliminary Injunction* with a superseding bond calculated without regard to antidumping or countervailing duty liabilities. *Id.* at 1; *Mot. to Amend Injunctive Relief Requested* at 2–3.

As required by the customs laws and regulations, a basic importation and entry bond allows Customs to make a monetary demand on the surety that issued the bond should the importer of record (*i.e.*, the "principal" on the bond) fail to meet its legal obligation to "pay duties, taxes, and charges" or fail to comply with another obligation (*i.e.*, a "bond condition") guaranteed by the bond. *See* 19 C.F.R. § 113.62 (2005). An importer breaching a bond condition typically will incur contractual liability to Customs in the form of liquidated damages that may not exceed the limit of liability of the bond, and also will incur contractual liability to indemnify the surety. *See id.* Commercial importers, such as the plaintiffs in this case, typically obtain "continuous" bonds (also referred to as "term" bonds), which cover liabilities resulting from multiple import transactions over a period of time, such as one year. *See id.* § 113.12(b). For commercial importers who conduct frequent import transactions, continuous bonds typically are more practical and economical than "single entry" bonds, which cover the obligations arising from one entry. *See id.* § 113.12(a).

To date, Customs has applied the amendment and the clarification of its bond directive only to importers of shrimp products covered by the six antidumping duty orders. The amendment and the clarification of the bond directive have had the effect of increasing substantially the limits of liability for the continuous bonds that Customs has demanded of the individual plaintiffs. *See Pls.' Mot. for Prelim. Inj.* at 2–3. The member-importers seeking injunctive relief are Admiralty Island Fisheries, Inc., d.b.a. "Aqua Star" ("Aqua Star"); Berdex Seafood, Inc. ("Berdex Seafood"); Censea Inc.; Crystal Cove Seafood Corp.; Eastern Fish Company, Inc. ("Eastern Fish"); Harbor Seafood, Inc.; Icicle Seafoods, Inc.; International Gourmet Fisheries, Inc., d.b.a. "Mid Pacific Seafoods" ("IGF"); Interocean Inc.; L.N. White & Co., Inc.; Mazzetta Company, LLC; McRoberts Sales Co., Inc.; Mseafood Corporation; Newport International; Ocean Cuisine International; Ocean to Ocean Seafood, LLC; Ore-Cal Corp. ("Ore-Cal"); Oriental Foods, Inc. ("Oriental Foods"); Pacific Seafood Group; Red Chamber Co. ("Red Chamber"); Sea Port Products Corporation; Sea Snack Foods Inc.; Southwind Foods LLC, d.b.a. "Great American Seafood Imports Co."; Tampa Bay Fisheries, Inc. ("Tampa Bay");

Thai Royal Frozen Foods Co., Inc.; The Seafood Exchange of Florida; and The Talon Group LLC. *See First Am. Compl.* Attach. 1.

Plaintiffs claim that the application of the amendment and the clarification of the bond directive are causing and will continue to cause them substantial economic harm because of the obligation to post large amounts of collateral with the surety to satisfy the current and impending bond sufficiency determinations by Customs, which plaintiffs consider to be excessive. *See Pls.' Mot. for Prelim. Inj.* at 2–5; *Mem. of P. & A. in Supp. of Pls.' Mot. for Prelim. Inj.* at 15 ("*Pls.' Mem.*"). Plaintiffs argue that the decision of Customs to require continuous bonds sufficient to cover potential antidumping or countervailing duty liability exceeds the Agency's authority under 19 U.S.C. § 1623(a) (2000). *See Pls.' Mot. for Prelim. Inj.* at 5–6; *Pls.' Mem.* at 40–44. They further claim that the selective application of the amendment and the clarification by Customs to shrimp importers is arbitrary and capricious. *See Pls.' Mot. for Prelim. Inj.* at 6; *Pls.' Mem.* at 39–40, 47–50. Plaintiffs maintain that in weighing whether or not to grant the requested injunctive relief, the balance of the hardships and the public interest favor NFI and its members. *See Pls.' Mem* at 50–52.

Defendant contends that plaintiffs' alleged economic hardships "do not rise to the severe level necessary to establish immediate irreparable harm" sufficient to warrant a preliminary injunction. *Def.'s Opp'n to NFI's Mot. For Prelim. Inj.* at 7 ("*Def.'s Opp'n*"). Defendant argues that a preliminary injunction should not be ordered because, in its view, plaintiffs have not established a likelihood of success on the merits. *See id.* at 7–8, 12–23. Defendant submits that because 19 U.S.C. § 1623 grants the Agency "broad authority to protect the revenue by requiring bonds or other security as Customs 'may deem necessary,' " Customs acted reasonably and within its statutory authority when it increased the continuous bond requirements for importers of shrimp. *Id.* at 15 (quoting 19 U.S.C. § 1623(a)). Defendant further submits that "the specter of harm faced by the Government is very real and acute" if Customs is not allowed to protect the revenue of the United States through increased bonding, and that this potential harm outweighs the hardships alleged by the plaintiffs. *Id.* at 24–25. Defendant also argues that the public interest favors the protection of the revenue through resort to continuous bonds of the size Customs determines to be necessary under the amendment and the clarification of the bond directive. *See id.*

During a hearing held at the United States Court of International Trade on March 30 and March 31, 2006, representatives of eight plaintiffs, specifically, Eastern Fish, Ore-Cal, Red Chamber and affiliates IGF and Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star, testified in support of the claim that plaintiffs will suffer immediate, irreparable harm absent injunctive relief. On April 5, 2006, a representative from Customs testified to the hardship that

Customs will suffer in protecting the potential revenue and in collecting outstanding antidumping duties from shrimp importers if Customs is prevented from applying the new bond formulas.

The court's decision on plaintiffs' motion for preliminary injunctive relief is based on a review of the evidence introduced at the hearing; the transcripts of the oral argument held on April 7, 2006; plaintiffs' motion to amend its request for preliminary injunction relief filed on April 14, 2006; post-hearing briefs submitted by the parties on May 5, 2006; plaintiffs' unopposed motions to amend the *de novo* hearing record to admit limited additional evidence, filed on May 5, 2006 and July 31, 2006; and other relevant papers and proceedings in this case. The court concludes that plaintiffs have not established their entitlement to the particular injunctive relief sought in their amended motion. The court, however, further concludes that limited injunctive relief is appropriate.

The court held an in-chambers conference on July 19, 2006, during which the court discussed with the parties the reasons that the court would not grant the specific preliminary injunction sought by plaintiffs, the court's conclusion that only the eight plaintiffs that presented evidence at the hearing could satisfy the requirement of showing irreparable harm, and the court's view that plaintiffs' showing of likelihood of success on the merits does not support plaintiffs' request to permit plaintiffs "to replace any bond used to enter merchandise on or after February 23, 2006, with a bond calculated without regard to potential antidumping or countervailing duties." *Mot. to Amend Injunctive Relief Requested*, attached *Order* at 3. As discussed in Section II.A.3 of this opinion, such relief is more akin to the restoration of a form of *status quo ante*, rather than a preliminary injunction to preserve the *status quo*, because it would require the court to order the cancellation of bonds, thereby extinguishing all obligations under such bonds, and would require Customs to approve the replacement of such bonds with superseding bonds with lower limits of liability. During the July 19, 2006 conference, the court attempted to facilitate an amicable resolution of the preliminary injunction issue by informing the parties of the court's preliminary conclusions, by reviewing the language of a limited draft injunction prepared by the court, and by soliciting from the parties suggested modifications to the draft that could achieve an administrable preliminary injunction. At that conference, the parties requested a period of time to consult and to seek agreement on language for a preliminary injunction to which all parties could consent. The court initially granted the parties a period of one week to consult. The plaintiffs subsequently requested, and the court granted, additional time for plaintiffs to continue their consultations with defendant.

In response to a USCIT R. 16 letter from the court dated August 17, 2006, defendant filed status reports on August 17 and September

1, 2006, and plaintiffs filed a status report on August 21, 2006, each advising the court of various matters. Of particular importance was that the communications in the status reports indicated to the court that the parties had reached an impasse in their negotiations concerning the preliminary injunction. Plaintiffs' August 21, 2006 status report conveyed plaintiffs' desire to continue negotiations, but interpreted defendant's August 17, 2006 status report as signaling that negotiations were at an end. Believing that negotiations had concluded, plaintiffs' August 21, 2006 status report requested that the court issue a preliminary injunction. Plaintiffs proposed a substantial change to the draft order prepared by the court, requesting that the injunction require Customs to permit any plaintiff "who obtained a new continuous entry bond on or after February 23, 2006 . . . to change the limit of liability in the new bond" without applying the amendment or the clarification of the bond directive. *Pls.' Status Report* at 2. Defendant's status reports informed the court that defendant continued to oppose any preliminary injunction but also informed the court that Customs currently did not plan to alter the bond requirements for any of the eight plaintiffs that attempted to demonstrate immediate irreparable harm. *Def.'s Status Report* at 1, Aug. 17, 2006; *Def.'s Status Report* at 1–2, Sept. 1, 2006.

Defendant submitted another status report on October 25, 2006, informing the court that Customs had published the previous day a Federal Register notice concerning bond requirements for importers of certain merchandise subject to antidumping and countervailing duty orders. The notice, described later in this opinion, announced changes to the process used to determine bond amounts for importers of Special Category merchandise. Because the notice addressed matters relevant to the situations of the individual plaintiffs, the court held two status conferences with the parties, on October 26 and November 3, 2006. In the second status conference, counsel for defendant informed the court that Customs did not intend to use the process announced in the notice to replace with superseding bonds any of the bonds already required pursuant to the amendment and the clarification, including those bonds under which plaintiffs currently are importing merchandise. The court held another status conference on November 13, 2006, before issuing this opinion.

Based on all proceedings held to date, the court will enter a limited preliminary injunction that generally will preserve the *status quo* with respect to the bond status of the eight plaintiffs identified above. Each of those eight plaintiffs established that it will suffer immediate, irreparable harm, including a serious impairment of its ability to conduct its shrimp importing business, absent a preservation of the *status quo* during the pendency of this case. Plaintiffs demonstrated that they likely will succeed, partially, on the merits in establishing that the balance of the hardships on all parties in this action tips in favor of plaintiffs and that the public interest

would be better served if the court grants injunctive relief. The court concludes that the showing made on behalf of the remaining 19 plaintiffs is insufficient to establish that those plaintiffs will suffer immediate, irreparable harm absent a preliminary injunction.

I. Background

Bond Directive 99–3510–004 (the "Bond Directive"), originally issued by Customs on July 23, 1991, established guidelines under which port directors are to assess the adequacy of an importer's continuous bond. *See Monetary Guidelines for Setting Bond Amounts*, Customs Directive 99–3510–004 (July 23, 1991), *available at* http://cbp.gov/linkhandler/cgov/toolbox/legal/directives/3510-004.ctt/3510-004.txt. Prior to the amendment by Customs in 2004, the Bond Directive set a non-discretionary, minimum continuous bond amount at $50,000 and established a formula by which "the bond limit of liability amount shall be fixed in multiples of $10,000 [or $100,000] nearest to 10 percent of duties, taxes and fees paid by the importer or broker acting as importer of record during the calender year preceding the date of the [bond] application." *Id.* (setting forth formulas under "Activity 1 - Importer or Broker - Continuous"). Whether the bond limit was fixed in multiples of $10,000 or $100,000 depended upon whether the total duty and tax liability for an importer during the calender year preceding its bond application exceeded $1,000,000. *Id.*

Customs, on July 9, 2004, posted on its website the amendment to the Bond Directive at issue in this case (the "Amendment"), which set forth new formulas for calculating minimum continuous bond amounts for importers of agricultural/aquacultural merchandise that is subject to antidumping or countervailing duty orders. *See Amendment to Bond Directive 99–3510–004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases* (July 9, 2004), *available at* http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml ("*Amendment*"). Customs cited an "increasing concern regarding the collection of antidumping and countervailing duties, the impact of these collections on the amount of disbursements pursuant to the Continued Dumping and Subsidy Offset Act [of 2000, Pub. L. 106–387 ("Byrd Amendment")] . . . , and continued vigilance by [Customs] to ensure collection of all appropriate antidumping and countervailing duties." *Id.* Customs listed under-collections of antidumping duty liabilities for imports of fresh garlic and crawfish from China as examples of why it deemed it necessary to change the formula for determining minimum bond requirements. *Id.* The Amendment was neither published in the Federal Register nor subjected to the established notice and comment procedures provided for under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (2000). Customs did not publish the Amendment in the Customs Bulletin.

The Amendment requires all Customs port directors "to review continuous bonds for importers who import agriculture/aquaculture merchandise subject to antidumping/countervailing duty cases and obtain larger bonds where necessary." *Id.* A formula contained in the Amendment directs that "in fixing the limit of liability amount," port directors will calculate the product of an importer's antidumping or countervailing duty rate and the value of merchandise subject to antidumping or countervailing duties imported by that importer during the previous year. *Id.* (setting forth the formula as the "[Commerce] rate at Order [multiplied by the] value of imports of merchandise subject to the case by the importer during the previous year"). The Amendment also applies to provisional measures by providing that "[i]f, at any time after [Commerce] issues a preliminary affirmative determination in an agriculture/aquaculture case, [Customs] detects sudden changes in declared values, claimed country of origin, or declared classification, etc., [Customs] will consider such changes to reflect an increased risk." *Id.* The Amendment, in that event, requires port directors to determine the amount of a continuous bond by calculating the product of the importer's deposit rate in effect on the date of entry and the value of merchandise imported during the previous year. *See Amendment* (setting forth the formula as the "[Commerce] deposit rate in effect on date of entry [multiplied by the] value of imports of merchandise subject to the case by the importer during the previous year"). For importers with no prior history of importing agricultural/aquacultural merchandise, the Amendment directs that a sufficient bond amount will be determined by calculating the product of the importer's cash deposit rate in effect on the date of entry and the "estimated annual import value" of the subject imports. *Id.* (setting forth the formula as the "[Commerce] deposit rate in effect on date of entry [multiplied by the] estimated annual import value of the goods subject to the case").

On January 24, 2005, Customs posted on its website a document entitled "Current Bond Formulas," which contained, *inter alia*, the formulas described in the Amendment. *Current Bond Formulas* (Jan. 24, 2005), *available at* http://www.cbp.gov/xp/cgov/import/communications_to_trade/pilot_program/ ("*Current Bond Formulas*"). The document, which was not published in the Federal Register or Customs Bulletin, also states that a "new comprehensive [Customs] Directive will be issued at a later date." *Id.*

On August 10, 2005, Customs posted on its website a clarification to the Amendment of the Bond Directive (the "Clarification"), which established two classes of merchandise, "Special Categories" and "Covered Cases." *See Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases* (Aug. 10, 2005), *available at* http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml ("*Clarification*"). The Clarifica-

tion was not published in the Federal Register or the Customs Bulletin and was not the subject of a notice and comment proceeding. According to the Clarification, "Special Categories of merchandise can be designated where additional bond requirements in the form of greater continuous entry bonds or other security, may be required." *Id*. The Clarification designates only agricultural/aquacultural merchandise as a Special Category. *Id*. The Clarification explains that "[t]he term Covered Cases refers to merchandise within a previously designated Special Category where different standards or formulas for determining the bond amount will be applied." *Id*. Antidumping and countervailing duty investigations and orders pertaining to shrimp are the only Covered Cases that Customs has designated as falling within the agriculture/aquaculture Special Category. *See id*. The Clarification sets forth criteria that Customs is to consider in determining whether imports designated as Special Categories or Covered Cases should be subject to increased bond requirements. *See id*.[1] The Clarification also establishes the procedure for "notice, timing and appeal" of increased bond demands made by Customs for importers of Special Category and Covered Cases merchandise. *See Clarification*.

Because Customs confined its "Covered Cases" designation to shrimp subject to antidumping or countervailing duty proceedings, only importers of certain frozen warmwater shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam, as specified in the scope of the six antidumping duty orders ("subject shrimp"), are subject to the new bond requirements set forth by Customs in the Amendment and the Clarification. Commerce issued amended antidumping duty orders on certain frozen warmwater shrimp from those six countries on February 1, 2005. *See Pls.' Mem*. Ex. 4. Subsequently, Customs issued to all 27 plaintiffs letters advising, pursuant to 19 C.F.R. Part 113, that their continuous bonds have been deemed "insufficient to protect the revenue and insure compliance with [Customs] laws and regulations." *See Pls.' Mem*. Ex. 5 Attach. B, Ex. 6 Attach. B, Ex. 7 Attach. A, Ex. 8 Attach. B, Ex. 9 Attach. C, Ex. 10 Attach. B. The notices of insufficiency established, for each importer, new continuous bond limits of liability and stated that in determining such limits, Customs applied the formula described as "AD/CVD Order (3)," *i.e.*, the "[Commerce] Order rate [multiplied by the] value of imports of merchandise subject to the case by the im-

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[1] The Clarification lists the following criteria: "1. Previous collection problems concerning a specific case or industry involved; 2. The similarity to previous cases or industries experiencing uncollected revenue problems; 3. Whether the merchandise in question had very low duty rates or was duty-free prior to initiation of an antidumping or countervailing duty case; 4. The projected ability of the industry to pay future duty liabilities; 5. Low capitalization of the industry involved such that new or increased duty liabilities create increased risk; 6. Whether the industry involved is highly leveraged such that new or increased duty liabilities create increased risk; [and] 7. Any other factors that are deemed relevant."

porter" during the previous year. *See id.*; *Current Bond Formulas* (setting forth the formula under "AD/CVD Order (3)").

On October 24, 2006, Customs published a Federal Register notice (the "Notice") "to provide additional information on the process used to determine bond amounts for importations involving elevated collection risks and to seek public comment on that process." *Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62,276, 62,276 (Oct. 24, 2006) ("*Notice*"). The Notice announces changes to the process discussed in the Amendment and the Clarification and, although inviting public comment, makes the changes in the process effective upon publication. *Id.* (stating that "[t]he process published in this Notice is in effect."). The Notice retains the same basic formulas for calculating limits of liability for the continuous bonds required of importers of merchandise in Special Categories. *Id.* at 62,277. The Notice announces, however, that Customs will provide for public notice and comment on the designation of new Special Categories, which it announces will occur according to specified criteria, and also will provide for public notice of the removal of a designation. *Id.*

The Notice does not announce that Customs is changing the current designation of aquaculture merchandise as a Special Category or the current designation of the shrimp antidumping orders as Covered Cases, but it indicates that Customs no longer will designate Covered Cases. "[Customs] will continue to evaluate on an industry wide basis those types of merchandise where additional bond requirements may be needed." *Id.* "However, because importers are only affected when merchandise is subject to different bond requirements, [Customs] will only designate Special Categories, that is, merchandise for which an enhanced bond amount may be required." *Id.* The Notice states, further, that importers of Special Category merchandise "will be offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and [Customs] will determine bond amounts based on that information, the importer's compliance history and other relevant information available to [Customs]." *Id.* The Notice indicates, however, that absent exceptional circumstances, Customs will apply the formulas to determine the bond amounts where a submission has not been made by a principal in response to a notice from Customs of a new bond requirement. *Id.*

The Notice announces a new procedure that will apply when an importer of Special Category merchandise makes a submission in response to a notice from Customs of a new bond requirement. The new procedure provides the principal with 30 days to respond and to provide evidence supporting a lower bond amount, including financial information relevant to the importer's ability to pay, such as financial statements and tax returns. *Id.* at 62,278. The Notice provides that Customs will consider this information along with the

factors identified in the applicable Customs regulation, 19 C.F.R. § 113.13(b), in determining a new bond requirement. *Id*. This new bond requirement "will not take effect with respect to a principal until 14 days after the date of [Customs'] reply to the principal's response." *Id*. The Notice indicates that Customs intends to exercise discretion in setting new bond amounts. "If [Customs] determines that the principal has a record of compliance with customs laws and regulations and that the principal has demonstrated an ability to pay, [Customs] may decide not to require an increased bond amount even though the principal imports Special Category merchandise." *Id*. The Notice, however, also states that "[a]t any time after [Customs] determines a bond amount for a principal below that provided by the formula, if the principal fails to remain compliant with customs laws and regulations, [Customs] will recalculate the principal's bond amount in accordance with the formulas outlined in this notice." *Id*.

After the issuance of the six antidumping duty orders on subject shrimp, plaintiffs were required to obtain new continuous bonds that secured the amount of liability demanded by Customs. Some of the 27 plaintiffs were unable to secure continuous bonds in the amounts requested by Customs, and as a result these plaintiffs ceased their importation of some or all types of subject shrimp. *See Pls.' Mem*. at 7. Other plaintiffs were able to secure continuous bonds acceptable to Customs to cover their 2005–2006 imports of subject shrimp. The eight plaintiffs that introduced evidence, in addition to the remaining 19 NFI importers, seek injunctive relief to, *inter alia*, restrict Customs from applying the Amendment or the Clarification, or from considering any potential antidumping duty liability, in determining the sufficiency of future continuous bonds.

II. Discussion

The court exercises subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i). *See First Am. Compl.* ¶¶ 2–4 (asserting jurisdiction under 28 U.S.C. § 1581(i)). That provision provides the Court of International Trade with exclusive jurisdiction over any civil action commenced against the United States that arises out of any law providing for revenue for imports (subsection (i)(1)), tariffs or duties on the importation of merchandise for reasons other than the raising of revenue (subsection (i)(2)), and administration and enforcement with respect to matters referred to in subsections (i)(1) and (i)(2) (subsection (i)(4)). 28 U.S.C. §§ 1581(i)(1), (2) & (4).

"The burden is always on the movant to show entitlement to a preliminary injunction." *Reebok Int'l Ltd. v. J. Baker., Inc.*, 32 F.3d 1552, 1555 (Fed. Cir. 1994). In determining whether the court should employ the extraordinary remedy of a preliminary injunction, a court of equity will consider the following four factors: (1) whether the moving party will suffer immediate and irreparable injury absent relief,

(2) whether there exists a likelihood of success on the merits, (3) whether the balance of hardship on all the parties favors the moving party, and (4) whether the public interest would be better served by the requested relief. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). The court, in its analysis of these factors, may "weigh the factors together in a sliding scale manner." *See Chilean Nitrate Corp. v. United States*, 11 CIT 538, 539 (1987). No one factor is dispositive. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). "[T]he weakness of the showing regarding one factor may be overborne by the strength of the others." *Id.* Consequently, the court need not assign equal weight to each factor. *See id.*; *see also Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1354 (2002), *aff'd on other grounds*, 352 F.3d 1351 (Fed. Cir. 2003).

The court, having considered the evidence put forth by the parties and the arguments addressing the four factors that the parties made in their briefs and during oral argument, concludes that only eight of the plaintiffs - specifically, Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star - have established their entitlement to a preliminary injunction. The showings by these eight plaintiffs as to irreparable harm and the likelihood of success on the merits, however, justifies a more limited preliminary injunction than that sought by plaintiffs. Plaintiffs' motion and draft order for a preliminary injunction, as amended on April 14, 2006, seek to prohibit Customs from "relying upon or otherwise considering" the Amendment, the Clarification, or "any potential antidumping or countervailing duty liability on any imported product, when determining the sufficiency of the continuous entry bond for any entry made on or after February 23, 2006," for the 27 plaintiff-importers. *Mot. to Amend Injunctive Relief Requested*, attached Order at 1–2. The motion and draft order also seek an order directing Customs to "permit any of the foregoing named companies to replace any bond used to enter merchandise on or after February 23, 2006, with a bond calculated without regard to potential antidumping or countervailing duties." *Id.* at 3. As discussed in this opinion, the court declines to impose the specific remedy sought by plaintiffs. The court, however, will order a limited preliminary injunction that preserves generally the *status quo* with respect to the bond status of these eight plaintiffs during the pendency of these proceedings.

A. Immediate and Irreparable Harm

To meet their burden of establishing immediate and irreparable harm, "plaintiff[s] must prove that unless the injunction is awarded, some harm will result to [them] that cannot be reasonably redressed in a court of law." *Am. Customs Brokers Co. v. U.S. Customs Service*, 10 CIT 385, 386, 637 F. Supp. 218, 220 (1986). "Only a viable *threat of serious harm which cannot be undone* authorizes exercise of a

court's equitable power to enjoin before the merits are fully determined." *Zenith Radio Corp.*, 710 F.2d at 809 (citation and internal quotation marks omitted).

To prevail on a motion for preliminary injunction, plaintiffs have the burden of producing "probative evidence" to demonstrate a threat of immediate, irreparable harm. *See Nat'l Hand Tool Corp. v. United States*, 14 CIT 61, 66 (1990). "Failure of [a plaintiff] to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction." *Bomont Indus. v. United States*, 10 CIT 431, 437, 638 F. Supp. 1334, 1340 (1986). However, there is no bright line test for determining whether a plaintiff will suffer irreparable harm. *Corus Group PLC*, 26 CIT at 943, 217 F. Supp. 2d at 1354. A plaintiff can satisfy its burden by showing that it will be forced into bankruptcy absent an injunction. *See Queen's Flowers de Columbia v. United States*, 20 CIT 1122, 1125, 947 F. Supp. 503, 506 (1996). Less drastic harm, however, also can satisfy the burden. *See, e.g., Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 54, 628 F. Supp. 978, 984 (1986) (finding that severe disruption to a company's business operations is sufficient to establish irreparable injury); *718 Fifth Ave. Corp. v. United States*, 7 CIT 195, 198 (1984) (stating that "[b]usiness disruption resulting from administrative delay could be sufficient to demonstrate irreparable harm"); *Lois Jeans & Jackets, U.S.A., Inc. v. United States*, 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (finding that "the real prospect for lost future orders, the lost benefits from its past advertising, substantial expenditures for marketing and promotional efforts, and the loss of plaintiff's reputation in the trade and with the consuming public are significant actual and potential injuries which warrant the extraordinary relief of a preliminary injunction").

1. Contentions of the Parties on Immediate and Irreparable Harm

Plaintiffs allege that absent the requested preliminary injunctive relief, they will continue to suffer immediate, irreparable harm that includes alteration of their buying activities, damage to their long-standing relationships with their customers and suppliers, and loss of sales and business opportunities. *See Post-Hearing Br. in Supp. of Pls.' Mot. for Prelim. Inj.* at 19–28 ("*Pls.' Post-Hearing Br.*"). According to plaintiffs, such harm results from the need to obtain continuous bonds, pursuant to insufficiency notices issued by Customs to plaintiffs, in the excessive amounts calculated by Customs using the bond formulas indicated by the Amendment and the Clarification. *See id.* at 16–17. The excessive bond amounts, plaintiffs contend, are causing sureties to require, as a condition of issuing a bond, a letter of credit in the amount of the bond. *Id.* at 31–32. Plaintiffs further contend that obtaining these letters of credit hinders plaintiffs' ability to finance their businesses efficiently. In this regard, plaintiffs describe a scenario they refer to as "stacking," arguing that, absent

preliminary injunctive relief, their credit will remain encumbered until final liquidation of all entries covered by the new continuous bonds, and that, as time goes on, plaintiffs will remain liable under multiple bonds at the same time. *See id.* at 16–17. Plaintiffs contend that the continuous and increasing burdens on their credit availability will impede severely the operation of their businesses and ultimately will force them out of the business of importing shrimp. *See id.* at 17–18. Although plaintiffs presented testimony from representatives of, and documentary evidence concerning, only eight of the 27 importers who filed jointly the *Complaint* and *Amended Complaint* in this action, plaintiffs argue that the court "should make reasonable inferences as to the irreparable harm that will befall the entire group of NFI [i]mporters" if the requested relief is not granted. *Id.* at 35.

Defendant argues that none of the plaintiffs has met its burden of establishing the level of economic harm necessary to warrant the extraordinary remedy of injunctive relief. *See Def.'s Opp'n* 9–12; *Def.'s Post-Hearing Br. in Opp'n to NFI's Mot. for Prelim. Inj.* 10–15 ("*Def.'s Post Hearing Br.*"). Defendant contends specifically that audited financial records, which were provided by two plaintiffs, fail to establish adequate irreparable harm as to those two plaintiffs, and that any findings of fact drawn from those financial statements for purposes of inferring irreparable harm cannot be extrapolated to the remaining plaintiffs. Tr. 851–868; *see Def.'s Post-Hearing Br.* at 12. Further, defendant claims that plaintiffs' arguments relating to lost business opportunities are speculative and indicate only that "the losing bidder was in a weaker financial position than its competitor." *Def.'s Opp'n* at 12. Defendant also maintains that the administrative record establishes that the overall volume of shrimp imports has declined by only 2.6 percent since importers, including plaintiffs, were required to obtain larger bonds and that, despite the testimony of plaintiffs, the shrimp importing industry as a whole is not suffering extraordinary harm. *See id.* at 10; *Def.'s Post-Hearing Br.* at 5; *Def.'s Opp'n* at *Decl. of Bruce W. Ingalls* Attach. B. According to defendant, "one plaintiff's lost business probably ended up in the hands of a different importer of the same product – like in any low margin, commodity industry with a large number of competitors." *Def.'s Opp'n* at 10. Finally, defendant maintains that plaintiffs' "stacking" argument is also mere speculation because "plaintiffs have provided no evidence that insurers intend to require additional collateral for future years." *Id.* at 5; *see Def.'s Post-Hearing Br.* at 4–5.

2. Findings of Fact on Immediate and Irreparable Harm

To establish that NFI and its members will suffer immediate, irreparable harm absent injunctive relief, eight plaintiffs - Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star - submitted testimonial and docu-

mentary evidence. Through such evidence, plaintiffs sought to demonstrate that all 27 plaintiffs will incur harm if Customs is not preliminarily enjoined from applying the Amendment in determining the sufficiency of plaintiffs' continuous bonds. Based on a preponderance of the evidence presented at trial, the court finds as facts that each of the above-named eight plaintiffs will incur serious, immediate and irreparable harm absent some form of preliminary injunctive relief. Specifically, this harm is the foreseeable result of the cumulative effects of obtaining the additional collateralized letters of credit necessary to secure future continuous bonds in amounts determined pursuant to the new bond requirements of the Amendment and the Clarification. At this time, the court lacks sufficient evidence to make factual findings that would justify preliminary injunctive relief on the basis of immediate and irreparable harm to the remaining 19 plaintiffs. The evidence supporting the findings of fact relevant to whether the eight plaintiffs will suffer immediate and irreparable harm absent injunctive relief is summarized below.

a. Company-Specific Findings of Fact

i. Eastern Fish

Plaintiffs introduced at trial the testimony of Mr. Eric Howard Bloom, President of Eastern Fish. The court found his testimony credible based on his demeanor, demonstrated knowledge of Eastern Fish's business activities, and general knowledge of the business of importing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

1. Eastern Fish, established in 1972, is engaged in the business of importing seafood products, [

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2. [

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3. [

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4. [

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5. [

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6. [

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7. [

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ii. Ore-Cal

Plaintiffs introduced at trial the testimony of Mr. Mark Daniel Shinbane, Vice-President of Ore-Cal. The court found his testimony credible based on his demeanor, demonstrated knowledge of Ore-Cal's business activities, and general knowledge of the business of importing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

8. Ore-Cal, for the last 45 years, has engaged in the business of importing shrimp into the United States. Tr. 193. [

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9. [

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10. [

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11. [

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12. [

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13. [

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iii. Red Chamber, IGF, and Tampa Bay

Plaintiffs introduced at trial the testimony of Mr. Richard V. Martin, General Manager of IGF and Executive Consultant to Red Chamber, a company that is affiliated through common ownership with plaintiffs IGF and Tampa Bay. The court found his testimony credible based on his demeanor, demonstrated knowledge of Red Chamber's, IGF's and Tampa Bay's business activities, and general knowledge of the business of importing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

14. Red Chamber, IGF, and Tampa Bay are affiliated through common ownership. Tr. 267. [

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15. [

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16. [

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17. [

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18. [

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19. [

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20. [

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21. [

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iv. Berdex Seafood

Plaintiffs introduced at trial the testimony of Mr. Donelson S. Berger, President of Berdex Seafood. The court found his testimony credible based on his demeanor, demonstrated knowledge of Berdex Seafood's business activities, and general knowledge of the business of importing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

22. Berdex Seafood is engaged in the business of importing seafood into the United States
[ ]

23. [

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24. [

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25. [

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26. [

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v. Oriental Foods

Plaintiffs introduced at trial the testimony of Dr. G.V. Reddy, President of Oriental Foods. The court found his testimony credible based on his demeanor, demonstrated knowledge of Oriental Foods' business activities, and general knowledge of the business of import-

ing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

27. Since 1979, Oriental Foods has engaged in the business of importing seafood products. Tr. 486. [
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28. [

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29. [

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30. [

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vi. Aqua Star

Plaintiffs introduced at trial the testimony of Mr. Robert Hooey, Senior Executive Vice President of Aqua Star. The court found his testimony credible based on his demeanor, demonstrated knowledge of Aqua Star's business activities, and general knowledge of the business of importing shrimp. His testimony established, by a preponderance of the evidence, the following facts:

31. Aqua Star is engaged in the business of importing seafood, [

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32. [

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33. [

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34. [

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b. Summary of Findings of Fact

Through testimony, Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star have established that they encountered difficulties in obtaining new bonds in the increased amounts demanded by Customs. *See Findings of Fact* ¶¶ 3–5, 7, 9–10, 13, 15–18, 23–25, 28–29, 32. The difficulties resulted from the need to provide their financial institutions with collateralized letters of credit in amounts that, in most instances, significantly burden plaintiffs' asset-based credit lines. *See Findings of Fact* ¶¶ 1, 4, 8, 10, 14, 17–18, 22, 24, 29, 32, 34; *see also Pls.' Mem.* at 15; *Pls.' Post-Hearing Br.* at 8–9. Because plaintiffs "rely heavily on their lines of credit to conduct their business[es]," Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star all reduced their on-hand inventories and declined to pursue tangible business opportunities. *Pls.' Post-Hearing Br.* at 8. In some instances, plaintiffs dropped product lines or scaled back existing or planned product lines. *See Findings of Fact* ¶¶ 5, 13, 16–17, 20–21, 25–26, 30, 33; *Pls.' Post-Hearing Br.* at 4–5. Effects on cash flow resulting from posting collateral to secure irrevocable letters of credit led some plaintiffs to forgo opportunities to supply, develop, and market new products. *See Findings of Fact* ¶¶ 5, 13, 20–21, 25–26, 30, 33. In several instances, some plaintiffs lost spot sales and declined to bid on major orders from supermarket chains and major retail customers because of the restrictions associated with the new bond requirements. *See Findings of Fact* ¶¶ 5, 25, 30, 34. In other instances, some plaintiffs were forced to import shrimp on a delivered duty-paid basis, which reduces profit margins. *See Findings of Fact* ¶¶ 4, 30, 32–33. For a period spanning 2005 and 2006, one of the plaintiffs was unable to secure a sufficient bond and temporarily was forced out of the importing business. *See Findings of Fact* ¶ 32.

The difficulties associated with obtaining sufficient continuous bonds also affect customer and supplier relationships of the eight plaintiffs. The evidence demonstrates that these plaintiffs declined opportunities to pursue business with existing companies and suppliers. Impediments to the ability to import shrimp on a continuous basis and the transition to importing on a delivered duty-paid basis affect plaintiffs' long-standing relationships with customers, who depend upon plaintiffs for supply, and with suppliers, who dedicate a portion of their production for purchase by plaintiffs. *See Findings of Fact* ¶¶ 6, 13, 20, 24–25, 30, 33–34. Some plaintiffs, in order to fulfill certain contracts with customers, must import shrimp from certain countries that are subject to the antidumping duty orders on shrimp, namely India, Thailand, and Vietnam. *See Findings of Fact* ¶¶ 2,

11–12, 20, 26, 33. These plaintiffs considered shrimp products from certain other countries to be unsuitable substitutes for shrimp from India, Thailand, and Vietnam because suppliers in those other countries, according to these plaintiffs, do not have the infrastructure or sanitary standards necessary to become reliable alternative suppliers. *See Findings of Fact* ¶¶ 2, 11, 20, 33.

The liabilities that are secured by plaintiffs' current bonds will extend until liquidation of all entries is final. The date on which final liquidation of those entries will occur is not known. The letters of credit supporting plaintiffs' current bonds will not be extinguished until after final liquidation. If Customs continues to apply the new bond formulas in calculating future bond demands, plaintiffs likely will suffer an additional reduction to their borrowing capacities as a result of securing new letters of credit. Two of the eight plaintiffs that introduced evidence have already suffered such an additional reduction in their borrowing capacities in order to secure new bonds that were issued in the spring of 2006. Such new letters of credit, the liability of which will not be extinguished until some future date, will further deplete plaintiffs' credit and cause plaintiffs significant economic harm. The court finds as a fact that another round of bond demands likely will cause plaintiffs severe irreparable harm, especially in view of the requirement on an importer, imposed by 19 C.F.R. § 113.12(b)(1), to notify Customs of any material changes in importing activities. The court further observes that bond determinations affecting the eight plaintiffs will occur as bonds expire over the next several months, some as early as December 2006. *See Findings of Fact.* Some plaintiffs have testified that such a burden on available credit may lead to additional drastic changes in business operations, including the importation of shrimp and other products on a delivered duty-paid basis. Such changes will lead to additional inefficiencies and, ultimately, reduced profit margins, lost sales, and severed relationships with customers and suppliers. Others have testified that additional reductions in borrowing capacity may restrict them from operating their businesses altogether.

3. Conclusions of Law on Immediate and Irreparable Harm Applicable to the Eight Plaintiffs

Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star have established, through probative testimony of their representatives and other probative documentary evidence that, absent a preliminary injunction that preserves generally the *status quo*, they will suffer the type of extraordinary harm that seriously threatens the continued operation of their shrimp importing businesses. Their respective showings satisfy the requirements for preliminary injunctive relief. With respect to all eight of these plaintiffs, the harm that will occur absent a *status quo* preliminary injunction includes severe disruption of the

plaintiffs' business activities, damage to the plaintiffs' long-standing relationships with their customers and suppliers, lost sales, diminished profits, and foregoing of business opportunities. *See Am. Customs Brokers Co.*, 10 CIT at 387, 637 F. Supp. 2d at 221 (finding irreparable injury where plaintiff provided "evidence of substantial harm to business good will, business reputation and a significant loss of new business."). The court concludes that some form of a preliminary injunction is the only way to protect the plaintiffs from future irreparable injury during the pendency of this case. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

The situation of three of the eight plaintiff-importers differs from that of the other five plaintiff-importers in a significant respect. These three plaintiffs are constrained, in whole or in part, from importing shrimp subject to the antidumping duty orders pursuant to side agreements that they entered into with Customs in order to obtain affordable continuous bonds. They are, in this respect, suffering a different type of harm than that afflicting the other five plaintiff-importers who introduced evidence of harm. As a direct result of the side agreements, these three importers are experiencing a substantial interference with or preclusion of their ability to conduct their shrimp importing businesses. For these three plaintiffs, a preservation of the *status quo* through a preliminary injunction would allow these conditions to remain in place despite the demonstrated harm that the conditions imposed in the side agreements are causing. Moreover, as discussed later in this opinion with respect to the showing of likelihood of success on the merits, these three importers are likely to be able to show that the imposition of the conditions was contrary to the Customs regulations. For this reason, the preliminary injunctive relief that the court will order prohibits the enforcement of the side agreements and the associated restraints on importation of subject merchandise during the pendency of this proceeding.

The harm being suffered by the other five plaintiff-importers that introduced evidence results from the high limits of liability associated with their basic importer's bonds. The court concludes, based on the evidence these five plaintiffs have introduced, that the impending harm will be a direct result of the cumulative burdens occurring as a result of the application of the bond formulas set forth in the Amendment, the Current Bond Formulas, and the Clarification to the next determinations of bond sufficiency. Each of these five plaintiffs will suffer adverse effects from the encumbering of additional credit when they are required to obtain future continuous bonds in amounts calculated pursuant to the new bond formulas required under the Amendment and the Clarification while they remain under the obligations of the continuous bonds Customs already assessed pursuant to those formulas. Two of these five plaintiff-importers received from Customs a second round of insufficiency notices in the

spring of 2006 and have been required to encumber additional credit in order to obtain the new bonds, a development the court has considered in reaching its conclusions concerning irreparable harm.

The court concludes that while a limited preliminary injunction that generally preserves the *status quo* is appropriate at this time, the evidence introduced thus far does not establish that the current level of harm being experienced by these five plaintiffs is so disruptive as to qualify them for a preliminary injunction that restores a form of *status quo ante*, *i.e.*, a preliminary injunction that directs Customs to replace the current bonds with bonds based on the same limits of liability as those in place prior to the application of the Amendment and the Clarification. The court recognizes, additionally, that the situations of one or more of these five plaintiffs, or one or more of the other testifying plaintiffs, may change, and may change rapidly, in a way that could necessitate a modification of the preliminary injunction. The court, therefore, will consider motions to modify the preliminary injunction and may order expedited hearings, if necessary.

The court notes the cumulative effects of two successive rounds of bond determinations based on the rigid application of the formulas, and the upcoming third round of bond determinations that will occur over the next several months. The burden imposed by an importer's outstanding letters of credit, which resulted from the application of the formula with little or no adjustment during the previous rounds of bond determinations, affects negatively the financial condition of that importer. The adverse effects will continue and are all but certain to become exacerbated upon the next round of bond determinations, during which the effect of the letters of credit, by weakening the plaintiff-importer's financial condition, may compromise the ability of that plaintiff-importer to qualify for a lower bond determination. The court, for these reasons, is ordering defendant to begin, immediately, a review of the five continuous bonds that have a limit of liability at or above $1.5 million under which these five plaintiffs currently are importing. The court is ordering Customs to review these five continuous bonds so that Customs determines expeditiously, on its own, whether those bonds should be canceled in favor of superseding bonds with lower limits of liability, and so that Customs reports to the court, within 60 days from the date of the Order imposing the preliminary injunction, its conclusions and explains to the court the reasons for those conclusions.

Defendant argues that plaintiffs have not been able to show sufficient injury to their current respective financial conditions to warrant a preliminary injunction. Although plaintiffs have not shown irreparable harm sufficient to qualify for a preliminary injunction restoring a form of *status quo ante*, they have shown sufficient irreparable harm to justify relief that generally preserves the *status quo*. *See* Tr. 749–751, 896–898 (discussing plaintiffs' request for the

status quo). Defendant's arguments that relate to whether or not the lost business opportunities, declining profit margins, and decreases in volume of shrimp imports are sufficient to establish irreparable harm that already has occurred, are therefore not on point. To establish irreparable harm, plaintiffs "must show a *presently existing threat* and not just the mere possibility of injury." *NSK Ltd. v. United States*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1128, 1132 (2004) (emphasis added); *see Zenith Radio Corp.*, 710 F.2d at 809; *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001). Irreparable harm constitutes *potential harm* that cannot be redressed by a legal or an equitable remedy at the conclusion of the proceedings, so that a preliminary injunction is the only way of protecting the plaintiffs. *See Weinberger*, 456 U.S. at 312–318.

Defendant urges the court to conclude that plaintiffs' argument that the "insurers intend to require additional collateral for future years" is pure speculation. *Def.'s Opp'n* at 5. Based on the facts established by the administrative record, *i.e.*, that each surety required an irrevocable letter of credit from plaintiffs who obtained new continuous bonds in 2005 and 2006, the court infers that there is a strong likelihood that sureties similarly will require additional collateral in the future. The facts established on the *de novo* record also support the inference that sureties will require up to 100 percent security for any new or extended continuous bonds, as they have to date. Specifically, the testimony of witnesses for two plaintiffs relating to the requirements imposed on plaintiffs seeking new term bonds corroborates the finding that sureties typically require 100 percent collateral in the situations occasioned by the new bonding requirements. The record also establishes that lending institutions typically reduce credit limits by amounts equal to, or nearly equal to, the amount of a letter of credit used to secure a bond. *See Findings of Fact* ¶¶ 3, 7, 9–10, 18, 24. Moreover, the requirement that plaintiffs must inform Customs of any material changes in the bond applications, such as whether "the value or nature of the merchandise to be imported will change in any material respect during the next year," further supports the inference that if plaintiffs exceed the import capacities on their existing term bonds, Customs, absent a preliminary injunction, will require additional bonding pursuant to the formulas set forth in the Amendment and the Clarification. 19 C.F.R. § 113.12(b)(1)(ii). Plaintiffs have demonstrated that to secure such additional bonding, plaintiffs' sureties are requiring that the bonds be fully collateralized, which in turn requires plaintiffs to further encumber the credit available from their lending institutions. In view of these demonstrated facts and the strong likelihood of cumulating harm, the court considers the review of current bond limits that it is ordering Customs to conduct to be necessary and appropriate.

In its status reports to the court, filed on August 17 and September 1, 2006, defendant informed the court that "Customs and Border Protection ("CBP") currently does not plan to alter the bond requirements for any of the eight plaintiffs that attempted to demonstrate immediate irreparable harm" and that "CBP does not currently intend to render insufficient the bonds of the three of those eight importers whose current bonds are subject to restrictions upon subject shrimp, should those plaintiffs import subject shrimp." *Def.'s Status Report* at 1–2, Aug. 17, 2006; *Def.'s Status Report* at 1, Sept. 1, 2006. Because of this lack of current intention, among other reasons, defendant submits that a preliminary injunction is not warranted. *Def.'s Status Report* at 1–2, Aug. 17, 2006; *Def.'s Status Report* at 2, Sept. 1, 2006. The court does not agree that this representation by defendant is sufficient to preclude the need for a preliminary injunction at this time. The current intention of Customs, absent a preliminary injunction, can change at any time and, without notice to plaintiffs or the court, result immediately in additional burden and disruption to one or more of the eight plaintiffs who presented evidence of irreparable harm. In addition, the aforementioned expiration of term bonds, some of which bonds will expire as early as December 2006, makes the future serious harm even more imminent. The assurance from defendant that Customs does not intend to render insufficient any current bonds of the eight plaintiffs does not address this imminent harm. The court can prevent that harm during the pendency of this proceeding only by enjoining Customs from applying the Amendment, the Current Bond Formulas, and the Clarification to the next determinations of limits of liability, which will occur upon the expiration of the current term bonds of the eight plaintiffs.

4. The Court Will Not Infer that the Remaining 19 Plaintiffs Have Met Their Burden of Establishing Immediate, Irreparable Harm

The court will not infer that the remaining 19 plaintiffs will suffer the same type of harm established by Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star. The only facts that the court can infer with respect to the remaining plaintiffs are listed in the *Joint Stipulation of Undisputed Facts* filed on March 30, 2006, which are insufficient to establish that those plaintiffs' current financial conditions, lending relationships, or business operations are threatened with irreparable harm. However, the court will consider another motion by any of these remaining plaintiffs for a preliminary injunction or for a hearing at which evidence of immediate, irreparable harm could be introduced.

B. Likelihood of Success on the Merits

To prevail on a motion for injunctive relief, plaintiffs carry the burden of establishing a likelihood of success on the merits. *FMC Corp.*, 3 F.3d at 427; *Zenith Radio Corp.*, 710 F.2d at 809. Plaintiffs have demonstrated a strong likelihood that they will succeed, in part, on the merits of this action.

Plaintiffs brought this action under 28 U.S.C. § 1581(i) to challenge the application of the Amendment and the Clarification in determinations by Customs of the sufficiency of continuous bonds covering plaintiffs' liabilities for import transactions, particularly those transactions involving subject shrimp. *See First Am. Compl.* ¶ 2. In support of their challenge, plaintiffs make several arguments. Plaintiffs primarily argue that the interplay of 19 U.S.C. § 1623, providing for the setting of bond conditions by Customs, and of 19 U.S.C. §§ 1671, 1673, providing for the assessment of antidumping and countervailing duties by Commerce, precludes Customs from considering potential antidumping and countervailing duty liability in determining the sufficiency of a continuous bond. *See id.* ¶¶ 24–28. Plaintiffs' second general argument is that the application of the Amendment and the Clarification to shrimp importers generally and to plaintiffs was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and was unsupported by substantial evidence. *See id.* ¶¶ 29–31.

1. Plaintiffs Failed to Show a Likelihood of Success for their Arguments that the Statute Precludes Customs From Considering Potential Antidumping Duty Liability in Determining the Sufficiency of a Continuous Bond

Plaintiffs' primary argument is that Customs is precluded by law from considering potential antidumping and countervailing duty liability in determining the sufficiency of a continuous bond. *See id.* ¶¶ 24–28. Plaintiffs argue, specifically, that 19 U.S.C. § 1623(a) "limits [Customs'] authority to require importers to post a bond to 'case[s] in which bond or other security is not specifically required by law." ' *Pls.' Post-Hearing Br.* at 39 (quoting 19 U.S.C. § 1623(a)). According to plaintiffs, cash deposits collected in antidumping and countervailing cases, which are provided for by statute in 19 U.S.C. §§ 1671e(a)(3), 1673e(a)(3), provide "other security" within the meaning of § 1623(a), thereby precluding Customs from requiring additional security for that purpose. *See Pls.' Mem.* at 41. Plaintiffs cite to the legislative history of § 1623(a) in support of their contention that the plain meaning of § 1623(a) confers on Customs authority to impose a bond or other security only in situations where such measures are not provided for by law. *See id.* at 41–42.

Defendant counters that Customs has full statutory authority to consider antidumping or countervailing duty liability in setting the

amount of a continuous bond. *See Def.'s Post-Hearing Br.* at 16–19. Rather than limiting the authority of Customs to establish the amount of a term bond, according to defendant, § 1623(a) confers authority upon Customs to impose bond requirements to protect the revenue, including the authority to set a continuous bond amount in the circumstances at issue in this case. *See id.* Defendant further argues that other subsections of § 1623 "demonstrate that [Customs] possesses discretionary authority to protect the revenue by requiring the posting of a bond." *Id.* at 20. Defendant specifically points to § 1623(b), stating that " '[w]henever a bond is required or authorized by a law, regulation, or instruction which . . . [Customs] is authorized to enforce, the Secretary of the Treasury *may* – (1) Except as otherwise specifically provided by law, *prescribe the conditions* and form of such bond . . . and *fix the amount of penalty* thereof." ' *Id.* (quoting 19 U.S.C. § 1623(b)).

The court concludes that plaintiffs have not met their burden of establishing a likelihood of success on the issue of whether Customs is precluded by law from considering potential antidumping or countervailing duty liability in setting the limit of liability for a continuous bond. Subsection (a) of 19 U.S.C. § 1623 provides that

> the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

19 U.S.C. § 1623(a). The subsection conditions the authority accorded to the Secretary or to Customs with the introductory phrase, "[i]n any case in which bond or other security is not specifically required by law." *Id.* Read according to its plain meaning, subsection (a) addresses the matter of *when* a bond or other security may be required. Plaintiffs would have the court construe the introductory phrase as a limitation on the authority of the Secretary and Customs to set the limit of liability of a term bond. The only language in subsection (a) that specifically relates to the limit of liability of a term bond allows for bonds "necessary for the protection of the revenue." Subsection (b) of § 1623 applies to various matters pertaining to bonds, regardless of whether the bond is required by statute, regulation, or instruction. It provides that "[w]henever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may– (1) Except as otherwise specifically provided by law . . . fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum." *Id.* § 1623(b)(1). The statute further allows the Secretary to "[a]uthorize

the execution of a term bond the conditions of which shall extend to and cover similar cases of importations over such period of time, not to exceed one year, or such longer period as he may fix when in his opinion special circumstances existing in a particular instance require such longer period." *Id.* § 1623(b)(3). When read together, the two subsections appear to provide Customs considerable discretion in setting the requirements for term bonds so as to protect the revenue.

In support of their argument, plaintiffs also refer to the legislative history of Section 623 of the 1930 Tariff Act (19 U.S.C. § 1623). Plaintiffs quote a House Report that explains that

> [i]n order to provide for more uniformity in these matters [*i.e.*, matters in the tariff laws pertaining to bonds] and for more elasticity in the requirement for bonds, there is included in the bill as section 623 a provision authorizing the Secretary of the Treasury by regulations to require or to authorize collectors to require such bonds or other security as he or they [may] deem necessary for the protection of the revenue and to assure compliance with the customs laws and regulations. A number of specific provisions of Titles III and IV requiring bonds in particular cases have been eliminated to correspond with this amendment. *The new provision will authorize the requirement of a bond wherever not specifically required by the law*, but will not permit of the waiving of a bond where an express requirement occurs.

Pls.' Mem. at 42 (quoting H.R. Rep. No. 71–7, at 186 (1929)) (emphasis added in *Pls.' Mem.*). The legislative history relied upon by plaintiffs does not support an inference that Congress intended to limit the authority of Customs in the way that plaintiffs advocate. To the contrary, in enacting Section 623, Congress appears to have endeavored to expand, not limit, the authority of Customs to provide Customs with sufficient authority to protect the revenue and to ensure compliance with the customs laws and regulations.

Plaintiffs further cite to 19 U.S.C. § 1673d(c)(1)(B)(ii) to support their argument that Congress intended to preclude Customs from considering antidumping duty liability in setting the amount of a continuous bond. *Pls.' Mem.* at 44. That statutory provision directs Commerce to "order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable." 19 U.S.C. § 1673d(c)(1)(B)(ii) (2000). The provision is directed at Commerce. The provision is silent on the question of whether Customs, under other Tariff Act provisions, specifically, under 19 U.S.C. § 1623, may require security in addition to the cash deposit if it deems such security necessary to protect the

revenue. Plaintiffs, as of yet, have not pointed to a provision of the antidumping laws indicating congressional intent that cash deposits be the exclusive security available to guarantee antidumping and countervailing duty liabilities. Nor have plaintiffs put forth a convincing argument that 19 U.S.C. § 1673d(c)(1)(B)(ii) and 19 U.S.C. § 1623, when read together, preclude Customs from requiring bonding as security for any potential amount by which liquidated duties may exceed the cash deposit.

2. Plaintiffs Established a Likelihood of Success for their Arguments Alleging That Customs' Actions were Arbitrary, Capricious, or an Abuse of Discretion

Although plaintiffs' showing of likelihood of success on the merits falls short in some respects, the court concludes that plaintiffs have shown that they are likely to prevail on their argument that the actions taken by Customs in imposing on plaintiffs increased bond requirements pursuant to the Amendment and the Clarification are arbitrary, capricious, or an abuse of discretion and, therefore, must be set aside pursuant to what they contend is the applicable standard of review, as provided in 5 U.S.C. § 706.[2] Plaintiffs contend, *inter alia*, that the administrative record does not support Customs' application of the new bond requirements to shrimp importers. *See Pls.' Post-Hearing Br.* at 47–51. In response to questions of the court during the hearing on the preliminary injunction motion, plaintiffs indicated that the action by Customs constitutes a legislative rule that was adopted without appropriate notice and comment procedures. *See id.* at 45–46. Plaintiffs further argued that application of the new formulas solely to importers of shrimp "is not a reasonable

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[2] Claims brought under 28 U.S.C. § 1581(i) are reviewed pursuant to § 706 of the APA, which provides for judicial review of agency action alleged to be, *inter alia*, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Specifically, 5 U.S.C. § 706 provides that

> [t]o 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 of applicability of the terms of an agency action. The reviewing court shall–
>
> (1) compel agency action unlawfully withheld or unreasonable 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 [5 U.S.C. §§ 556 and 557] 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.

response to the problem identified by [Customs]" in the Amendment or the Clarification. *Id.* at 43. Defendant argues that the actions of Customs in setting the amounts of continuous bonds are committed to agency discretion by law and therefore are not subject to the "arbitrary, capricious, or abuse of discretion" standard of review. *See Def.'s Post-Hearing Br.* at 23–26.

The court is not persuaded by defendant's argument regarding the applicability of the standard of review under the APA. Further, the court finds that plaintiffs have established a likelihood of demonstrating that Customs' selective application of the new bond formulas solely to shrimp importers and the stringent manner in which Customs applied the bond formulas to each of the eight shrimp importers who made an evidentiary showing of irreparable harm are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

a. The "Arbitrary, Capricious" Standard of Review Applies in this Case

Defendant argues that the actions of Customs in setting the amounts of continuous bonds are committed to agency discretion by law and therefore are not subject to the "arbitrary, capricious, or abuse of discretion" standard of review. *Def.'s Post-Hearing Br.* at 23–26. Defendant's post-hearing brief posits that 5 U.S.C. § 701(a)(2), the APA provision precluding review of agency action that is committed to agency discretion, applies " 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." ' *Id.* at 24 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Defendant submits that 19 U.S.C. § 1623 provides no such meaningful standard. *See id.* at 23. In further reliance on *Heckler v. Chaney*, defendant maintains that judicial review of the Customs bond decisions "is limited to whether: (1) [Customs] exceeded its statutory authority; (2) there was a constitutional violation; or (3) [Customs] violated its own regulation." *Id.* Defendant asserts that none of these three factors is present here. *Id.*

The court rejects defendant's arguments on the standard of review. Plaintiffs challenge the application of the Amendment and the Clarification to shrimp importers and specifically to the individual bond determinations. As part of their showing of a likelihood of success on the merits, plaintiffs have shown a likelihood of establishing that the bond determinations at issue properly are subjected to judicial review under an "arbitrary, capricious, or abuse of discretion" standard. They assert that the court is granted jurisdiction over this action by 28 U.S.C. § 1581(i). *First Am. Compl.* ¶¶ 2–4. In a challenge to agency action brought under 28 U.S.C. § 1581(i), the court is directed by statute to "review the matter as provided in section 706 of title 5." 28 U.S.C § 2640(e) (2000). In pertinent part, section 706 of title 5 directs a court to "hold unlawful and set aside agency

action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). Defendant would have the court decline to apply this standard of review, despite the statutory directive in 28 U.S.C. § 2640(e), based on what defendant considers to be the holding in *Heckler v. Chaney*.

Defendant's argument fails because the Supreme Court's holding in *Heckler v. Chaney* is inapplicable to the facts of this case. Heckler v. Chaney presented the question of whether, under the APA and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA"), the Food and Drug Administration's ("FDA") refusal to exercise its enforcement authority – specifically, in that case, the FDA's decision not to exercise authority to prohibit the use by States of drugs to carry out capital sentences by lethal injection – may be judicially reviewed. *See Heckler*, 470 U.S. at 828 (explaining that "th[e] case turns on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. That decision in turn involves the construction of two separate but necessarily interrelated statutes, the APA and the FDCA."). The holding, and the reasoning, of *Heckler v. Chaney* stem from the longstanding recognition by the Supreme Court that an agency decision not to exercise enforcement authority is generally unsuitable for judicial review because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. The Supreme Court based its holding in *Heckler v. Chaney* in part on 5 U.S.C. § 701(a)(2), which disallows review of agency actions "committed to agency discretion by law." *See id.* at 828–33. But the Supreme Court's analysis, and its holding in the case, is confined to the question of whether and how a court should review an agency's refusal to exercise its enforcement authority. Plaintiffs' claims do not challenge any determination by Customs not to exercise enforcement authority but involve, instead, the manner in which Customs exercised its discretion to set the limits of liability for plaintiffs' continuous bonds under 19 U.S.C. § 1623. Defendant's argument glosses over this critical distinction.

The Supreme Court cautioned in *Heckler v. Chaney*, as it had in its earlier decision in *Citizens to Preserve Overton Park v. Volpe*, that the exception to agency review created by 5 U.S.C. § 701(a)(2) is " 'a very narrow exception." ' *Id.* at 830 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). "The legislative history of the Administrative Procedure Act indicates that [the excep-

tion] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id*. (quoting S. Rep. No. 79–752, at 26 (1945)).

The court is unable to agree with defendant that there is no law to apply in this case. Under 19 U.S.C. § 1623(b)(3), Customs may authorize a term bond for a period of one year or longer. Customs has general authority under § 1623(b) to prescribe the conditions and form of a bond, including a term bond, and to "fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum." 19 U.S.C. § 1623(b)(1). Read as a whole, § 1623 clarifies that Customs is to exercise its discretion in setting the amounts and conditions of bonds to further the general purpose of ensuring compliance with law and regulation. That general purpose encompasses the more specific purpose of imposing such bond requirements as are necessary to protect the revenue.

Defendant further asserts that Customs did not violate 19 C.F.R. § 113.13, which regulation, in defendant's view, "does not tie the agency's hands in any way beyond the statute." *Def.'s Post-Hearing Br.* at 29. According to defendant, 19 C.F.R. § 113.13 is a "broadly worded regulation" that "only provides guidelines to use in setting bond amounts," and "in no way constricts [Customs'] authority to identify a risk to the revenue and act accordingly." *Id*. at 29–30. Defendant also argues that the Court of Appeals for the Federal Circuit, in *Carolina Tobacco Co. v. Bureau of Customs and Border Protection*, 402 F.3d 1345, 1349–50 (Fed. Cir. 2005), has rejected the notion that an importer is "entitled to an individualized bond determination based upon each prong of section 113.13(b)." *Id*.

In its regulations, Customs implemented 19 U.S.C. § 1623 to require port directors to make individual determinations on bonds, including continuous bonds, and to do so by applying certain guidelines. *See Carolina Tobacco Co.*, 402 F.3d at 1349 (stating that the guidelines in § 113.13(b) "provide suggested standards for government officials to use in performing their duties."). Under 19 C.F.R. § 113.13(b), the port director

> should at least consider: (1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments; (2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations; (3) The value and nature of the merchandise involved in the transaction(s) to be secured; (4) The degree and type of supervision that Customs will exercise over the transaction(s); (5) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages; and (6) Any additional information contained in any application for a bond.

19 C.F.R. § 113.13(b). In *Carolina Tobacco Co.*, the Court of Appeals approved of Customs' "regular practice . . . to set the bond at 10 percent of the importer's prior year's activity, and then use the factors in the regulation to determine whether a higher bond is required for a particular importer in order to protect the revenue." 402 F.3d at 1349. The Court of Appeals stated, in *dicta*, that "[e]ven if the Section 113.13(b) regulation required some individualized consideration by Customs of the six factors before setting the amount of the bond, Carolina has not shown that Customs failed to give such consideration in this case." *Id.* at 1350. The Court of Appeals rejected the notion that a port director must consider each of the six factors in determining the limit of liability for a continuous bond. "In considering the factors, the port director may give [the six factors] whatever weight he deems appropriate; he may conclude that particular factors should be given no weight whatsover." *Id.* (citing *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 613 (1950)).

The court does not construe 19 C.F.R. § 113.13(b) or the holding in *Carolina Tobacco Co.* to support the proposition that an importer is not entitled to an individualized bond determination by the Customs port director that would be upheld under an "arbitrary, capricious, or an abuse of discretion" standard of review. Under 19 U.S.C. § 1623(b) and Customs' own regulations, the Agency is to employ discretion, but that discretion is to be exercised according to statutory purpose and regulatory criteria. The discretion, therefore, is not unlimited. *See Beardmore v. Dep't of Agric.*, 761 F.2d 677, 679 (Fed. Cir. 1985) (stating that "an agency's discretion is not unlimited, and 'reasonableness' cannot cover for arbitrary or capricious action."). Yet, the implication of defendant's argument is that Customs in its broad discretion may set a bond amount that is unreasonable or that would not be sustained under an "arbitrary, capricious, or an abuse of discretion" standard of review. In view of the congressional directive that the court apply that standard in reviewing the agency actions plaintiffs have challenged, the court cannot accept defendant's constrained conception of the judicial review available to importers in the situation in which plaintiffs have brought this case.

Relying on Article III of the Constitution, defendant also contends that "[b]ecause NFI has not alleged that the bonding policy constitutes a 'legislative rule' subject to APA notice and comment procedures, there is no case or controversy concerning this issue." *Def.'s Post-Hearing Br.* at 30. Finally, defendant maintains that the Amendment and the Clarification are akin to "general statements of policy" and, therefore, exempt from the APA notice and comment procedures pursuant to 5 U.S.C. § 553(b)(A). *See id.* at 32–34.

Because plaintiffs have shown a likelihood of establishing that the individual bond determinations will not survive review under an arbitrary and capricious standard, the court need not reach these issues. The court, however, doubts that the requirements of Article III

could preclude plaintiffs from challenging the new bond requirements on the ground that they constitute a "legislative rule" that should have been subjected to notice and comment. Defendant contends that because the issue was not raised by plaintiffs, but rather raised by the court during oral argument, the issue is not properly before the court. *See id.* at 30. The court reads nothing in Article III or in precedent that limits a court's ability to consider arguments pertaining to the legality of agency action, in addition to those raised by the parties in their pleadings and their initial papers, so long as the court exercises proper jurisdiction over the matter challenged.

Plaintiffs challenge the new bond requirements on the basis that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *First Am. Compl.* ¶ 31. Whether the Amendment or the Clarification constitute a "legislative rule" that should have been subjected to notice and comment procedures is an issue that the court, in later ruling on the merits, could address in deciding whether the Customs action satisfies the "in accordance with law" element of the arbitrary and capricious standard of review. At that time, the court may consider evidence introduced by the testifying plaintiffs demonstrating that only those of the eight importers who promised not to import subject shrimp, or to limit such imports, were able to negotiate a lower minimum bond amount than the bond formulas required. *Findings of Fact* ¶¶ 16–17, 24, 32. Such onerous and rigid application of the new bond formulas indicates that Customs may have applied a quasi-legislative rule, which was not subject to the prescriptions of the APA, 5 U.S.C. § 553, rather than afford the eight plaintiffs a case-by-case administrative determination as contemplated by 19 C.F.R. § 113.13. *See New Jersey v. Dep't of Health & Human Servs.*, 670 F.2d 1262, 1281 (3d Cir. 1981) ("The APA notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public."); *Citizens to Save Spencer County v. U.S. EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979) (noting that quasi-legislative rules are subject to 5 U.S.C. § 553). Because the bond demands appear not to have been based on such individual case-by-case determinations, plaintiffs have established that their exists a strong likelihood that Customs' determinations of continuous bond requirements for Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star were arbitrary and capricious.

The court need not decide at this time the merits of defendant's argument characterizing the Amendment and the Clarification as "general statements of policy" exempt from APA notice and comment procedures. The court nonetheless observes that the Amendment and the Clarification possibly can be read to modify the subject matter of 19 C.F.R. § 113.13. The Amendment and the Clarification es-

tablish new bonding requirements that affect the substantive rights of an entire group consisting of all or nearly all U.S. importers of shrimp.

b. Plaintiffs Established a Likelihood of Success for their Arguments that in the Clarification, Customs Arbitrarily and Capriciously Designated the Shrimp Antidumping Duty Orders as the Only "Covered Cases"

The administrative record supports a conclusion that plaintiffs are likely to demonstrate that Customs arbitrarily and capriciously selected the antidumping duty orders on shrimp as the only "Covered Cases." The Amendment stated three reasons why Customs must reevaluate the way it determines sufficient bond amounts: a heightened concern regarding the under-collection of antidumping and countervailing duties, the effect of such under-collection on the ability of Customs to disburse duties to the domestic industry pursuant to the Byrd Amendment, and the continued vigilance by Customs to collect all appropriate antidumping and countervailing duties from importers. *See Amendment.* Customs, however, did not articulate in the Amendment or the Clarification a reason why antidumping duties on shrimp imports are especially susceptible to under-collection, as opposed to duties on imports of other agricultural or aquacultural products subject to antidumping duty orders, or as opposed to all products subject to such orders. *See Pls.' Mem.* at 47. Due to the unliquidated status of entries subject to the antidumping duty orders on subject shrimp, no record exists demonstrating that significant numbers of shrimp importers are defaulting or have defaulted on any obligation to pay antidumping duties on their imports of shrimp. *See id.* Even were there a record of under-collection of antidumping duties on shrimp imports, such a record would not serve as an explanation of why Customs has not subjected importers in the industries Customs cited in the Amendment as having established histories of under-collection, *i.e.*, importers of crawfish tail meat and garlic from China, to the bonding formulas in the Amendment and the Clarification.[3] When asked at oral argument to explain this paradox, counsel for defendant responded, even more paradoxically, that the new bond formulas were not applied to importers in other agricultural or aquacultural industries because of "legal challenges." *See* Tr. 1059–61.

Although Customs infers that there exists a risk that the duty liability on certain shrimp imports may be subject to "large fluctuations in the dumping margins, and importers who enter and exit the

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[3] According to Customs, the amounts of uncollected duties for crawfish tail meat from China for fiscal years 2003, 2004 and 2005 were $85,397,347.58, $170,053,407.56 and $32,370,446.32, respectively. The amount of uncollected duties for garlic from China for fiscal year 2004 was stated to be $24,581,557.26. *See Pls.' Mem.* at 48 & Ex. 12.

importing business quickly," the administrative record does not appear to support such a finding. *Admin. R.* Ex. 1 at 2. The record does not identify evidence that the initial cash deposits of plaintiffs will be insufficient to cover the final rates of liquidation. Nor does the record identify evidence that importers of shrimp are particularly susceptible to bankruptcy, likely to go out of business, or operating as "sham" or "alter ego successor companies." *Admin. R.* Ex. 7 & Ex. 8 at 1.[4]

Other documents in the administrative record appear to lend further support to plaintiffs' future endeavor to show that the Amendment and the Clarification were imposed arbitrarily or capriciously on shrimp importers. As one example, the administrative record appears to indicate that political considerations influenced the decision by Customs to apply the new bond formulas only to the shrimp importing industry. The document entitled "Periodic Risk Assessment of Material Risks in the Revenue Process" explains that "the uncollected antidumping duties are under the watchful eye and close scrutiny of the domestic industry. With a large amount of funds unavailable for disbursement [under the Byrd Amendment] because of unpaid duty bills, the issue also garners Congressional and media interest." *Admin. R.* Ex. 1 at 2. All of the "uncollected duties" to which Customs refers in the administrative record, however, pertain to imports of agricultural and aquacultural products other than shrimp.

The record shows that Customs explained why it singled out the entries subject to the antidumping duty order on shrimp during an internal power point presentation on May 27, 2004:

> We are proposing a proactive and prospective approach for the purpose of reducing the potential revenue write-off exposure [(*i.e.*, uncollected duties),] that we have experienced in other cases recently. We have chosen shrimp as a first shot at this because we feel we have built a strong risk based case that provides a strong, defensible position for why we are taking these actions. We can can [sic] be sure that we will hear complaints about these actions from importers but in this case, for once, we can also count on support for our actions from the very parties that have been complaining recently, congress and domestic industry.

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[4] The administrative record establishes that 25 current shrimp importers were participating in the Customs-Trade Partnership Against Terrorism ("C–TPAT"), which evidences a cooperative relationship between those importers and Customs in the war against terror. *Admin. R.* Ex. 6 at 3. Although participation in C–TPAT does not lend support to any finding relating to these importers' financial stability, such participation is relevant to a finding that these importers are not "fly-by-night" operations.

Admin. R. Ex. 8 at 8. Customs noted that the Ad Hoc Shrimp Action Committee, which is the petitioner in the shrimp antidumping investigations and represents the interests of the domestic industry, is comprised of shrimp producers located mainly in Alabama, Florida, Louisiana, Mississippi, North Carolina, South Carolina and Texas. *See id.*

In a memorandum by the Deputy Commissioner of Customs entitled "Proposed Bonding Guidelines for Agriculture/Aquaculture Antidumping and Countervailing Duty Cases," Customs stated that

> [p]olitical and domestic interest and scrutiny of [Customs] actions in [antidumping and countervailing duty] collections is intense as a result of the Byrd Amendment which makes [antidumping and countervailing] duty collections available to domestic petitioners. The domestic petitioners in this case are from south and southeastern states that have congressional representation on committees that include the Subcommittee on Homeland Security, International Trade, House Ways & Means, Appropriations, Small Business Affairs, and the Senate Finance Committee. Concern has been raised about [Customs] efforts in the area of collecting [antidumping and countervailing] dut[ies], particularly from Southeast Asia, and this proposal would provide an example of our proactive efforts to address these concerns.
>
> The impact on importers may also generate inquiries and interest from their congressional representatives. The importers are not as geographically concentrated as the domestic industry but are represented on all of the same committees. In fact, three states that account for over 50 percent of the imports of shrimp are also the home to domestic petitioners for the case.

Admin. R. Ex. 14 at 3–4. These statements appear to be relevant to a finding that Customs, rather than basing its determination to apply the new bond formulas only to importers of shrimp on facts in the administrative record demonstrating risk to the revenue particular to shrimp imports, was motivated, at least in part, by domestic political pressures to take action directed against the shrimp importing industry. Even if such considerations were not dispositive in the decision by Customs to confine the action to shrimp importers, plaintiffs may well be able to establish on the merits that the political considerations help support a conclusion of arbitrariness and capriciousness and that "the appearance and integrity of the [agency] decision-making process would have benefited from a more formal procedure." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992), *reh'g denied and amended by*, 985 F.2d 1419 (9th Cir. 1993) (finding invalid an order of the Secretary of Agriculture for failure to comply with the APA).

c. Plaintiffs Established a Likelihood of Success for their Argument that the Application of the Amendment and the Clarification to Eight Individual Plaintiffs Was Arbitrary and Capricious

Based on a review of the administrative record, the court concludes that plaintiffs are likely to succeed in showing that Customs applied the Amendment and the Clarification to Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star in an arbitrary and capricious manner. Despite the flexibility granted to port directors by 19 C.F.R. § 113.13 in determining the minimum amount of a bond, the evidence put forth by these plaintiffs demonstrates that Customs, in applying the new bond requirements, did not allow for any meaningful deviation from the formulas set forth in the Amendment and maintained in the Clarification. Rather, Customs strictly applied the formulas, apparently despite the criteria in 19 C.F.R. § 113.13. The administrative record indicates that plaintiffs are likely to succeed in showing that the bond formulas were applied to these plaintiffs for the sole reason that these plaintiffs were importers of shrimp subject to antidumping duty orders.

The obligation to pay antidumping duties that would be secured by a continuous bond is limited to the amount by which the liquidated antidumping duties may exceed the cash deposits. The formulas, however, do not appear to include a factor to adjust for the required cash deposits unless it is assumed that the cash deposits represent only about half of the eventual antidumping duty liability. In response to plaintiffs' arguments, defendant has not advanced a convincing reason why the formulas do not directly take into consideration the cash deposits, which in the ordinary instance would be made by the importer of record and would reduce the amount of unsecured potential antidumping duty liability.[5]

Each notice of bond insufficiency issued to the eight plaintiffs by Customs cites, as authority, Part 113 of the Customs regulations. *See, e.g., Pls.' Mem.* Ex. 5 Attach. B, Ex. 6 Attach. B, Ex. 7 Attach. A, Ex. 8 Attach. B, Ex. 9 Attach. C, Ex. 10 Attach. B; *Joint Stipulation of Undisputed Facts* ¶¶ 8–31. As discussed above, § 113.13(b) of the Customs regulations sets forth guidelines for determining the amount of a bond. "In determining whether the amount of a bond is sufficient, the port director . . . should at least consider" factors including an importer's prior record of paying outstanding duty liabili-

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[5] In the closing sentence of the Notice, Customs appears to acknowledge that the continuous bond ordinarily would serve as security only for amounts by which the cash deposit is exceeded. *See Notice*, 71 Fed. Reg. at 62,278 ("Congress has provided CBP authority to require security in order to ensure the payment of all duties determined to be due to the United States, including any revenue collection gaps between estimated duty deposits and final assessed duties that the importer fails to satisfy."). The Notice, nevertheless, maintains the basic formulas announced in the Amendment and the Clarification.

ties, an importer's prior record of complying with Customs' demands for redelivery, the degree of supervision that Customs will exercise over the subject transactions, and an importer's prior record of honoring bond commitments. 19 C.F.R. § 113.13(b). As also discussed above, the Court of Appeals for the Federal Circuit in *Carolina Tobacco Co.* stated that a port director, in reviewing the factors listed in § 113.13(b), may accord those factors "whatever weight he deems appropriate" but did not state that Customs may deny an importer an individualized bond determination or imply that Customs need not act reasonably. 402 F.3d at 1350. In determining the minimum bond amounts for Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star, the evidence supports a finding that Customs applied the formula AD/CVD Order (3) – *i.e.*, the Commerce Order rate multiplied by the value of imports of merchandise subject to the case by the importer during the previous year – without regard to each importer's individual compliance record. *See Pls.' Mem.* Ex. 5 Attach. B, Ex. 6 Attach. B, Ex. 7 Attach. A, Ex. 8 Attach. B, Ex. 9 Attach. C, Ex. 10 Attach. B; *Joint Stipulation of Undisputed Facts* ¶¶ 8–31; *Findings of Fact* ¶¶ 1, 4, 9, 15, 19, 23, 28, 31–32. Moreover, it appears that Customs did not consider each individual importer's financial condition or ability to pay prospective antidumping duty liabilities, but rather appeared to base the application of the formulas on one critical factor – that the importer engages in the importation of subject shrimp. *Findings of Fact* ¶¶ 1, 4, 9, 15, 19, 23, 28, 32.

Three plaintiff-importers have established a likelihood of success of prevailing in a challenge to their respective bond determinations in yet another respect. As noted above, each of these importers has been required by Customs to accept a limitation on the importation of subject shrimp, in whole or in part, as a condition of obtaining a bond allowing them to continue to import merchandise. With respect to each of the three importers, the limitation is not set forth as a bond condition but is established only in a series of e-mail communications between the plaintiff-importer and the Customs port director. *See Pls.' Mem.* Ex. 7 Attachs. B, C, & E (e-mails from Customs to each of two plaintiffs, including e-mails from Casey Horn of Customs to these importers stating that bonds will be rendered insufficient "immediately" if the importer attempts to import certain aquacultural products covered by antidumping or countervailing duty orders), Ex. 9 Attach. C (e-mails between an importer and Customs, including an e-mail from Casey Horn of Customs to the importer stating that bonds will be rendered insufficient "immediately" if the importer attempts to import certain aquacultural products covered by antidumping or countervailing duty orders). Those communications reveal a likelihood that each of the three importers were, or are likely to be, denied the benefit of the notice procedure required by 19 C.F.R. § 113.13(c), under which an importer must be

provided 30 days to obtain a new continuous bond following notice by the port director that the port director has determined a continuous bond to be inadequate "to protect the revenue and insure compliance with the law and regulations." 19 C.F.R. § 113.13(c). Moreover, the conditions were, according to the record evidence, imposed under a degree of duress and without citation to any statutory or regulatory authority.[6]

C. Balance of the Hardships

In evaluating whether to grant a motion for injunctive relief, the court must "determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction." *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000). Plaintiffs and defendant each contend that the balance of hardships militates in its respective favor.

Plaintiffs allege that "[i]f no injunctive relief is granted, and if [Customs] continues to require bonds to cover potential antidumping duty liability on frozen shrimp, and if sureties continue their collateral demands to issue these bonds, NFI [i]mporters will suffer grievous irreparable harm. By contrast, if the injunction is granted, [Customs] will suffer none." *Pls.' Mem.* at 50–51. According to plaintiffs, Customs will not suffer harm because plaintiffs are required to post cash deposits when entering subject shrimp into the United States for consumption. *Pls.' Mem.* at 51; *see Pls.' Post-Hearing Br.* at 54–56. These cash deposits provide Customs with the type of security "that Congress intended for imports under antidumping and countervailing duty orders." *Pls.' Mem.* at 51. Plaintiffs argue that they are entitled to preliminary equitable relief to "place NFI [i]mporters in exactly the same position as every other importer of every other product subject to antidumping and countervailing duty orders – no better, no worse." *Pls.' Post-Hearing Br.* at 54.

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[6] The court raised this issue during the July 19, 2006 conference. In response, Customs represented that "the Government will provide notice to the relevant party pursuant to 19 C.F.R. § 113.13(c), should [Customs] find it necessary to render insufficient any bond issued to any of the eight plaintiffs that attempted to demonstrate immediate irreparable harm." *Def.'s Status Report* at 2, Aug. 17, 2006. While committing Customs to providing notice, defendant simultaneously asserts that "pursuant to 19 C.F.R. § 113.13(d), no notice to the principal is required for additional security if the agency believes there [*sic*] the revenue is in jeopardy." *Id.* at 3. Subsection (d) of § 113.13, however, does not allow Customs to dispense with the 30-day notice when rendering a continuous bond insufficient. The regulations state that "[n]otwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback office believes that acceptance of *a transaction* secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security." 19 C.F.R. § 113.13(d) (emphasis added). Section 113.13(d) grants to port directors the discretion to review an individual transaction to determine whether that transaction poses a risk to the revenue, *i.e.*, a port director must make the determination on an entry-by-entry basis. Nothing in 19 C.F.R. § 113.13(d) authorizes Customs to eliminate the 30-day notice requirement of § 113.13(c).

Defendant argues that the balance of hardship favors the protection of the revenue of the United States. According to Customs, "the cash deposit requirement does not, and was never intended to, provide protection for all antidumping and countervailing duties." *Def.'s Opp'n* at 24.

The balance of hardships favors the grant of a limited preliminary injunction. If the Amendment and the Clarification remain in effect and continue to be applied by Customs during the pendency of this litigation in the manner in which Customs has applied them thus far, the eight plaintiffs are likely again to be confronted with the obligation to obtain term bonds of substantial size while their obligations under past term bonds continue. Two plaintiffs already have secured additional bonds to secure their 2006–2007 importations and, not surprisingly, both of these plaintiff-importers were required by their sureties to obtain letters of credit from financial institutions collateralizing the full amount of the bonds. There is little doubt that sureties will require that the eight plaintiffs obtain additional letters of credit from their lenders to post as security for any future term bonds. Defendant does not assert, and cannot credibly assert, that the obligations under the bonds will not continue until all entries thereunder are liquidated – an event which is not imminent. Defendant raises only the unconvincing argument that plaintiffs' assertion that sureties will continue to require collateralization for new bonds is "speculative." The current level of financial pressures on the eight plaintiffs, as established by the evidence submitted and those plaintiffs' testimony before the court, can only increase absent a preliminary injunction directed to preserving generally the *status quo* during the pendency of this litigation.

Defendant raises an additional argument concerning alleged transhipment of shrimp, pointing to a "possibility" that certain entries will be assessed antidumping duties at the countrywide rate for China of 112.8 percent.[7] *See Def.'s Post-Hearing Br.* at 37. As to the alleged transhipment, Bruce W. Ingalls, Chief of the Debt Management Branch in the Revenue Division of the Office of Finance, testified during the hearing on April 5, 2006, declaring that

> [a]fter initiation of the antidumping cases, [Customs] noted substantial shifts in import patterns that suggest transhipment of shrimp to circumvent the high tariffs on shrimp. [Customs] and U.S. Immigration and Customs Enforcement representative [*sic*] (ICE) from the Singapore Attaché office visited shrimp producers in Indonesia (a country not subjected to antidumping) that appeared to be of high-risk for transhipment.

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[7] The countrywide rate for China is the rate assessed to those Chinese exporters who were unable to establish freedom from government control. It is also, ultimately, the highest rate assessed during the investigation.

> [Customs] confirmed that three producers commingled Chinese shrimp and exported the merchandise claimed as Indonesian to circumvent the payment of antidumping duties. Fifty-four importers were sourcing shrimp from the three Indonesian producers during the time when Chinese shrimp was commingled.
>
> NFI importers represent approximately 50% of the imported volume. . . . [Customs] has issued CF 29 (Notice of Action) [to notify each importer that Customs is investigating subject imports pursuant to 19 U.S.C. § 1592 and] to demand that antidumping deposits be made for these imports. . . .

Def.'s Opp'n at *Decl. of Bruce W. Ingalls* ¶¶ 18–20. Defendant maintains that the new bonds "are thus the only security that the Government possesses with respect to these entries." *Id.* at 24 (citing *Decl. of Bruce W. Ingalls* ¶ 21). According to defendant, this prospective harm outweighs plaintiffs' "hardship," which defendant characterizes as "bear[ing] the risk of their own nonpayment of duties." *Id.* at 25. Defendant also argues that because plaintiffs failed to inform the court of the proceedings initiated by Customs with respect to such alleged transhipments, plaintiffs' "claims should be barred by the doctrine of unclean hands." *Id.* at 27.

The court finds defendant's arguments concerning the alleged transhipment, including the "unclean hands" argument, unconvincing. The court cannot draw conclusions relevant to a preliminary injunction from the investigation under 19 U.S.C. § 1592 to which defendant alludes. Any such investigation has yet to be completed. The facts that eventually may emerge from such an investigation have not yet been found. In any event, the relevant facts are not before the court. Defendant has not introduced evidence in this proceeding that would enable the court to make findings concerning the alleged transhipment and any eventual antidumping duty liability that could be associated with such findings. Any inference drawn with respect to an investigation under 19 U.S.C. § 1592, therefore, would be unsupported by evidence and premature. Defendant's "unclean hands" argument is unavailing for this same reason. Moreover, defendant did not introduce evidence at the court's hearing from which the court could conclude that any of the eight plaintiffs engaged in wrongdoing.

Customs has failed to establish to any degree of certainty that the future entries of Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star will be assessed upon liquidation any antidumping duties above the cash deposits, or that these plaintiffs are prone to default on future obligations to pay such duties. The United States, through the testimony of Mr. Ingalls and the submission of attachments A through E regarding the possibility of substantially higher final antidumping duty liability, sought to demonstrate the potential loss of revenue if the injunctive relief is

granted. *See Def.'s Opp'n* at *Decl. of Bruce W. Ingalls* ¶¶ 10–15 & Attachs. A-E. Mr. Ingalls, however, conceded that the scenarios presented in attachment A are hypothetical.[8] Tr. 652. Moreover, the court does not view as probative Mr. Ingalls's general assertion that the final antidumping duty rates on shrimp are likely to be higher rather than lower because this conclusory statement was not supported by any record evidence. Tr. 653–655, 678–680. Therefore, the arguments raised by Customs regarding potential antidumping duty liabilities and "possible" transhipments of Indonesian and Chinese shrimp are, necessarily, speculative.

Attachment A indicates that the bonds issued to importers of shrimp prior to the six subject antidumping duty orders would cover the liabilities arising from a 28 percent increase in the final antidumping duty rate over the cash deposit rate. *See Def.'s Opp'n* at *Decl. of Bruce W. Ingalls* ¶ 15 & Attach. A. The bonds required by Customs after the implementation of the new bond formulas ensured that Customs would recover the liabilities arising from an 85 percent increase in the final antidumping duty rate. *See id.* ¶ 14 & Attach. A. During his testimony, Mr. Ingalls was asked to identify a situation where every importer, at the end of an administrative review, defaulted on its obligations to pay antidumping duties. Mr. Ingalls could not identify such a situation and testified that he "would find it hard to believe that there is any industry or any sector where you could say for certain that 100 percent don't pay their bills." Tr. 693.

Attachment C also establishes that only five of the eight plaintiffs were consignees of imports from Indonesian shrimp producers that allegedly engaged in the transhipment of Chinese shrimp. *See Def.'s Opp'n at Decl. of Bruce W. Ingalls* Attach. C. Although the possibility of circumvention was a critical factor in defendant's balance of the hardship argument – *i.e.*, "the specter of harm faced by the Government is very real and acute" – defendant did not distinguish between the three plaintiffs that did not purchase shrimp from subject Indonesian producers and the five that did. *Def.'s Opp'n* at 24. A review of Attachment C also reveals that the values of imports for three of the five plaintiffs that purchased shrimp from subject Indonesian producers were grossly disproportionate to the levels of security demanded by Customs in the original notices of insufficiency and in

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[8] Attachment A presents five scenarios by which defendant quantifies the amount of antidumping duties that Customs would be required to collect if it were instructed to liquidate subject entries at a rate 10, 25, 50, 75, or 100 percent higher than the rate at which the cash deposits were collected. *See Def.'s Opp'n* at *Decl. of Bruce W. Ingalls* Attach. A. For example, if $1 million worth of entries were subject to a 10 percent duty rate, the cash deposits would be $100,000. Assuming that those entries were liquidated at a rate that is 50 percent higher than the 10 percent duty rate, Customs, in this example, would be required to collect an additional $50,000 from subject importers. *See id.*; Tr. 626–627.

subsequent demands.[9] Even assuming that all subject entries of Indonesian shrimp are assessed the China-wide rate, the bond requirements of Customs far exceed the security necessary to cover a 112.8 percent final liquidation rate. Customs has already collected nearly 100 percent security from Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star for subject entries made in 2005 through 2006. An agency's action must be reasonable in light of the harm it seeks to redress. *See* 5 U.S.C. § 706(2)(A) (setting forth the "arbitrary, capricious" standard of review that the court is to apply when reviewing certain agency actions); *cf. Pope v. U.S. Postal Serv.*, 114 F.3d. 1144, 1148 (Fed. Cir. 1997) (stating that an "agency's action should be sustained as long as the penalty imposed is reasonable"). These facts lend strong support to a finding that Customs did not evaluate each importer's risk on a case-by-case basis in assessing the amount of additional security needed to cover the "alleged," yet undetermined, risk posed by the possibility of transhipments or increased final dumping margins. Plaintiffs have shown, therefore, that the bond sufficiency determinations likely were not reasonable in light of the situation Customs sought to redress. When balancing the hardships of the parties, the court finds that plaintiffs will suffer greater adverse effects than defendant during the pendency of this litigation if Customs is not enjoined from making additional bond demands according to the Current Bond Formulas, which will necessitate the further serious depletion of plaintiffs' credit. Moreover, because the court will fashion the injunctive relief in a manner that will allow defendant to move for a modification of the injunction to "establish a change in circumstances that would make the original preliminary injunction inequitable," any prospective harm to defendant that later materializes may be remedied. *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 340 (3d Cir. 1993); *see Aimcor, Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999) (stating that "courts have inherent power and the discretion to modify injunctions for changed circumstances" (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961))).

D. Public Interest

Even when plaintiffs have "overcome the burden of showing the probability of irreparable harm and the likelihood of success on the

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merits, or alternatively, that the parties have presented serious questions of law and that the balance of the hardships tips in favor of the plaintiff[s], the court must still protect the public interest." *Associated Dry Goods Corp. v. United States*, 1 CIT 306, 310–11, 515 F. Supp. 775, 779 (1981). For several reasons, the public interest would be best served by the issuance of a preliminary injunction that preserves generally the *status quo* with respect to the bond status of each of the eight plaintiffs that made adequate factual showings of irreparable harm and precludes enforcement of the "agreements" not to import certain subject shrimp.

The public interest is not served by administration of a bond policy that plaintiffs likely will demonstrate to be arbitrary and capricious and, specifically, to be discriminatory with respect to the shrimp importing industry. Nor is the public interest served by the continued application of a regulatory action that plaintiffs are likely to demonstrate is unreasonable and more onerous than necessary to achieve the statutory purposes of 19 U.S.C. § 1623 and the regulatory objectives of 19 C.F.R. § 113. The court recognizes, however, that the public interest is served by ensuring that any equitable remedy adopted for the pendency of the proceedings allows Customs to protect the revenue. Therefore, any injunctive relief must be fashioned in a manner that would allow for modifications under the appropriate circumstances.

E. Scope and Nature of Preliminary Injunctive Relief

Based on plaintiffs' showings of irreparable harm and likelihood of success on the merits, the court concludes that plaintiffs' amended motion for a preliminary injunction seeks relief that is overly broad. As discussed previously, only eight of the 27 plaintiffs have established that, absent a preliminary injunction, they will suffer irreparable harm. Accordingly, the court is ordering preliminary injunctive relief that, at this time, is confined to the bond status of the eight plaintiffs that made a showing of irreparable harm at the court's hearing.

With respect to the eight plaintiffs, the court's preliminary injunction order is narrower in scope than that sought by plaintiffs. Plaintiffs seek an order requiring Customs to allow any plaintiff to replace any continuous basic importer's bond that was used to enter merchandise on or after February 23, 2006. Under plaintiffs' draft order, Customs would be required to allow a plaintiff to replace such a bond "with a bond calculated without regard to antidumping or countervailing duties." *Mot. to Amend Injunctive Relief Requested*, attached *Order* at 3. Were the court to include such a provision in its preliminary injunction order, that order would restore, for most plaintiffs, the *status quo ante* rather than maintain the *status quo*. Such an order would be broader than the showing of irreparable harm that any plaintiff has made. Although the eight plaintiffs have

shown that further application of the formulas in the Amendment, the Current Bond Formulas, and the Clarification will cause them irreparable harm, they have not shown that the demonstrated irreparable harm is preventable *only* through a new bond with a limit of liability that is calculated entirely without regard to antidumping duties. Seeking such broad relief without a demonstrated factual basis presumes that no other limit of liability would suffice to preclude additional irreparable harm during the pendency of this case.

Plaintiffs' proposed order also exceeds plaintiffs' showing of likelihood of success on the merits. As discussed previously in this opinion, plaintiffs have shown a likelihood of success of demonstrating that the individual bond determinations for the eight plaintiffs were made in a way that was arbitrary and capricious. Plaintiffs attempted to, but did not, establish a likelihood of success for their argument that Customs is precluded by 19 U.S.C. § 1623 from any consideration of antidumping duties when setting limits of liability for term bonds. This is not to suggest that the court rejects plaintiffs' argument, only that the showing they have made to date falls short of a showing of likelihood of success on the merits with respect to that particular issue. Moreover, an appropriate preliminary injunction considers the balance of hardships and the public interest. The court considers these two factors to be best satisfied by preliminary injunctive relief that is sufficient to avoid the demonstrated irreparable harm during the pendency of the proceeding but that balances the scope of the relief with the government's interest in setting bond limits of liability that are adequate to protect the revenue.

As noted previously, counsel for plaintiffs, in the status report of August 21, 2006, sought a modification to the draft preliminary injunction that the court discussed with the parties at the conference of July 19, 2006. That modification would direct Customs to permit the parties to obtain a change in the limit of liability in any continuous bond obtained on or after February 23, 2006, to a limit of liability that is not determined according to the Amendment or the Clarification, using the procedures of 19 C.F.R. § 113.23(a)(1) and (d), under which Customs may approve a superseding bond. Counsel for plaintiffs informed the court in the August 21, 2006 status report that this superseding bond procedure would be intended for only two of the eight plaintiffs who introduced evidence. The evidence introduced by those two plaintiffs thus far, however, does not establish that the limits of liability in the current bonds, even when considered with the continuing liability under previous bonds, are causing the extraordinary level of harm that would require the court to order Customs to approve superseding bonds at this time. However, the preliminary injunction that the court is ordering will permit Eastern Fish and Ore-Cal, and any other plaintiff, to seek a modification of the preliminary injunction based on a demonstration of changed circumstances.

The preliminary injunction that the court will order is necessary to prevent the imminent harm that will result when the current one-year term bonds expire and must be replaced with new term bonds. As noted previously, that process will begin in December 2006 and continue over the next several months. Application of the Current Bond Formulas will add to the cumulative burden on the credit availability of the eight testifying plaintiffs. The letters of credit resulting from the first two rounds of bond sufficiency determinations already burden plaintiff-importers' credit availability, adversely affect their ability to pay, and therefore impede their ability to qualify for what otherwise would be lower bond limits. Some of the bonds issued during the second round of bond determinations contained limits of liability of $1.5 million or higher, and certain of those bonds were for amounts substantially higher than $1.5 million.

As discussed previously, counsel for defendant indicated in a status conference that the bond sufficiency reviews contemplated under the Notice are prospective only, and that Customs did not intend to review bonds currently in use by the eight plaintiffs to determine whether it is appropriate to cancel and replace the current bonds with superseding bonds with lower limits of liability. Customs stated in the Notice that "[i]f [Customs] determines that the principal has a record of compliance with customs laws and regulations and that the principal has demonstrated an ability to pay, [Customs] may decide not to require an increased bond amount even though the principal imports Special Category merchandise." *Notice*, 71 Fed. Reg. at 62,278. The court notes that the revised position by Customs as announced in the Notice is likely to prejudice some shrimp importers, including certain of the testifying plaintiffs, relative to other shrimp importers. The high limits of liability on bonds currently in place, which resulted from the application of the Current Bond Formulas with little or no discretionary relief from such application, required plaintiffs to incur substantial liability under letters of credit to secure those bonds and thereby adversely affect the plaintiffs' future ability to pay by burdening plaintiffs' credit lines. Consequently, by refusing to reconsider the damaging effects of its previous bond determinations, Customs is perpetuating the harm caused to the affected importers, which harm is likely to become more acute as a result of the impending next round of bond determinations. The court considers the threat of future harm sufficiently serious as to require the court to address it in the preliminary injunction.

The court will order Customs to begin immediately a review of each of the bonds containing limits of liability of $1.5 million or more that currently are in use by any of the eight plaintiffs that testified before the court. Five current bonds fall into this category. The court directs that the review be focused on the question of whether those bonds should be replaced with superseding bonds with lower limits of liability based on the prior record of the principal and on the other

factors identified in 19 C.F.R. § 113.13(b). The review must be completed within 60 days of the date of the Order imposing the preliminary injunction, during which period Customs must report to the court its conclusions and the reasons for its conclusions. Thus, the review must occur concurrently with the earliest of the bond sufficiency determinations that will take place upon the expiration of the term bonds currently in place for the eight testifying plaintiffs. The court requires that Customs allow the affected plaintiffs the opportunity to submit relevant information and to comment during the reviews. The court is limiting the required reviews to the five current bonds with limits of $1.5 million or above because of the exigent circumstances and the need of the court to obtain additional information concerning those five bonds.[10] However, nothing in the preliminary injunction precludes Customs from similarly reviewing other bonds of the testifying plaintiffs or any other plaintiffs, including bonds for which the term has expired or that have been terminated but otherwise remain in effect.

Future bond determinations also have a significant effect on the status of this case. Continuous bonds of two of the eight testifying plaintiffs will expire in December 2006. The court, therefore, is directing counsel for the parties to inform the court of the status of their negotiations on the limits of liability in the two continuous bonds that will be in place following the December 2006 expirations.

Finally, the appropriate preliminary injunctive relief must address the special situation presented by the current bond status of three of the testifying plaintiffs. Each is subject to an agreement not to import shrimp, or certain shrimp, that are subject to antidumping duties. One plaintiff is subject to an agreement not to import any aquaculture product subject to antidumping duties. The record reveals that plaintiffs are likely to be able to show that these conditions, which are not bond conditions but the result of side agreements in e-mail correspondence, violate the Customs regulations, including, in particular, the 30-day notice requirement of 19 C.F.R. § 113.13(c). Because these agreements appear to have been imposed contrary to the regulation and under a degree of duress, and because the conditions are causing irreparable harm to each of these three plaintiff-importers, as discussed previously, the court considers it inappropriate to allow these conditions to be enforced during the pendency of this proceeding. However, the limits of bond liability for each of these three plaintiffs may or may not be sufficient to allow

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[10] The statute, under 28 U.S.C. § 2643, provides the court with broad discretion to fashion the appropriate relief. "[T]he court . . . may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" in cases where "the [court] is unable to determine the correct decision on the basis of the evidence presented." 28 U.S.C. § 2643(b). "[T]he [court] may, in addition to the orders specified in [§§ 2643(a) and (b)], order any other form of relief that is appropriate in a civil action, including, but not limited to, . . . injunctions. . . ." 28 U.S.C. § 2643(c)(1).

Customs to protect the revenue should imports of the subject merchandise resume. The preliminary injunction order, therefore, allows Customs to seek a modification of the injunction for changed circumstances. Any change in a limit of liability must be reasonable in view of the circumstances and consistent with the purposes of 19 U.S.C. § 1623 and the guidelines of 19 C.F.R. § 113.13.

III. Other Motions

During the cross-examination of Mr. Ingalls, plaintiffs moved to strike two statements. Plaintiffs moved to strike the record of testimony proffered with respect to certain additional Customs notices of action (*i.e.*, "Customs Form 29s" or "CF 29s") that had not been included in the administrative record or submitted to the court by defendant. Plaintiffs argued that any such testimony would be hearsay because Mr. Ingalls testified that he had neither seen nor could confirm the actual existence of additional notices of action. *See* Tr. 638, 697. Plaintiffs further moved to strike, on the basis of hearsay, the portions of testimony proffered by Mr. Ingalls that relate to the three Indonesian shrimp producers who are said to have admitted to commingling Chinese shrimp. *See* Tr. 635, 708. The court reserved decision on both rulings.

The testimony elicited from Mr. Ingalls relating to the notices of action contained in Attachment D indicates that Mr. Ingalls has personal knowledge that additional notices of action had been issued. *See Def.'s Opp'n* at *Decl. of Bruce W. Ingalls* Attach. D. When asked on direct examination whether Attachment D contained "all of the CF29s that were sent to the various NFI importers," Mr. Ingalls testified "[n]o, [it] is not an exhaustive list." Tr. 638. Upon cross-examination, when asked how he knew that other CF 29s exist, Mr. Ingalls responded "[w]hen we contacted the ports to get copies [of the CF 29s], some of the ports produced them immediately and other ports didn't, so that led me to believe that there are other CF29s out there having been issued. We just didn't get copies [of the other CF 29s]." Tr. 697. Based on Mr. Ingalls's testimony, his statement appears to be based on personal knowledge. Despite plaintiffs' assertion that someone at Customs told Mr. Ingalls that other CF 29s existed, plaintiffs never so established upon the cross-examination of Mr. Ingalls. *See* Tr. 696–705. Rather, Mr. Ingalls's testimony indicates that he believes that other CF 29s exist based on the fact that Customs requested copies of the CF 29s, some of the ports immediately produced copies, and some of the ports did not. Mr. Ingalls could reach such a conclusion based on his personal knowledge of the case. Plaintiffs did not elicit testimony to the contrary. Plaintiffs' objection and motion to strike the testimony as hearsay are overruled.

Mr. Ingalls's statement that three Indonesian shrimp producers admitted to commingling shrimp, however, is an out-of-court statement offered for the truth of the matter asserted. *See* Tr. 635, 708.

Upon cross-examination, plaintiffs asked Mr. Ingalls whether he was "directly told by the Indonesian shrimp producers" as to the information concerning the admissions of commingling. Mr. Ingalls replied, "[d]irectly from the Indonesian – no." Tr. 708. Plaintiffs then asked "[w]as it something you were told by someone else at Customs," to which Mr. Ingalls replied "[y]es." *Id.* The statement is therefore double hearsay: hearsay as stated by the Customs official to Mr. Ingalls and hearsay as stated by Mr. Ingalls before the court. The court is not aware of, and defendant did not point to, an applicable exception that would allow the admission of this hearsay evidence. Defendant's assertion that the admissions by the Indonesian shrimp producers are statements against interest perhaps accounts for the statement by the Indonesian shrimp producers to the Customs official, but it does not allow for the admission of the statement by the Customs official to Mr. Ingalls, as recalled by Mr. Ingalls before the court. *See* Tr. 709. Plaintiff's objection is sustained, and the statement in question is stricken from the record of the hearing transcript.

Finally, the court grants the four additional unopposed motions that remain outstanding: plaintiffs' *Motion to Amend Injunctive Relief Requested*, filed on April 14, 2006 and consented to on May 3, 2006; plaintiffs' *Motion to Re-Open Record of Plaintiffs' Motion for Preliminary Injunction*, filed on May 5, 2006 and consented to on May 31, 2006; defendant's *Consent Motion for an Extension of Time Out of Time to Respond to Plaintiffs' Motion to Supplement the Factual Record*, filed on May 31, 2006 and unopposed by plaintiff; and plaintiffs' *Motion to Re-Open the Record for Plaintiffs' Motion for Preliminary Injunction*, filed on July 31, 2006 and unopposed by defendant.

IV. Conclusion

Upon application of the four factors that the court must consider when determining whether to order a preliminary injunction, the court concludes that the factual assertions and arguments advanced by plaintiffs establish that Eastern Fish, Ore-Cal, Red Chamber, IGF, Tampa Bay, Oriental Foods, Berdex Seafood, and Aqua Star have shown that they are entitled to preliminary injunctive relief. Plaintiffs merit preliminary injunctive relief that imposes restraints and obligations on Customs, but only to the extent required to prevent irreparable harm during the pendency of this proceeding. These eight plaintiffs have not established their entitlement to a preliminary injunction restoring a form of *status quo ante*, which would require Customs to replace current continuous bonds with new continuous bonds for which liability limits are set without regard to antidumping duty liability. The remaining 19 NFI importers have failed to establish that they will suffer immediate, irreparable harm

absent injunctive relief. The court will order preliminary injunctive relief accordingly.

Slip Op. 06–168

SICHUAN CHANGHONG ELECTRIC CO., LTD., Plaintiff, and APEX DIGITAL, INC. and TCL CORP., Pl.-Ints., v. UNITED STATES, Defendant, and FIVE RIVERS ELECTRONICS INNOVATION, LLC, INDUSTRIAL DIVISION OF THE COMMUNICATION WORKERS OF AMERICA (IUE-CWA) and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Deft.-Ints.

Before: Richard K. Eaton, Judge
Court No. 04–00266
Public Version

OPINION AND ORDER

[United States International Trade Commission's Final Determination remanded.]

Dated: November 15, 2006

Wiley, Rein & Fielding, LLP (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*), for plaintiff.

McDermott, Will & Emery, LLC (*Raymond Paul Paretzky*), for plaintiff-intervenor TCL Corp.

O'Melveny & Myers, LLP (*Veronique Lanthier*), for plaintiff-intervenor Apex Digital, Inc.

James M. Lyons, General Counsel, United States International Trade Commission; *Robin L. Turner*, Acting Assistant General Counsel, United States International Trade Commission (*Marc A. Bernstein*), for defendant.

Kelley Drye Collier Shannon, PLLC (*Mary Tuck Staley*), for defendant-intervenors.

Eaton, Judge: Before the court is plaintiff Sichuan Changhong Electric Co., Ltd.'s ("Changhong" or "plaintiff") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. By its motion, Changhong contests the final affirmative material injury determination of the United States International Trade Commission (the "Commission" or "ITC") in the antidumping duty investigation concerning certain color television receivers ("CTVs") from the People's Republic of China ("PRC").[1] *See* Certain Color Television Receivers From China, USITC Pub. 3695, Inv. No. 731–TA–1034 (Final) (May 2004), List 2, Doc. 426 ("Final Determination"); Certain Color Televi-

[1] As a manufacturer and exporter of CTVs subject to the ITC's final determination, Changhong is an "interested party" within the meaning of 19 U.S.C. § 1677(9)(A) (2000) and is thus entitled to challenge the determination.

sion Receivers From China, 69 Fed. Reg. 31,405 (ITC June 3, 2004). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000). For the reasons that follow, the court remands the Final Determination.

BACKGROUND

On May 2, 2003, the International Brotherhood of Electrical Workers, the Industrial Division of the Communication Workers of America (IUE-CWA) and Five Rivers Electronics Innovation, LLC filed an antidumping duty petition alleging that the United States CTV industry was being materially injured and was threatened with further material injury by reason of less than fair value ("LTFV") imports of CTVs from the PRC and Malaysia.[2] List 1, Doc. 1. Based on the information contained in the petition, the Commission instituted an antidumping duty investigation. Certain Color Television Receivers From China and Malaysia, 68 Fed. Reg. 25,627 (ITC May 13, 2003). A conference in connection with the investigation was held on May 23, 2003, and all persons requesting the opportunity were permitted to appear. Certain Color Television Receivers From China and Malaysia, 68 Fed. Reg. 38,089 (ITC June 26, 2003) (prelim.). Interested parties filed briefs on May 29, 2003. *See, e.g.*, List 2, Docs. 42–46. On the basis of the record developed in the investigation, the ITC preliminarily determined that there was a "reasonable indication that an industry in the United States [was] materially injured by reason of imports" of the subject merchandise. 68 Fed. Reg. at 38,089.

Following its preliminary determination, the ITC published a schedule for the final phase of its investigation. Certain Color Television Receivers From China and Malaysia, 69 Fed. Reg. 3601 (ITC Jan. 26, 2004) ("Scheduling Notice"). Issued on January 20, 2004, the Scheduling Notice established a timetable for the remainder of the ITC's investigation: (1) "The prehearing staff report . . . will be placed in the nonpublic record on April 1, 2004"; (2) "The Commission will hold a hearing . . . on April 15, 2004. . . . Requests to appear . . . should be filed . . . on or before April 7, 2004"; (3) "Each party who is an interested party shall submit a prehearing brief to the Commission. . . . [T]he deadline for filing is April 8, 2004"; (4) "The deadline for filing posthearing briefs is April 22, 2004"; (5) "On

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[2] The United States Department of Commerce's ("Commerce") investigation was initiated for both Malaysia and the PRC. Certain Color Television Receivers From Malaysia and the PRC, 68 Fed. Reg. 32,013 (ITA May 29, 2003). As a result of the investigation, Commerce determined that imports from Malaysia were not sold at LTFV. Certain Color Television Receivers From Malaysia, 69 Fed. Reg. 20,592 (ITA Apr. 16, 2004). The Commission terminated its investigation with respect to CTVs from Malaysia, effective April 16, 2004. Certain Color Television Receivers From Malaysia, 69 Fed. Reg. 22,093 (ITC Apr. 23, 2004). As such, imports from Malaysia are not the subject of this litigation.

May 7, 2004, the Commission will make available to parties all information on which they have not had an opportunity to comment"; (6) "Parties may submit final comments on this information on or before May 11, 2004, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules." *Id*. at 3601–02.

The Commission conducted its investigation according to the Scheduling Notice. Interested parties submitted questionnaire responses and pre-hearing briefs in March and April 2004. On April 15, 2004, the ITC held a day-long hearing where several parties presented testimony. The arguments made at the hearing prompted a reevaluation of the record information documenting the domestic industry's financial performance. This reevaluation led the Commission to conclude that it lacked the most recent financial data relating to the domestic industry. On April 21, 2004, Commission staff sent e-mail messages to domestic producers of CTVs whose fiscal years ended on March 31, 2003, asking for updated financial data for calendar year 2003. List 2, Docs. 308, 309, 313, 314. On April 29 and May 4, 2004, the domestic producers furnished the ITC with the requested information ("updated financial information"). In the aggregate, the domestic producers' submissions averaged under ten pages in length. List 2, Docs. 324, 325, 326, 336.

On May 6, 2004, the Commission placed on the record a memorandum, which contained a one-page digest of the updated financial information provided by the domestic CTV producers. List 2, Doc. 398. In accordance with the dates in the Scheduling Notice, the updated financial data was released to the parties, including Changhong, on May 7, 2004. Changhong and the other Chinese respondents filed their final comments on the updated financial information on May 11, 2004. List 2, Doc. 407. Pursuant to Commission regulations, the parties' final comments were not to exceed fifteen pages. 19 C.F.R. § 207.30(b) (2004). Changhong submitted ten pages of comments, of which one and one-quarter pages discussed the updated financial information. List 2, Doc. 407 at 6–7. On May 27, 2004, on the basis of the record developed in the investigation, the ITC determined that "an industry in the United States is materially injured by reason of imports of certain color television receivers from China that are sold in the United States at less than fair value. . . ." Final Determination at 3.

STANDARD OF REVIEW

When reviewing a final determination in an antidumping or countervailing duty investigation, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is such relevant evidence as a reasonable mind might ac-

cept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a mere scintilla." *Consol. Edison*, 305 U.S. at 229. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

A. Changhong's Due Process Claim

Changhong argues that the ITC deprived it of a right to "participate meaningfully" in the ITC's investigation. Pl.'s Conf. Revised Br. Supp. Mot. J. Agency R. ("Pl.'s Supp. Br.") at 4. Changhong styles this claim as a due process violation, but it does not challenge the constitutionality of either the antidumping statute or the Commission's regulations, nor does it contend the ITC failed to comply with its regulations. Pl.'s Revised Conf. Reply Br. ("Pl.'s Reply") at 4 ("Changhong has never claimed that the ITC did not comply with its regulations.").

In its opening brief, Changhong claims that "[b]ecause [it] was given only four days to review and comment on [the updated financial] information, it had no real opportunity to analyze the information, conduct further research, and develop and submit its own information and arguments in response." Pl.'s Supp. Br. at 10 (emphasis omitted). In its reply brief, however, Changhong seems to retreat from this position and argues instead that the "issue is not whether [it] should have been accorded more time to comment on the information, but whether its inability to submit new factual information prejudiced its ability to make meaningful comments." Pl.'s Reply at 5–6. Changhong asserts that the updated financial information was important to the ITC's finding that the profitability of the domestic industry decreased between 2001 and 2003, and that it was prejudiced by not having the opportunity to submit new factual information of its own to show that "declining production and profitability in the domestic industry was a consequence of [a] shift to non-subject countries. . . ." Pl.'s Supp. Br. at 14. Changhong thus seeks a remand to the Commission with instructions to permit the parties to "submit new factual information" on the domestic industry's financial condition in 2003 and the first quarter of 2004. Pl.'s Reply at 9. The court shall address both of Changhong's arguments.

It is well established that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (citations omitted). In order to succeed in its due process claim, then, Changhong must show that its opportunity

to be heard was unreasonably curtailed. *See Borden, Inc. v. United States*, 23 CIT 372, 375 n.3 (1999), *rev'd on other grounds*, 7 Fed. Appx. 938 (Fed. Cir. 2001).

Here, the primary basis for Changhong's due process claim is that it was denied a meaningful opportunity to participate in the administrative proceeding by having only four days to review and comment on the updated financial information and by not being permitted to submit new factual information. Pl.'s Supp. Br. at 10. This Court has stated that, at a minimum, the ITC must adhere "to the procedures which Congress has set out in the statutes and [the ITC] has implemented in regulations." *PPG Indus., Inc. v. United States* 13 CIT 183, 190, 708 F. Supp. 1327, 1332 (1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992).[3]

The statutory and regulatory provisions relevant to Changhong's claim are set forth in 19 U.S.C. § 1677m(g) and 19 C.F.R. § 207.30. Subsection 1677m(g) of the antidumping statute, entitled "Public comment on information," provides:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section 1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

19 U.S.C. § 1677m(g). The regulation that implements this provision expands upon § 1677m(g)'s instruction to afford the parties advance notice of the time within which to comment upon information submitted to, or collected by, the ITC. Section 207.30 provides that "the Commission shall specify a date on which it will disclose to all parties . . . all information it has obtained on which the parties have not previously had an opportunity to comment." 19 C.F.R. § 207.30(a). Subsection (b) of the regulation provides:

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[3] Changhong relies heavily on the *PPG Industries* case, where the court remanded the matter to Commerce to reopen and supplement the record with a document Commerce stated it had relied upon in making its determination, but which the parties had neither seen nor commented upon prior to the litigation before this Court. Pl.'s Supp. Br. at 10–11. On remand, the parties were permitted to review and comment on the omitted document. Here, it is undisputed that the updated financial information relied upon by the ITC was placed on the record and was the subject of comment by the parties. Thus, *PPG Industries* is of no benefit to Changhong.

> The parties shall have an opportunity to file comments on any information disclosed to them after they have filed their posthearing brief. . . . Comments shall only concern such information, and shall not exceed 15 pages of textual material. . . . A comment may address the accuracy, reliability, or probative value of such information by reference to information elsewhere in the record. . . . Comments containing new factual information shall be disregarded.

19 C.F.R. § 207.30(b). Like the statute it implements, § 207.30 provides that parties will have an opportunity to comment on previously undisclosed information following the filing of their post-hearing briefs. The statute's requirement that the Commission disregard new factual information is reiterated in the regulation by its statement that the comments themselves may only address the "accuracy, reliability, or probative value" of information on the record by reference to information already present elsewhere in the record.

There is no dispute that the ITC complied with the relevant statute and regulations. Indeed, as noted above, Changhong concedes as much. Pl.'s Reply at 4. The ITC provided the parties, including Changhong, an opportunity to comment on the updated financial information as provided in the Scheduling Notice. Scheduling Notice, 69 Fed. Reg. at 3602 ("On May 7, 2004, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before May 11, 2004. . . ."). Changhong did, in fact, avail itself of the opportunity and submitted comments on May 11, 2004.

In its initial papers, Changhong expends considerable argument on the amount of time afforded it to comment on the updated financial information. Pl.'s Supp. Br. at 5, 6–12 ("Changhong was given access to this information only four days before the Commission closed the record . . . depriving Changhong of any meaningful opportunity to analyze or rebut this information. . . ."). Changhong essentially argues that had it had more time to prepare comments on the updated financial information, it potentially could have found holes in the data and rebutted the usefulness of the information more successfully. Rather than point to the specific information with which it would have found fault, however, plaintiff merely asserts that "[w]ith a reasonable amount of time, Changhong could have at least attempted to develop information addressing" the factual issues allegedly raised by the updated financial information. *Id*. at 16.

This argument, of course, could be made in nearly any investigation. With more time most parties could improve the quality of their comments. Nonetheless, the Commission complied with the statute and its regulations, which provide for an opportunity to comment while bringing an investigation to an orderly end. In addition, the ITC maintained the schedule it had established from the first, and

Changhong did, in fact, submit comments on the new data. Finally, there is no evidence that given more time Changhong would have, in fact, provided more meaningful comments.

Nor can Changhong make a claim of prejudice based on its alleged "inability to submit new factual information. . . ." Pl.'s Reply at 5. When an investigation is coming to a close, the antidumping statute specifically directs the Commission to disregard new factual information. 19 U.S.C. § 1677m(g). The implementing regulation echoes this restriction and further directs that the final comments themselves may not reference new factual information, but only that information already in the record. 19 C.F.R. § 207.30(b). This Court has found that limiting the submission and consideration of new factual information is reasonable because an agency "clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information." *Böwe-Passat v. United States*, 17 CIT 335, 339 (1993) (not published in the Federal Supplement).

For the foregoing reasons, the court finds that the four-day period in which Changhong could submit final comments conformed to its long-established schedule and provided an adequate period for the submission of comments, which Changhong took advantage of. In addition, the statutory and regulatory provisions set forth in 19 U.S.C. § 1677m(g) and 19 C.F.R. § 207.30 are a reasonable means to bring an administrative procedure to closure.

B. Changhong's Causation Claim

Next, Changhong challenges the ITC's finding that subject imports caused material injury to the domestic industry.[4] Changhong contends that "[t]he Commission failed to consider other factors that affected the performance of the U.S. industry, especially the impact of non-subject imports, and so failed in its duty to ensure that injury from other factors was not attributed to the subject imports." Pl.'s Supp. Br. at 16–17. In particular, it asserts that the ITC failed to "assess . . . sufficiently . . . whether [non-subject imports from Thailand] . . . severed the causal connection between the subject imports and injury." Pl.'s Reply at 12–13.

To make an affirmative material injury determination, the ITC must find both "(1) present material injury and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997) (citation omitted). With respect to the latter finding, the United States Court of Appeals for the Federal Circuit has held that "[a]s long as its effects are not merely incidental, tangential or trivial, the foreign

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[4] Changhong does not contest the ITC's volume, price effects and impact determinations, made pursuant to 19 U.S.C. § 1677(7)(C)(i)–(iii), which form the basis of the ITC's materiality finding.

product sold at less than fair value meets the causation requirement." *Nippon Steel Corp. v. United States Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) (citation omitted). In determining causation, "the Commission must analyze 'contradictory evidence or evidence from which conflicting inferences could be drawn' . . . to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way." *Taiwan Semiconductor Indus. Ass'n v. United States*, 266 F.3d 1339, 1344 (Fed. Cir. 2001) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994); citing *Gerald Metals*, 132 F.3d at 722). In other words, the ITC "must distinguish between harm that is caused by imports and harm that is caused by other factors; in determining injury, it cannot attribute to imports the impact of other factors." *Altx, Inc. v. United States*, 370 F.3d 1108, 1120 (Fed. Cir. 2004) (citation omitted).

In keeping with these injunctions, cases have expanded on the necessary inquiry the ITC must conduct by holding that, under certain circumstances, the ITC must consider the effects of non- subject imports. *See Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006) ("Where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers."); *Caribbean Ispat, Ltd. v. United States*, 450 F.3d 1336, 1341 (Fed. Cir. 2006) (remanding to ITC for further consideration where ITC had found "high level of fungibility" between subject and non-subject imports but had not addressed whether non-subject imports would replace subject imports without any beneficial effect on the domestic industry); *Gerald Metals*, 132 F.3d at 720 (remanding where subject and non-subject Russian imports of pure magnesium were "perfect substitutes"). Thus, to sustain a finding of material injury, the court must (1) be able to discern how the Commission ensured that it did not attribute the injury from other sources to the subject imports; and as shall be seen, (2) under certain circumstances, be able to determine that, following issuance of an antidumping order, the injury would not continue by reason of non-subject imports. *Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT 410, 416, 59 F. Supp. 2d 1324, 1330–31 (1999), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001); Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–826(I), at 851–52 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4184–85; *Bratsk*, 444 F.3d at 1373.

Here, the ITC did take into account non-subject imports in making its volume, price effects and impact determinations under 19 U.S.C. § 1677(7)(B). *See, e.g.*, Conf. Staff Report at E–6–7 & Tbls. E–12,

II–3, II–4, IV–2, IV–4, IV–5, V–2, V–4, V–5 & V–6. Nonetheless, as discussed *infra* in section B(4), the court finds remand appropriate, in light of the Federal Circuit's holdings in *Bratsk* and *Caribbean Ispat*, which were issued after the Final Determination was made. A brief description of the findings made by the Commission will illustrate why this remand is appropriate.

(1) *Volume*

The ITC concluded that under 19 U.S.C. § 1677(7)(C)(i), "the volume and increase in volume of subject imports, both in absolute terms and relative to consumption in the United States, [were] significant." Final Determination at 22; 19 U.S.C. § 1677(7)(C)(i). In its volume analysis, the ITC found that between 2001 and 2003 the record evidence showed increases in the total quantity of subject imports,[5] U.S. shipments of subject imports[6] and the share of apparent U.S. consumption represented by U.S. shipments of subject imports.[7] Final Determination at 19–20.

The ITC also considered non-subject imports. This consideration is evident in its findings with respect to market share. The ITC found that the "subject imports gained market share at the expense of both the domestic industry and nonsubject imports . . . in some of the most significant CTV size ranges." Final Determination at 20. For example, the ITC examined analog direct-view CTVs with a 4 x 3 aspect ratio in size ranges: 27 to 30 inches; 24 to 25 inches; and the combined category of 24 to 30 inches. *Id*. at 20–22. In these size ranges, the quantity of shipments of subject imports and the share of total U.S. shipments represented by the subject imports increased. Non-subject import measures, however, decreased. Specifically, non-subject imports from Mexico decreased in absolute terms, and the share of total shipments represented by non-subject imports and the domestically produced product declined as well. *Id*. at 20–22 (citing Conf. Staff Report at E–6–7 & Tbl. E–12). After considering the record evidence regarding subject and non-subject imports, the Commission concluded that the increase in subject import volume, in absolute terms and relative to apparent consumption, was significant.

(2) *Price Effects*

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[5] "[T]he quantity of subject imports increased from 56,000 units in 2001 to 1.3 million units in 2002 and then to 1.8 million units in 2003." Final Determination at 19 (citing Conf. Staff Report, Tbl. IV–2).

[6] United States shipments of subject imports increased from [[ ]] units in 2001 to [[ ]] in 2002 and then to [[ ]] in 2003. Final Determination at 19 (citing Conf. Staff Report, Tbl. IV–3).

[7] The share of apparent U.S. consumption represented by subject imports increased from [[ ]] percent in 2001 to [[ ]] percent in 2002 and then to [[ ]] percent in 2003. Final Determination at 19–20 (citing Conf. Staff Report, Tbl. IV– 5).

Next, with respect to price effects, the ITC concluded that "there has been significant price underselling by the subject imports and that the effect of such imports has been to depress prices for the domestic like product to a significant degree." Final Determination at 27; 19 U.S.C. § 1677(7)(C)(ii)(I)–(II). In its price effects analysis, the ITC considered underselling and price depression, as required by § 1677(7)(C)(ii)(I)–(II). It found that the subject imports undersold the domestic like product in 26 out of 28 comparisons. Final Determination at 23 (citing Conf. Staff Report, Tbls. V–2, V–4, V–5 & V–6).

In determining the significance of the observed underselling by subject imports, the ITC considered data showing that non-subject imports from Mexico also frequently undersold the domestic like product. The ITC further noted that "subject imports from China also undersold imports from Mexico in 16 of 23 quarterly comparisons." *Id*. The non-subject data collected permitted a comparison of quarterly prices of imports from Mexico and Malaysia, which indicated "[p]rices for subject imports were lower than prices for nonsubject imports from any source in 14 of 28 quarterly observations. Thus, the pricing data . . . show that subject imports were frequently the lowest-priced products in the market." *Id*. (citing Conf. Staff Report, Tbls. V–2, V–4, V–5 & V–6).

The ITC found that U.S. CTV prices declined during the period of investigation and that "the subject imports, frequently the lowest-priced product in the market, were a significant cause of price declines." Final Determination at 25. Questionnaire responses submitted by CTV purchasers indicated that price was a "very important" factor in their purchasing decisions. *Id*. at 16 (noting 26 of 30 purchasers indicated price as "very important" factor; citing Conf. Staff Report, Tbl. II–15). In light of the price competition found to exist among CTVs, the ITC sent questionnaires to domestic producers, importers and purchasers, asking them to attribute the cause of U.S. CTV price declines to imports from specific countries. Conf. Staff Report, Tbls. II–3 & II–4. "On average, producers attributed 73 percent of this cause of price decline to subject imports, importers 50 percent, and purchasers 56 percent." Final Determination at 25 (citing Conf. Staff Report, Tbl. II–4). The ITC found that "the subject imports have had significant price-depressing effects on prices for the domestic like product." *Id*. at 26.

(3) *Impact*

Finally, with respect to impact, the ITC "conclud[ed] that the subject imports have had a significant adverse impact on the domestic CTV industry." Final Determination at 33; 19 U.S.C. § 1677(7)(C)(iii). The ITC considered the factors enumerated in the

statute.[8] The ITC found the record evidence showed declines in output related indicators. For example, production, capacity utilization and the domestic industry's share of U.S. apparent consumption declined in the face of overall increases in capacity and apparent U.S. consumption. Final Determination at 28 (citing Conf. Staff Report, Tbl. III–6).[9]

The ITC's findings with respect to the volume and market penetration of the subject imports, adverse price effects of the subject imports and "the causal linkage between the subject imports and the domestic industry's declines in output, market share, employment, and operating performance" led to the ITC's conclusion that the "subject imports have had a significant adverse impact on the domestic CTV industry." *Id.* at 33.

(4) *Consideration of Non-Subject Imports*

The court finds Changhong's argument that the ITC did not consider record evidence pertaining to non-subject imports from Thailand, to be without merit. While the Final Determination specifically discussed non-subject imports from Mexico, the staff report contains information about Thai, Korean, Malaysian and other non-subject imports.[10] *See, e.g.*, Conf. Staff Report, Tbl. IV–2. It is presumed that the ITC considered all of the evidence placed before it, and here, the

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[8] Subsection 1677(7)(C)(iii) lists the following economic factors, which the ITC must consider in the context of the business cycle and conditions of competition of the affected industry:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii).

[9] In addition, the ITC expressly addressed the respondents' argument that "declines in the domestic industry's domestic shipments of CTVs were . . . offset by increases in the domestic producer's shipments of non-[cathode ray tube] televisions," finding that the decline in the domestic industry's CTV shipments was many times greater than the increase in domestic producers' U.S. shipments of non-cathode ray tube televisions during the period of investigation. Final Determination at 30 (citing Conf. Staff Report, Tbl. E–13).

[10] The ITC specifically discussed non-subject imports from Mexico in the Final Determination. It is undisputed that Mexico was the largest source of non-subject imports during the period of investigation. Pl.'s Supp. Br. at 20 & Tbl. 1 at 17; Def.'s Opp'n Mem. at 22. The ITC explained that subject imports were priced lower than not only the domestic like product but also non-subject imports. Final Determination at 23 ("[S]ubject imports from China also undersold imports from Mexico in 16 of 23 quarterly comparisons.").

ITC clearly considered non-subject imports from a number of countries in reaching its causation determination. *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988) ("[A]bsent some showing to the contrary, the Commission is presumed to have considered all of the evidence in the record.") (citations omitted). "This is especially true where the facts allegedly ignored were presented to the Commission at an open hearing," as facts pertaining to Thailand were here. *Id.; see, e.g.*, Tr. Public Hearing at 169, 178, 206, 221; Pl.'s Supp. Br. at 24 ("In this case, Changhong and the other Chinese producers presented detailed arguments regarding the impact of non-subject imports on the domestic industry." (citations to record omitted)).

It is apparent that the ITC took the necessary steps to ensure that it did not attribute injury caused by non-subject imports to the subject imports. To the extent Federal Circuit precedent requires the ITC to make "a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers," however, the court finds remand appropriate. *Bratsk*, 444 F.3d at 1375; *Caribbean Ispat*, 450 F.3d at 1341. In doing so the court recognizes that in *Bratsk* and *Caribbean Ispat*, the subject imports were found to be highly fungible, price-sensitive commodities that could be replaced by non-subject imports without benefit to the domestic industry. Here, there has been no showing that CTVs are "commodity products," nor has the ITC made a finding of "high fungibility" among subject and non-subject imports. Thus, it may be that the analysis the court required in those cases does not apply here. Nonetheless, because the Final Determination was issued before the Federal Circuit's decisions in *Bratsk* and *Caribbean Ispat*, the court remands this matter to the ITC to explain (1) whether the "specific causation determination" required in those cases applies here; and (2) whether the Final Determination otherwise complies with the Federal Circuit's requirements in making its causation determination. If the ITC finds its causation analysis deficient in any respect in light of *Bratsk* and other Federal Circuit case law, it must adjust its analysis accordingly.

CONCLUSION

For the foregoing reasons, the court remands the matter to the ITC. Remand results are due on February 7, 2007, comments are due on March 9, 2007, and replies to such comments are due on March 20, 2007.

Slip Op. 06–176

MORRIS COSTUMES, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 05–00184

[Plaintiff's Motion for Summary Judgment is DENIED; Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) is GRANTED; Defendant's Cross-Motion for Summary Judgment is GRANTED.]

Dated: December 6, 2006

Alston & Bird, LLP, (*Jason Matthew Waite* and *Bobbi Jo Shannon*) for Plaintiff Morris Costumes, Inc.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *Marcella Powell*, Department of Justice, Civil Division, Commercial Litigation Branch, *Beth Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiff Morris Costumes, Inc. ("Morris Costumes") challenges the decision of the United States Bureau of Customs and Border Protection ("CBP" or "Customs") to liquidate the subject entries as wearing apparel rather than as festive articles under 9505.90.6000, Harmonized Tariff Schedule of the United States ("HTSUS"). Defendant agrees to the jurisdiction of this court over Plaintiff's cause of action arising under 19 U.S.C. § 1520(c),[1] but disputes jurisdiction over Plaintiff's cause of action brought under 28 U.S.C. § 1581(i). Because Plaintiff could have asserted jurisdiction under 28 U.S.C. § 1581(a), and because there was no mistake of fact on the part of Customs to satisfy the requirement of 19 U.S.C § 1520(c), Plaintiff's Motion for Summary Judgment is denied. For these same reasons, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) and Defendant's Cross-Motion for Summary Judgment are granted.

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[1] 19 U.S.C. § 1520(c) was repealed by Pub. L. 108–429, Title III, § 2105 (December 3, 2004).

II
BACKGROUND

Morris Costumes imports flimsy textile costumes and costume accessories into the United States, which, prior to the spring of 2002, it classified as festive articles under 9505.90.6000, HTSUS. On February 19, 2002, the court issued an opinion in *Rubie's Costume Co. v. United States*, 26 CIT 209, 196 F. Supp. 2d 1320 (2002) ("*Rubie's I*"), overturning CBP's administrative determination and finding that flimsy textiles are to be classified as wearing apparel instead of festive articles.[2] Accordingly, Morris Costumes began to classify its flimsy costumes under dutiable provisions, mainly as wearing apparel in chapters 61 and 62, HTSUS. Complaint ¶ 9, *Morris Costumes, Inc. v. United States*, No. 05–00184 (CIT March 3, 2004) ("Complaint"). Subsequently, on April 22, 2002, a Notice of Appeal was filed by Rubie's Costumes, and CBP determined that liquidation of entries of the subject merchandise was to be suspended pending the outcome of the case. *Id*. Nevertheless, Plaintiff's merchandise was automatically liquidated between March 7, 2003 and August 8, 2003, after the suspension was in effect but before the appellate decision in *Rubie's I* was rendered. Plaintiff's Statement of Undisputed Material Facts at 2. At that time no Customs employee knew whether or not the subject entries contained merchandise subject to the *Rubie's I* suspension. Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts, ¶ 7.

On August 1, 2003, the Court of Appeals for the Federal Circuit reversed *Rubie's I* in *Rubie's Costume Co. v. United States*, 337 F.3d 1350 (Fed. Cir. 2003) ("*Rubie's II*"), holding that flimsy textile costumes are to be classified as festive articles. Importers were subsequently directed by CBP to classify their flimsy textile costumes accordingly. On February 9, 2004, Morris Costumes filed a request for reliquidation with CBP under 19 U.S.C. § 1516(f) and, alternatively, under 19 U.S.C. § 1520(c), both of which were denied by Customs.[3] Complaint ¶ 19. Plaintiff protested the denial of the claim under 19 U.S.C. § 1520(c), which was also denied by CBP.[4] *Id*.

Motions under review in this opinion are Plaintiff's Motion for Summary Judgment, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Defendant's Cross-Motion for Summary Judgment. Oral Argument was held on October 18, 2006.

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[2] The parties do not dispute that the subject entries are of the same character as those in *Rubie's I*, and therefore are governed by the rulings in that case and its appeals.

[3] Case No. 1512–04–20001 and internal advice ruling letter HQ 230500 (Jan. 19, 2005).

[4] Protest number 1512–05–100009.

III
STANDARD OF REVIEW

In determining the outcome of a motion for summary judgment, the court must examine whether there remain any "genuine issues of material fact" in dispute on the matter. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202, 211 (1986). The inquiry therefore is not into factual matters, but whether either party is entitled to a judgment as a matter of law.[5]

IV
DISCUSSION

A
The Court Lacks Jurisdiction under 28 U.S.C. § 1581(i) because 28 U.S.C. § 1581(a) was Available to Plaintiff

Plaintiff argues that CBP is required to reliquidate the subject entries in accordance with *Rubie's II* because they are "of the character of the merchandise" reviewed in that decision. Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Plaintiff's Brief") at 6 (citing 19 U.S.C. § 1516(f)). According to Morris Costumes, this court has both inherent ancillary jurisdiction over the matter in order to determine the scope and effect of *Rubie's II* and jurisdiction under 28 U.S.C. § 1581(i)(1),(4). *Id*. Additionally, Plaintiff states that it was not required to protest the original liquidations of the subject entries as a condition of relief because section 1516 is an exception to section 1514's mandate for "final and conclusive" determinations and requires suspension of liquidation proceedings by the Government. *Id*.

Defendant counters that the court lacks jurisdiction over Morris Costumes's claim because it failed to file protests over the liquidations of the entries at issue. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) and Cross Motion for Summary Judgment ("Defendant's Brief") at 7. First, according to Customs, Plaintiff's failure to protest the liquidation as required by 19 U.S.C. § 1514(a)[6] is dispositive in this case because section 1516 is only exempted from section 1514's finality as it applies to domestic parties, and Plaintiff is an importer. *Id*. at 9. Second, it concludes that Morris Costumes

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[5] Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R.56(c).

[6] 19 U.S.C. § 1514(a) provides for the finality of all decisions by Customs unless the subject entries fall under an exempted section, such as section 1516, or a protest is timely filed in accordance with the statute.

could have obtained relief through section 1581(a) if it had chosen to utilize the protest procedure provided for therein. *Id.* at 7.

1

For This Court to Have Jurisdiction Under 28 U.S.C. § 1581(i), Jurisdiction Must Not be Available Under any Other Subsection of Section 1581.

This court has jurisdiction under 28 U.S.C. § 1581(i) when there is no jurisdiction available under any other subsection of section 1581 in civil actions concerning:

> (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). . . .

28 U.S.C. § 1581(i) (emphasis added).

Section 1581(i) therefore "should not be utilized to circumvent the exclusive methods of judicial review . . . set forth in 19 U.S.C. § 1516(a)," nor can it be used to create new causes of action or supercede specific jurisdictional requirements set forth elsewhere in the statute. *Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 586, 717 F. Supp. 847, 849 (1989). As section 1581(a) confers on the court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part," 28 U.S.C. § 1581(i) jurisdiction is not available in this case if Plaintiff had the option of protesting the classification and liquidation and failed to do so.

Allowing jurisdiction in that circumstance would first undermine the express language of the statute that section 1581(i) is "in addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section. . . ." *Id.* Additionally, the legislative history of the statute illustrates that "Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557–58 (Fed. Cir. 1988) (quoting *United States v. Uniroyal, Inc.*,

687 F.2d 467, 471, 69 C.C.P.A. 179, 182 (1982)); *see also Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate."). If 28 U.S.C. § 1581(a) was available to Plaintiff as an avenue for jurisdiction, and is not manifestly inadequate, there can be no jurisdiction under 28 U.S.C. § 1581(i).

Barring exceptions, jurisdiction in this court fails without a properly filed protest because of the finality provision found in 19 U.S.C. § 1514(a). The statute states that:

> any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) 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 the United States Court of International Trade. . . .

Id.

Included in the exemptions from section 1514's finality provision is 19 U.S.C. § 1516,[7] as "relating to petitions by domestic interested parties." *Id*. Plaintiff, an importer, is therefore not exempted from the protest requirement in section 1514, as 19 U.S.C. § 1516 is by the statute's plain language exempted only as it relates to "petitions by domestic interested parties." 19 U.S.C. § 1514(a). Morris Costumes is not exempted from the section 1514 protest requirement because it is not a domestic interested party as specified by the statute for exemption.

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[7] Under 19 U.S.C. § 1516 entries of the kind reviewed in a pending judicial decision are to be suspended until they can be liquidated in accordance with the final judicial decision in the case. 19 U.S.C. § 1516(f). The statute in pertinent part reads:

> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision. . . .

Id. Accordingly, Plaintiff is correct in its assertion that under the circumstances of the pending *Rubie's II* litigation Customs was expected to suspend the liquidation of entries covered by the determination.

2

Automatic Liquidations by CBP are Protestable, and Therefore 28 U.S.C. § 1581(a) Applies to Plaintiff's Claim.

Plaintiff further argues that because the liquidations made by CBP were automatic, Customs's actions were not protestable and 28 U.S.C. § 1581(a) does not apply. Plaintiff's Brief at 10 (citing *LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 991 F. Supp. 668 (1989).

Plaintiff also states that even if the liquidations were protestable, Customs would have been required to deny the protest because *Rubie's II* was pending at the time, rendering jurisdiction under section 1581(i) the only option remaining in section 1581. *Id.* at 10–11.

Defendant counters that the liquidations under the current section 1514 are unlike the entries in *LG Electronics* because of subsequent amendments to the statute,[6] and were therefore protestable. Defendant's Brief at 11. The Government further notes that a protest may be suspended under Customs Directive 099–3550–065,[7] and thus Morris Costumes had the opportunity to have its protest suspended until the final outcome in *Rubie's II*, or alternatively, if suspension were denied to appeal to this court for relief. Reply Memorandum in Further Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) and Cross-Motion for Summary Judgment ("Defendant's Reply") at 2.

Plaintiff mistakenly relies on *LG Electronics* for the proposition that automatic liquidations do not constitute "decisions" under 19 U.S.C. § 1514(a). There, the court's decision regarding the protestability of automatic liquidation decisions turned on the statutory language specifying that a decision was to be made by an "appropriate customs officer." *LG Electronics*, 991 F. Supp. at 673. The Customs Modernization Act ("Mod Act"), Pub. L. 103–82, § 638(1) (1993), amended 19 U.S.C. §§ 1500 and 1514(a) to allow for liquidation by "Customs Service" rather than the individual "appropriate customs officer." *Id.* at 673 n.8. The amendment thus broadens the applicability of the protest requirement to include all decisions of the Customs Service, not merely those made by an individual officer. Accordingly, automatic liquidations are protestable under 19 U.S.C. § 1514, and section 1581(a) is the proper jurisdictional statute.

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[6] The Customs Modernization Act, Pub. L. 103–82, § 638(1), enacted and effective on December 8, 1993, changed 19 U.S.C. §§ 1500 and 1514(a) by substituting "Customs Service" for "appropriate customs officer." For example, the amended statute required that "[w]hen a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly," whereas it previously provided for an "appropriate customs officer, which shall take action accordingly." 19 U.S.C. § 1514(a).

[7] Revised Protest Directive, No. 099–3550–065 (August 4, 2003).

Further, Plaintiff's argument that any protest filed by Morris Costumes would necessarily have been denied by CBP due to the pending *Rubie's II* litigation, therefore rendering section 1581(i) the only jurisdictional option, is misplaced. Morris Costumes could have filed its protest to the liquidations followed by a request for suspension of the protest pending the outcome of the litigation under Customs Directive 099–3550–065. If, after filing the protest and request, both were denied by CBP, Morris Costumes could then have turned to this court for relief. 19 U.S.C. § 1514(a). Therefore, in this case the appropriate procedure for Morris Costumes to challenge Customs's automatic liquidation of the subject entries was to protest the decision within ninety days of the liquidation and then, if unsuccessful, to appeal to this court in order to challenge the government's determination, as prescribed by 19 U.S.C. § 1514(a). Because this option was available to Morris Costumes and it failed to protest the liquidations within the allotted time, this court cannot have jurisdiction under 28 U.S.C. § 1581(i).

3

There is No Ancillary Jurisdiction in This Case Because the Facts are Not Interdependent With Those in *Rubie's II*.

In addition, Morris Costumes argues that the court has inherent ancillary jurisdiction to determine the effect of *Rubie's II* on entries of merchandise that fall under that decision. Plaintiff's Brief at 19 (citing *Heartland By-Products v. United States*, 424 F.3d 1244 (Fed. Cir. 2005)). The Government responds that ancillary jurisdiction is not conferred on the court merely because the subject entries were of the same character as those in the *Rubie's II* decision.

As noted in *Heartland By-Products*, though all federal courts have ancillary jurisdiction as part of their inherent power to enforce their judgments, "the Supreme Court has 'cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree.' " *Heartland By-Products*, 424 F.3d 1244 at 1252 (quoting *Peacock v. Thomas*, 516 U.S. 349, 357–59, 133 L. Ed. 2d 817, 116 S. Ct. 862 (1996)). In this case, though the subject entries are of the same character as those in *Rubie's II*, this court made no ruling on the specific entries in question. Additionally, Morris Costume's entries are not sufficiently "factually interdependent" as required by the Supreme Court. *See Peacock*, 516 U.S. 349 at 354–55 (holding that a federal court may exercise ancillary jurisdiction "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage it proceedings, vindicate its authority, and effectuate its decrees"). Because the court has never before ruled on the entries at issue, and as the *Rubie's II* entries, though similar in character, are not "factually in-

terdependent" with the entries in this case, this court does not have ancillary jurisdiction over the issues at hand.

Protesting the liquidation of the subject entries was a viable and adequate option for Morris Costumes at the time of CBP's decision. This court therefore cannot have jurisdiction over the matter under 28 U.S.C. § 1581(i), because to do so would be to allow the plaintiff to circumvent the protest procedure of section 1514 in a way that Congress clearly did not intend. As Morris Costumes failed to protest the liquidation of the subject entries as required by 19 U.S.C. § 1514(a), this court lacks jurisdiction under 28 U.S.C. § 1581(a). This court further has no ancillary jurisdiction over the matter, and therefore Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) must be granted.

B
There was no Mistake of Fact by Customs to Qualify the Subject Entries for Reliquidation under 19 U.S.C. § 1520(c)

Morris Costumes asserts that CBP's error in liquidating the subject entries constituted a mistake of fact or other inadvertence under 19 U.S.C. § 1520(c)[8], and Morris Costumes is therefore entitled to reliquidation. Plaintiff's Brief at 22. According to Plaintiff, CBP's lack of knowledge that the liquidation of the subject entries should have been suspended pending the *Rubie's II* decision was a mistake of fact rather than of law because it was a lack of knowledge of the physical nature of the merchandise, and CBP made no legal determinations about the subject entries because they were liquidated automatically. *Id*. at 24, 26.

The Government counters that there was no mistake of fact under 19 U.S.C. § 1520(c) because the entries were liquidated prior to *Rubie's II* and the classification was, at the time, consistent with the law. Defendant's Brief at 14–16. Customs further argues that even if the classification does qualify as a mistake it constitutes a mistake of law rather than of fact because the import specialist was unaware of the *legal* requirement that liquidation of the subject entries was to be suspended. *Id*. at 16. If that is the case, the mistake at issue is not covered by section 1520(c) as it refers to mistakes of fact only.

Section 1520(c) provides for an exception to section 1514's finality in absence of a protest in cases of reliquidation when there was an error made by Customs that involved a mistake of fact. The statute reads, in pertinent part:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—

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[8] 19 U.S.C. § 1520(c) was repealed on December 3, 2004, after the merchandise in question was imported by Morris Costumes.

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

19 U.S.C. § 1520(c). This provision is intended to be a "limited exception," not to be employed to excuse the failure to protest a decision by Customs as required by section 1514. *Fujitsu Compound Semiconductor, Inc. v. United States*, 363 F.3d 1230, 1235 (Fed. Cir. 2004); *see also ITT Corp. v. United States*, 24 F.3d 1384, 1387 n.4 (Fed. Cir. 1994) ("Section 1520(c)(1) does not afford a second bite at the apple to importers who fail to challenge customs' decisions within the 90 day period set forth in § 1514. . . ."); *Boast, Inc. v. United States*, 17 CIT 114, 116 (1985) (noting that section 1520(c) "affords limited relief where an unnoticed or unintentional error has been committed."). In order to obtain reliquidation under section 1520(c) for mistake of fact, an importer must show (1) there was a mistake of fact; (2) the mistake did not involve a mistake in the construction of the law; (3) the mistake was adverse to the importer; (4) the mistake was manifest from the record or can be established by documentary evidence which was brought to CBP's attention within one year of the disputed liquidation. *See Brother Int'l Corp. v. United States*, 368 F. Supp. 2d 1345, 1351 (CIT 2004) *rev'd on other grounds*, *Brother Int'l Corp. v. United States*, 464 F.3d 1319, 1326 (Fed. Cir. 2006).

Under section 1520(c), a mistake of fact "takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist." *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972); *see, e.g., Executone Info. Sys. v. United States*, 96 F.3d 1383, 1386 (Fed. Cir. 1996) (finding that when a fact thought to exist did not, in fact, exist, a mistake of fact had occurred). In addition to qualifying as a mistake of fact, "for an error to be correctable, it must simultaneously qualify as at least one of the three enumerated types [clerical error, mistake of fact, or other inadvertence] and not qualify as an 'error in the construction of a law.' " *Brother Int'l Corp.*, 368 F. Supp. 2d at 1351 (quoting *Ford Motor Co. v. United States*, 157 F.3d. 849, 857 (Fed. Cir. 1998)) (alteration in original).

In this case, there was no action by CBP that qualified as a mistake of fact under 1520(c) in the liquidation of the subject entries. The liquidation of the entries took place after *Rubie's I* but prior to *Rubie's II*, at which time the liquidation of the entries in question was done in accordance with the current law as applied under *Rubie's I*. The burden of ensuring suspension of liquidation when

litigation that will effect the decision is pending is on the importer, not on Customs. *Cf. Fujitsu Compound Semiconductor, Inc.*, 363 F.3d at 1235 (" '[M]istake of fact' does not comprehend the fact here asserted [by the plaintiff] to be a mistake, viz. Customs' failure to reliquidate the entries at its own initiative, for we agree with the trial court that this burden is not upon the Customs Service."). Thus, it is not a mistake of fact for Customs to liquidate the subject entries according to their proper physical characteristics as the law required before the final determination changed the law; it was up to Plaintiff to challenge CBP's failure to suspend the liquidation. Accordingly, there was no mistake of fact on the part of Customs that qualifies for reliquidation under section 1520(c).

V
CONCLUSION

For the reasons stated above, Morris Costume's Motion for Summary Judgment is denied and the Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b) and Cross-Motion for Summary Judgment are granted.

SLIP OP. 06–178

GRAHAM ENGINEERING CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 03–00008

OPINION

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

Dated: December 7, 2006

Law Office of Stephen J. Leahy (*Stephen J. Leahy*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Aimee Lee*); *Su-Jin Yoo*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel, for the defendant.

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment by plaintiff Graham Engineering Corp. ("Graham") and defendant United States (the "Government")

pursuant to USCIT R. 56. At issue is the United States Customs Service's[1] ("Customs") denial of an unused merchandise drawback claim seeking return of duties paid and subsequent protest filed by Graham. Customs denied the claim because Graham failed to file a notice of intent to export pursuant to 19 C.F.R. § 191.35(a)(2006). Graham challenges Customs' denial on the basis that 19 C.F.R. § 191.35(a) is unreasonable and exceeds Customs' authority under 19 U.S.C. § 1313(j)(1) (2000). The court disagrees.

BACKGROUND

I. Factual Background

As the parties have not submitted record evidence or discovery materials in connection with this case, the court relies entirely on the parties' arguments and statements of material fact in resolving the case. According to these sources, the following facts are undisputed.

On or about May 26, 2000, Graham imported a blow molding machine and parts. At the time of importation, Graham paid in full applicable U.S. duties, fees and/or taxes totaling $18,290.00. The same blow molding machine and parts were exported by Graham via the port of Houston, Texas on or about October 27, 2000. Graham did not file a notice of intent to export as required by Customs drawback regulation 19 C.F.R. § 191.35 prior to exporting the machine.

On February 23 and July 11, 2001, Graham submitted and resubmitted applications under 19 C.F.R. § 191.36 for accelerated payment and one-time waiver of prior notice of intent to export. Customs denied the applications on June 14 and December 14, 2001, respectively.[2] Graham did not appeal either denial. On December 5, 2001, Graham filed a drawback entry requesting a refund of 99 percent of the duties, fees and/or taxes paid at the time of importation, the amount allowable for an unused merchandise drawback under the statute. Customs liquidated the drawback entry on December 21, 2001, without refunding any of the requested funds.

Graham filed timely protest pursuant to 19 U.S.C. § 1514, challenging Customs' decision denying their drawback request. Graham argues that Customs' requirement for notice of intent to export is invalid. Graham claims that the machine was unused and exported

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[1] Since 2003, known as U.S. Customs and Border Protection.

[2] According to Customs, Graham requested waivers of prior notice of intent to export because they had "no prior knowledge of the Drawback Regulations." Mem. in Opp'n to Pl's Mot. for Summ. J. and in Supp. of Def's Cross-Mot. for Summ. J. 3. Customs further asserts that it denied Graham's request because Graham "had filed eight claims of this kind since 1995." *Id.* Graham disputes these assertions on the basis of lack of knowledge or sufficient information, but states that this denial does not create a material issue of fact that would preclude summary judgment. *See* Pl's Resp. to Def's Statement of Add'l Undisputed Material Facts as to Which There is No Genuine Issue to be Tried 1.

within three years of importation, and that this was sufficient to qualify for the drawback under the statute. Customs argues that the regulation is valid and applicable and states that it had no opportunity to examine the machine prior to export, making it impossible to know whether the machine fulfilled the drawback requirements. Graham filed a complaint against the Government on July 30, 2004 initiating the instant proceedings.

II. Statutory Background

Section 313 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1313, states, in pertinent part:

> (j) Unused merchandise drawback
>
> (1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation –
>
> (A) is, before the close of the 3-year period beginning on the date of importation –
>
> (i) exported, or
>
> (ii) destroyed under customs supervision; and
>
> (B) is not used within the United States before such exportation or destruction;
>
> then upon such exportation or destruction 99 percent of the amount of each duty, tax, or fee so paid shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

19 U.S.C. § 1313(j).

In providing for recovery of an unused merchandise drawback, Customs regulation 19 C.F.R. § 191.35(a) requires that:

> A notice of intent to export merchandise which may be the subject of an unused merchandise drawback claim (19 U.S.C. 1313(j)) must be provided to the Customs Service to give Customs the opportunity to examine the merchandise. The claimant, or the exporter, must file at the port of intended examination a Notice of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback on Customs Form 7553 at least 2 working days prior to the date of intended exportation unless Customs approves another filing period or the claimant has been granted a waiver of prior notice [under § 191.91].

19 C.F.R. § 191.35(a).

This requirement may be waived at Customs' discretion pursuant to 19 C.F.R. § 191.36(a), which states that "[m]erchandise which has been exported without complying with the requirements of § 191.35(a) or § 191.91 of this part may be eligible for unused mer-

chandise drawback under 19 U.S.C. 1313(j) subject to [stated conditions]." 19 C.F.R. § 191.36(a). Similarly, § 191.91 allows for waiver of "[t]he requirement in § 191.35 of this part for prior notice of intent to export merchandise which may be the subject of an unused merchandise drawback claim under [§ 1313(j)]." 19 C.F.R. § 191.91(a)(1). Waiver is granted or denied by Customs upon consideration of (but not limited to) the following factors:

The presence or absence of unresolved Customs charges . . . [t]he accuracy of the

> claimant's past drawback claims; . . . [w]hether waiver of prior notice was previously revoked or suspended; and . . . [t]he presence or absence of any failure to present merchandise to Customs for examination after Customs had timely notified the party filing a Notice of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback of Customs intent to examine the merchandise.

19 C.F.R. § 191.91(c)(1)(i–iv).

Graham challenges the permissibility of these regulatory requirements under the statutory drawback provision, arguing that 19 C.F.R. § 191.35(a) is an invalid imposition of "additional requirements" for recovery of drawback under 19 U.S.C. § 1313, and that the regulation exceeds Customs' authority to implement the terms of the statutory drawback provision. Graham seeks to invalidate the Customs regulations requiring certain procedures, including the submission or waiver of prior notice of intent to export, in order to obtain drawback under 19 U.S.C. § 1313.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1514(a)(6) and 28 U.S.C. § 1581(a)(2000). In reviewing Customs' regulation requiring notice of intent to export or waiver of such notice in order to claim successfully an unused merchandise drawback, the court will determine whether the regulation conflicts with the plain meaning or is an impermissible implementation of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). This inquiry addresses whether the agency has authority to interpret the statute and whether the interpretation or regulatory implementation is reasonable. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

DISCUSSION

I. Customs Had Authority to Interpret the Statutory Drawback Provision

The terms of 19 U.S.C. § 1313 allow for recovery of drawbacks under specified circumstances but are silent as to how these require-

ments are to be implemented. As the agency charged with the administration of the drawback statute, Customs, at least, is implicitly entrusted with authority to enact regulations implementing the statute pursuant to its terms and purpose.

The Supreme Court in *Chevron* stated that an agency entrusted to administer a statutory program " 'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843–44 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). A regulation will not control, however, if it is inconsistent with Congress' statutory language or if "Congress has directly spoken to the precise question at issue." *Haggar*, 526 U.S. at 392 (quoting *Chevron*, 467 U.S. at 842–43).

Congress' drawback statute allows for recovery of an unused merchandise drawback if the imported merchandise "is, before the close of the 3-year period beginning on the date of importation – (i) exported, or (ii) destroyed under Customs supervision." 19 U.S.C. § 1313(j)(1)(A). Graham argues that this provision is clear and unambiguous based on the separation of the term "export" from the phrase "under Customs supervision."[3] Graham asserts that this phrasing indicates clear Congressional intent to remove entirely from Customs' oversight the exportation of unused merchandise on which drawback is sought. This argument, however, erroneously relies on the reading of the single term "export" as decisively unambiguous, rather than on statutory ambiguity as to how the provision as a whole will be administered and enforced. The statute lacks any guidance as to how Customs should ensure that drawback applicants are adhering to the enunciated requirements.

In addition, Congress' silence as to how the drawback provisions are to be administered is reinforced by its unambiguous instruction in 19 U.S.C. § 1313(*l*) that "[a]llowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury[4] shall prescribe." 19

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[3] Graham also argues that the regulation requires export under Customs supervision in certain cases when the place of inspection differs from the location of exportation. This argument refers to 19 C.F.R. § 191.35(d), which states that such merchandise "shall be transported in-bond to the port of exportation." *Id*. This argument is neither applicable to the facts of the instant case, nor an accurate reading of the regulation. This provision requires only an "in-bond" mode of post-inspection transport in certain situations, and does not require direct Customs supervision. *Id*. In addition, this provision applies only to the transportation - not exportation - of the merchandise.

[4] Customs operated under the U.S. Treasury Department until the enactment of the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002), which moved Customs into the jurisdiction of the U.S. Department of Homeland Security and renamed it as the Bureau of Customs and Border Protection.

U.S.C. § 1313(*l*). This direction indicates that Congress anticipated some Customs regulatory action to implement and enforce the statute's drawback provisions and demonstrates that Customs' authority to make such regulations is both explicit and implicit within the statute.[5]

Prior case law also holds that drawback regulations are within Customs' authority. In *Chrysler Motors Corp. v. United States*, 14 CIT 807, 755 F. Supp. 388 (1990), the court upheld Customs regulations governing drawback claims on merchandise transferred to a foreign-trade zone as reasonable and within Customs' authority under 19 U.S.C. § 1313. The court stated that "the allowance of drawback claims under [19 U.S.C. § 1313] delegated authority to issue regulations to the Commissioner of Customs to describe in detail the type of drawback allowed, eligibility requirements, and procedures for filing claims." *Id.* at 809–10. Similarly, the Federal Circuit Court of Appeals has upheld Customs' authority to deny drawback applications to parties who do not comply with applicable Customs regulations. *United States v. Lockheed Petroleum Servs., Inc.*, 709 F.2d 1472, 1476 (Fed. Cir. 1983). *Lockheed* states that drawback privileges "are expressly conditioned, by statute, upon compliance with such rules and regulations as the Secretary of the Treasury shall prescribe." *Lockheed*, 709 F.2d at 1474 (quotations omitted).

In addition, such regulations are "mandatory, not merely directory, and compliance is a condition precedent to the right of recovery of drawback." *Id.* Because drawbacks are deemed a "mere gratuity, proffered by the government," it is incumbent upon the applicant to take the "preliminary steps and acts . . . in accordance with [applicable] regulations" in order to establish their drawback claim. *Campbell v. United States*, 12 Ct. Cl. 470 (Ct. Cl. 1876). *United States v. Ricard-Brewster Oil Co.* states that "reasonable and proper" drawback regulations are within Customs' authority and that the drawback statute "should be construed as a Governmental grant of privilege, and any doubt in construction thereof should be resolved in favor of the Government." *United States v. Ricard-Brewster Oil Co.*, 29 CCPA 192, 197 (1942) (citing *Nestle's Food Co. (Inc.) v. United States*, 16 Ct. Cust. App. 451 (Ct. Cust. App. 1929)).

In the instant case, the applicable statute is silent as to the implementation of unused merchandise drawback requirements. Congress

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[5] The court notes that the regulation at issue, 19 C.F.R. § 191.35, was adopted after notice and comment and was intended by Customs to carry the force of law once it became effective on April 6, 1998. *See* Proposed Rule, 62 Fed. Reg. 3082–3114 (Jan. 21, 1997); Final Rule, 63 Fed. Reg. 10985–10995 (Mar. 5, 1998). Agency rules preceded by notice and comment are sufficiently formal to warrant deference. *See Mead*, 533 U.S. at 230 (2001); *see also Haggar*, 526 U.S. at 380–81.

stated in 19 U.S.C. § 1313(*l*) that parties seeking drawback must comply with relevant regulations promulgated by Customs, and case law supports Customs' authority to do so. Therefore, Customs had authority to formulate the regulations at issue in order to implement the terms and purpose of the statutory drawback provisions.

II. Customs' Regulation Is Reasonable and Within the Terms of the Statute

The court finds that Customs' regulation requiring prior notice of intent to export or waiver of such notice for recovery of drawbacks is reasonable and within the terms of 19 U.S.C. § 1313.

The *Chevron* doctrine gives controlling weight to an agency interpretation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design." *Haggar*, 526 U.S. at 392 (citations omitted). As long as the "interpretation of a statute by an agency charged with its execution is reasonable, it should be followed. . . ." *Chrysler*, 14 CIT at 816 (citing *Chevron*, 467 U.S. at 843–44).

The court finds that Customs' requirement to file notice of intent to export unused merchandise for the purposes of obtaining a drawback is within the terms and purpose of the statutory drawback requirements, enables Customs to administer these requirements without prior notice of intent to export, and does not place an unreasonable burden on the drawback applicant.

Customs' drawback regulation is within Congress' purpose to ensure that all drawback applicants meet the statutory requirements. The statute states that an unused merchandise drawback is recoverable if imported merchandise is exported or destroyed within three years of the date of importation and is unused within the United States. 19 U.S.C. § 1313(j)(1). Customs regulation 19 C.F.R. § 191.35 requires notice of prior intent to export in order for Customs to have an opportunity to examine the merchandise and determine whether the merchandise meets the statutory requirements of 19 U.S.C. § 1313(j)(1). The regulation upholds the statutory requirements and ensures that Customs can administer drawback claims according to the terms and purpose of the statute. Therefore, the regulation is within the scope of the statute, as well as within Congress' intent to delegate to an agency the administration of the statute.

Second, it would be impossible for Customs to prepare the necessary procedures involved with inspecting merchandise in order to approve it for drawback eligibility without notice prior to export. Administrative factors such as scheduling and inspection capacity affect Customs' ability to implement the statutory drawback requirements, and adequate notice is required in order to fulfill this duty.

The regulatory requirement of notice of intent to export is reasonable because it allows Customs to operate pursuant to its responsibilities under the statute. The notice requirement also allows for expedited review and refund of the requested drawback.

Finally, prior notice of intent to export or waiver of such notice is reasonable because it does not impose an unreasonable burden on the applicant seeking drawback. The notice of intent to export requires only certification that the merchandise has not been used in the United States, information regarding importation and intended exportation, contact information, and the location of the merchandise. 19 C.F.R. § 191.35(b). The regulations also allow for waiver of the notice requirement even after the merchandise has been exported, so long as an application for waiver is filed with Customs, and subject to Customs' discretion. 19 C.F.R. § 191.36(a)(1). The regulation allows Customs to implement the terms and purpose of the drawback statute in a consistent and efficient manner without imposing unreasonable burdens on the applicant party. The regulation is therefore reasonable and within the scope of the statute.

For the foregoing reasons, the court finds that Customs' statutory interpretation of the drawback statute, 19 U.S.C. § 1313(j)(1), through its regulation, 19 C.F.R. § 191.35(a), was reasonable and within the scope of its authority under the statute. Accordingly, Graham's Motion for Summary Judgment is denied, and the Government's Cross-Motion for Summary Judgment is granted. Customs' denial of Graham's claim for an unused merchandise drawback is sustained.

Slip Op. 06–179

ALLSTATES TRADING & CLOTHING CO., INC., v. Plaintiff, UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 04–00245

OPINION AND ORDER

[Plaintiff's motion for summary judgment to the extent it seeks a declaration that its merchandise is Vietnamese in origin and an order directing Customs to release its merchandise pursuant to paragraphs 1–5 of its amended complaint is denied as moot; Defendant's cross-motion for summary judgment to the extent it addresses the actions taken by the port director in excluding plaintiff's merchandise is denied as moot; Plaintiff's motion for summary judgment with respect to its claim for storage costs as provided in paragraph 6 of its amended complaint and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue, are denied, subject to renewal at a later date; Plaintiff's motion for summary judgment with

respect to its demand in paragraph 7 of its amended complaint seeking the removal from Customs's database of the electronic flag alerting Customs to give special attention to future entries of plaintiff's merchandise and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue, are denied, subject to renewal at a later date.]

Dated: December 8, 2006

Law Offices of George R. Tuttle (*Carl Don Cammarata* and *George R. Tuttle, III*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jack S. Rockafellow*), for defendant.

Eaton, Judge: This matter is before the court on cross-motions for summary judgment pursuant to USCIT Rule 56(c) of plaintiff Allstates Trading & Clothing Co., Ltd. ("plaintiff" or "Allstates") and defendant the United States. By its motion, plaintiff challenges the denial of its protest of the Bureau of Customs and Border Protection's ("Customs") exclusion of 7,170 men's polar fleece vests based on Customs's determination that the documentation submitted to establish the country of origin of the subject merchandise was not authentic. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") at 13. By its complaint, plaintiff asks the court to direct Customs to release its merchandise, to require the United States to pay all fees associated with storing the vests while the merchandise was denied entry into the United States and to remove the electronic flag from plaintiff's future entries of merchandise.[1] *See* Am. Compl. at 9–10. Customs asserts that plaintiff's motion has been rendered moot because the agency has conceded that the merchandise originated in Vietnam and the vests have been released into the United States. *See* Reply Pl.'s Opp'n Def.'s Cross-Mot. Summ. J. ("Def.'s Reply") at 1–2. For the following reasons, (1) plaintiff's motion for summary judgment to the extent it seeks a declaration that its merchandise is Vietnamese in origin and an order directing Customs to release its merchandise pursuant to paragraphs 1–5 of its amended complaint is denied as moot; (2) defendant's cross-motion for summary judgment to the extent it addresses the actions taken by the port director in excluding plaintiff's merchandise is denied as moot; (3) plaintiff's motion for summary judgment with respect to its claim for storage costs as provided in paragraph 6 of its amended complaint and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue are denied, subject to renewal at a later

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[1] Customs maintains an electronic database called the "Automated Broker Interface," or "ABI." *See* http://www.cbp.gov/xp/cgov/import/operations_support/automated_systems/abi/features.xml (last visited Dec. 8, 2006). This database is intended to reduce the number of entry documents that are submitted in paper form, and allows for entry of summary information to be "transmitted prior to the arrival of merchandise." *Id.* The ABI system also serves to notify the port director of imports that could require special attention. *See id.*

date; and (4) plaintiff's motion for summary judgment with respect to its demand in paragraph 7 of its amended complaint seeking the removal from Customs's database of the electronic flag alerting Customs to give special attention to future entries of plaintiff's merchandise and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue are denied, subject to renewal at a later date.

BACKGROUND

The following facts are undisputed. Plaintiff is an importer of men's spun polyester knit fabric polar fleece vests. *See* Pl.'s Mem. at 3; Def.'s Resp. Pl.'s Statement Material Facts ("DRPF") at 2. On March 11, 2004, it attempted to enter 7,170 units of the subject merchandise at the port of Oakland, California. *See* Pl.'s Mem. at 3; DRPF at 2. The entry was dated March 17, 2004. *See* Pl.'s Mem. at 3; DRPF at 2. At the time of entry, plaintiff submitted documentation in accordance with, what was then, 19 C.F.R. § 12.130(f)(2) (2004) stating that Vietnam was the country of origin of the vests.[2] *See* Pl.'s Mem. at 3; DRPF at 2. According to Customs, plaintiff's "documentation did not include any production records maintained on the factory floor, such as cutting tickets and sewing tickets, which would provide direct evidence of the production processes relating to the manufacture of the merchandise in issue." Decl. of Erik K. Grotz 4/19/05 at 1. In addition, the port director stated that "[t]he type of documents submitted were charts and tables apparently created after production. Many of these charts . . . were illegible and did not appear to be complete." *Id.* at 2.[3] Thus, unconvinced that the docu-

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[2] In accordance with 19 C.F.R. § 12.130(f) (2004):

> All importations of textiles and textile products subject to section 204, Agricultural Act of 1956, as amended, shall be accompanied by the appropriate declaration(s) set forth in paragraphs (f)(1) or (f)(2) of this section. Textiles or textile products subject to section 204 include that merchandise [that is in chief value of cotton, wool or man-made fibers]. . . . The declaration(s) shall be filed with the entry. The declaration(s) may be prepared by the manufacturer, producer, exporter or importer of the textiles and textile products. . . . The determination of country of origin . . . will be based upon information contained in the declaration(s). . . . Entry will be denied unless accompanied by a properly executed declaration(s).

19 C.F.R. § 12.130(f) (2004). This provision is no longer part of Customs's regulations.

[3] An example of the then-required declaration is provided for in Customs's 2004 regulations:

> MULTIPLE COUNTRY DECLARATION
>
> I, _____ (name), declare that the articles described below and covered by the invoice or entry to which this declaration relates were exported from the country* identified below on the dates listed and were subject to assembling, manufacturing or processing operations in, and/or incorporate materials originating in, the foreign territory or country* or countries*, or the U.S. or an insular possession of the U.S., identified below. I declare that the information set forth in this declaration is correct and true to the best of my information, knowledge, and belief.

mentation established Vietnam as the country of origin of the subject merchandise, Customs, pursuant to, what was then, 19 C.F.R. § 12.130(g),[4] sent plaintiff a "Request for Information" dated March 17, 2004. *See* Pl.'s Mem. at 17; DRPF at 2. Allstates responded to the request on three different dates: March 26, 2004; April 6, 2004; and April 13, 2004. *See* Pl.'s Mem. at 17; DRPF at 3. Customs found plaintiff's responses to its Request for Information to be equally unreliable, and, thus, on April 20, 2004, denied entry of the vests. *See* Pl.'s Mem. at 19; DRPF at 6 ("Admits that San Francisco Import Specialist Erik Grotz . . . stated that the vests were excluded because the documentation provided [did] not appear authentic.") (internal quotation marks omitted). Plaintiff timely filed a protest of Customs's determination on May 12, 2004. *See* Summons of 6/21/04. On May 28, 2004, Customs denied the protest and, in accordance with 19 U.S.C. § 1514(a)(4) (2000) and 28 U.S.C. § 1581(a) (2000), plaintiff timely commenced an action in this Court challenging that denial. *See id.*

Plaintiff insists that Customs unreasonably excluded its vests and acted beyond its authority by requesting additional country of origin information because the submitted documentation was complete and sufficient to permit the port director to determine that the vests originated in Vietnam. The United States, on behalf of Customs, asserts that because Customs has now conceded that Vietnam is, in fact, the country of origin of plaintiff's merchandise and released the vests, plaintiff's motion for summary judgment is moot, and any

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A . . . . . (country*)
B . . . . . (country*)
C . . . . . (country*)
D . . . . . (country*)
etc.

Marks of indentification, numbers	Description of article and quantity	Description of manufacturing and/or processing operations	Date and country of manufacture and/or processing		Materials		
			Country	Date of exportation	Description of material	Country of production	Date of exportation

19 C.F.R. § 12.130(f)(2) (2004).

[4] The regulation provided, in pertinent part:

> If the port director is unable to determine the country of origin of an article from the information set forth in the declaration, the declarant shall submit additional information as requested. Release of the article from Customs custody will be denied until the determination is made based upon the information provided or the best information available. In this regard if incomplete or insufficient information is provided, the port director may consider the experience and costs of domestic industry in similar manufacturing or processing operations.

19 C.F.R. § 12.130(g) (2004). Like 19 C.F.R. § 12.130(f), this provision is no longer part of Customs's regulations.

opinion rendered by this court addressing plaintiff's claim that Customs acted ultra vires in requesting more country of origin information would be purely advisory. *See* Def.'s Reply at 2.[5]

DISCUSSION

I. Plaintiff's Motion for Summary Judgment

A. Mootness

By its motion, plaintiff contests the actions taken by Customs in excluding its merchandise. The crux of plaintiff's claim is its assertion that it "filed with Customs all of the documentation required for entry, including the Declaration of Origin executed by the exporter . . .[,]" in compliance with 19 C.F.R. § 12.130(f). Pl.'s Mem. at 20. In plaintiff's view, that documentation was sufficient to establish that the vests originated in Vietnam and, because of the completeness of its submission, Customs did not have the authority pursuant to 19 C.F.R. § 12.130(g) to request additional country of origin information. *See id*. It is apparently plaintiff's position that if the country of origin declaration is complete on its face, Customs is foreclosed from seeking more information. According to plaintiff:

> [I]f the Declaration is incomplete or insufficient (as stated in the title to the provision) so that the Port Director is unable to make the determination from the information contained therein, the Port Director is authorized to request additional information. However, if all of the specified information is provided in the Declaration, in that event the Port Director will have sufficient information to be able to determine the country of origin and is not authorized to request additional information. Any other interpretation of [§ 12.130(g)] would render the regulation meaningless, as the Port Director could always request additional information and there would be no purpose for the declaration if it cannot be relied upon.

Id. at 22–23 (emphasis omitted). Thus, plaintiff maintains that because its country of origin submission complied with the regulation, Customs did not have the authority to ask for more information and to continue to exclude the vests.

Customs, by its cross-motion for summary judgment, first asserts that its decision to ask plaintiff for additional country of origin information and to exclude the vests until it received such information is entitled to a presumption of correctness in accordance with 28

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[5] Customs points out that it attempted to stipulate that the vests originated in Vietnam in exchange for plaintiff abandoning its remaining claims, but plaintiff refused. *See* Def.'s Reply at 1 & n.1. Nonetheless, the record indicates that plaintiff's vests have been released from Customs custody and have entered the United States.

U.S.C. § 2639(a)(1).[6] *See* Mem. Supp. Def.'s Cross-Mot. Summ. J. Opp'n Pl.'s Mot. Summ. J. ("Def.'s Mem.") at 7. For Customs, Allstates has failed to meet its burden to overcome that presumption, and therefore the agency is entitled to judgment as a matter of law. *See id.*

Customs argues alternatively that, in the event the court concludes plaintiff has met its burden, Customs nonetheless had the authority to seek more information regarding country of origin despite the completeness of the importer's declaration. *See* Def.'s Mem. at 7; *see also* 19 C.F.R. § 12.130(g).

Following the filing of each party's initial papers, plaintiff filed a response in opposition to Customs's cross-motion for summary judgment that served to alter the facts before the court. *See generally* Pl.'s Mem. Opp'n Def.'s Cross-Mot. Summ. J. & Reply Def.'s Resp. Pl.'s Mot. Summ. J. ("Pl.'s Opp'n"). Upon review of plaintiff's filing, which according to Customs contained "important new information," Customs conceded that the vests came from Vietnam and released the merchandise. Def.'s Reply at 1. It is not clear from the record what new information in plaintiff's filing tipped the scales for Customs with respect to the vests' country of origin. In any event, based on this new information, Customs attempted to dispose of this case by stipulated judgment. These efforts failed when plaintiff refused to abandon its subsidiary claims for relief, i.e., its demands for storage costs and the removal of the electronic flag from future entries of its merchandise. *See id.* at 1–2 n.1.

The court now turns to whether Customs's concession that the vests originated in Vietnam and the consequent release of plaintiff's merchandise from Customs custody renders this action moot.

The mootness doctrine is rooted in Article III, section 2 of the Constitution, which "limits the exercise of the judicial power to 'cases' and 'controversies.' " *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1860–61 (2006). Indeed, "when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to [the] prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (alterations in original) (internal cita-

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[6] According to that provision:

> [I]n any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

28 U.S.C. § 2639(a)(1).

tions and quotation marks omitted). Simply put, "[t]here is no case or controversy once the matter has been resolved." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 12 at 63 (6th ed. 2002); *see also Pap's A.M.*, 529 U.S. at 287 (finding that a federal court may not entertain a claim where "the issues presented are no longer live or the parties lack a cognizable interest in the outcome") (internal citations and quotation marks omitted). An exception to the mootness doctrine applies where the claimed wrong is "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (internal citation and quotation marks omitted).

There can be no doubt that the release of plaintiff's goods into the United States makes moot its demand for the release of the merchandise. As to the question of whether Customs's conduct is capable of repetition yet evading review, and, thus, falls within the exception to the mootness doctrine, there are two bases for finding that the exception does not apply.

First, if Customs were to unjustly exclude future entries of plaintiff's merchandise, that action would give rise to a protestable event and thus would be reviewable. The same would be true if Customs were now to demand redelivery of the merchandise that is the subject of this action. *See* 19 U.S.C. § 1514(a)(4) (permitting an importer to protest a decision by Customs concerning "the exclusion of merchandise from . . . a demand for redelivery to customs custody under any provision of the customs laws"). Thus, even if Customs were to repeat its behavior, it would not prevent plaintiff from seeking and gaining judicial review. *See Wear Me Apparel Co. v. United States*, 10 CIT 332, 334, 636 F. Supp. 481, 483 (1986) ("[28 U.S.C. §] 1581(a) is the proper jurisdictional provision for bringing [an] action to contest the denial of a protest under 19 U.S.C. § 1514(a)(4).").

Second, there is no indication that the specific challenged conduct can, in fact, be repeated. This is because, even if the court were to credit plaintiff's arguments with respect to the conclusiveness of its declaration, the prospect of Customs repeating its actions was eliminated on October 5, 2005, when § 12.130 was revised and redesignated generally as 19 C.F.R. § 102.22 (2006). *See* Country of Origin of Textile and Apparel Prods., 70 Fed. Reg. 58,009, 58,011 (Dep't Homeland Security, Oct. 5, 2005). In the revised regulation, § 12.130(f) was eliminated. *See id.* at 58,011 (indicating that "[a]s a consequence of relocating the provisions of § 12.130 to Part 102, § 12.130 is removed from the . . . regulations"). As a result of this change, Customs no longer requires an importer to submit a country of origin declaration. Similarly, § 12.130(g), which previously granted Customs the authority to seek additional country of origin information when the information contained in the importer's declaration was insufficient or incomplete, was combined with § 12.130(h) in new § 102.23(b). *See id.* at 58,012. According to this revised section, "[i]f the port director is unable to determine the

country of origin of a textile or apparel product, the importer must submit additional information as requested by the port director." 19 C.F.R. § 102.23(b). Notably absent from the new regulation is the phrase "from the information set forth in the declaration."[7] 19 C.F.R. § 12.130(g).

The new regulations thus ensure that the precise conduct about which plaintiff complains is not capable of repetition, yet evading review. Therefore, because plaintiff no longer suffers an injury fairly traceable to Customs's conduct, and because the instant action does not fall within the exception to the mootness doctrine, to the extent that plaintiff's action seeks the release of its merchandise and a declaration that the vests originated in Vietnam, it is dismissed as moot. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("The federal courts established pursuant to Article III of the Constitution do not render advisory opinions.") (internal quotation marks and alterations omitted). In like manner, defendant's cross-motion on this issue is equally moot.

B. Storage Costs

While plaintiff's primary cause of action is moot, its other claims still may have life. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996) (citing *Powell v. McCormack*, 395 U.S. 486, 498–500 (1969)). By its complaint, plaintiff further asks the court to direct Customs to pay it "accrued storage fees and costs" resulting from what it views as the unlawful exclusion of its merchandise. Am. Compl. at 10. Plaintiff contends that the court has jurisdiction over this claim because it relates directly to the denial of its protest.

Defendant argues that this additional cause of action "exceeds the scope of this Court's jurisdiction or is more than the Government is legally required to grant." Def.'s Reply at 1 n.1. Because defendant questions the presence of subject matter jurisdiction to hear plaintiff's claim, the burden rests with plaintiff to establish that the court indeed possesses jurisdiction. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993).

Pursuant to 19 U.S.C. § 1514(a), an importer is permitted to protest the following decisions by Customs:

(1) the appraised value of merchandise;

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[7] The court ordered that the parties each submit a letter brief addressing the impact, if any, of the new regulations on the instant action. *See* Order of 8/16/06. While the parties acknowledge that the 2006 regulation has no legal effect on Customs's conduct in 2004, each party further recognizes that the new regulations preclude any repetition of the conduct challenged here. *See* Pl.'s Letter Br. of 8/25/06 at 2; Def.'s Letter Br. of 8/25/06 at 3.

> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under section 1520(c) of this title. . . .

19 U.S.C. § 1514(a). It is well settled that where Customs has denied an importer's protest of its decision regarding one of the seven issues listed above, this Court has jurisdiction to review the reasonableness of the denial. *See* 28 U.S.C. § 1581(a); *see also Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994). However, as the statute specifically limits the decisions that can be protested, the Court's jurisdiction is likewise restricted to a review of those same decisions. *See Mitsubishi*, 44 F.3d at 977 ("Thus, without a decision under section 1514(a), the trial court correctly determined that it lacked jurisdiction under section 1581(a).").

What is not clear is how the demand for "accrued storage fees and costs" should be characterized. That is, whether or not the payment of these sums are being challenged as "exactions" and thus reviewable as a result of its protest. 19 U.S.C. § 1514(a)(3). If the payments were exactions, jurisdiction is proper under 28 U.S.C. § 1581(a).

If on the other hand, these amounts are seen as expenditures for which plaintiff claims it should be reimbursed, other statutory provisions may control. Under 28 U.S.C. § 1581(i)(4), the Court's residual jurisdiction provision, the Court is empowered to hear "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 . . . [the] administration and enforcement with respect to the matters referred to in . . . subsections (a)–(h) of this section." As a result, even if the storage fees and costs are not of a nature that could be the subject of a protest, they may be characterized as having been incurred as a result of Customs's administration and enforcement of the Customs laws. Thus, it would appear that § 1581(i)(4) might be a source of jurisdiction.

Here, however, the doctrine of sovereign immunity comes into play. Sovereign immunity requires the consent of the United States before it or its agencies can be sued. That is, for the United States or

its agencies to be sued in federal court, they must first agree to be sued. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Further, "[s]overeign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define the court's jurisdiction to entertain the suit.' " *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); see also 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3654, at 281 (3d ed. 1998) ("The natural consequence of the sovereign immunity principle is that the absence of consent by the United States is a fundamental defect that deprives the district court of subject matter jurisdiction."). Thus, the court must determine whether the United States has waived the protection provided by the doctrine of sovereign immunity.

If the payments are not seen as "exactions," plaintiff's claim is at law and seeks an order from the court directing the United States to pay it money damages to cover the costs incurred for storing the vests while the goods were excluded from the country. In order "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). Such waivers are found in the Federal Tort Claims Act ("FTCA"), where the United States consents to be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, the FTCA is clear in its instruction that the United States and its agencies retained the right to be free from suit in federal courts regarding "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . ." 28 U.S.C. § 2680(c); *see also Worman v. United States*, 98 F.3d 1360 (Fed. Cir. 1996) (unpublished table decision) ("While the FTCA waives sovereign immunity for some tortious actions committed by the government, it is clear that there is no waiver for tortious acts committed by Customs officials arising out of the detention of goods."). The United States Supreme Court has held that "the fairest interpretation of the crucial portion of [28 U.S.C. § 2680(c)] is the one that first springs to mind: 'any claim arising in respect of' [the assessment or collection of any customs duty] means any claim 'arising out of' [the assessment or collection of any customs duty]. . . ." *Kosak v. United States*, 465 U.S. 848, 854 (1984) (quoting 28 U.S.C. § 2680(c) (1982)).

Should it be that Customs's actions resulted from its obligation to collect the proper amount of duty owed, the harm suffered by plaintiff arose, if at all, from "the assessment or collection of [a] . . . customs duty." 28 U.S.C. § 2680(c). Therefore, because the

United States has not given its consent to be sued for money damages arising out of the assessment or collection of a customs duty, the court would not have jurisdiction to entertain plaintiff's claim for the storage costs incurred as a result of Customs's actions.

It is clear, therefore, that the nature of costs and fees must be known before the court can determine if it has jurisdiction. As a result, both parties' motions for summary judgment are denied, subject to renewal at a later date.

C. Removal of Electronic Flag

By its complaint, plaintiff next asks the court to "[d]irect[ ] [d]efendant to remove the electronic flag which designates to Customs Import Specialist teams that merchandise imported by [p]laintiff should be detained and production document requests issued." Am. Compl. at 10. Plaintiff, however, does not assert nor establish the court's jurisdiction to grant the requested relief. Likewise, both parties fail to address adequately the facts surrounding the purported electronic flagging procedure employed by Customs. Thus, without a demonstrated basis for jurisdiction, and in the absence of proper facts, it is not possible at this time for the court to adjudicate plaintiff's final claim. As a result, each party's motion for summary judgment is denied, subject to renewal at a later date.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment to the extent it seeks a declaration that its merchandise is Vietnamese in origin and an order directing Customs to release its merchandise pursuant to paragraphs 1–5 of its amended complaint is denied as moot;

ORDERED that defendant's cross-motion for summary judgment to the extent that it addresses the actions taken by the port director in excluding plaintiff's merchandise is denied as moot;

ORDERED that plaintiff's motion for summary judgment with respect to its claim for storage costs as provided in paragraph 6 of its amended complaint and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue are denied;

ORDERED that plaintiff's motion for summary judgment with respect to its demand in paragraph 7 of its amended complaint seeking the removal from Customs's database of the electronic flag alerting Customs to give special attention to future entries of plaintiff's merchandise and defendant's cross-motion for summary judgment to the extent it seeks judgment in its favor on this issue are denied; and it is further

ORDERED that the parties appear on January 12, 2007 at 11:00 A.M. in Courtroom 2 at the United States Court of International

Trade, One Federal Plaza, New York, NY 10278 for a scheduling conference. Judgment shall be entered accordingly.

SLIP OP. 06–180

ABRAM K. ANDERSON Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: WALLACH, Judge
Court No.: 04–00655

JUDGMENT ORDER

Upon consideration of the Department of Agriculture's Reconsideration Upon Remand of the Application of Abram K. Anderson of November 3, 2006 ("Agriculture's Remand Determination"), filed pursuant to this court's decision and Order in *Anderson v. United States*, 429 F. Supp. 2d 1352 (CIT 2006); Plaintiff having filed no comments contesting Agriculture's Remand Determination; the court having reviewed Agriculture's Remand Determination and all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED that Agriculture's Remand Determination is in accordance with this court's decision and Order of April 28, 2006; and it is further

ORDERED that Agriculture's Remand Determination is SUSTAINED.

Slip Op. 06–181

SAKAR INTERNATIONAL, INC., Plaintiff, v. **UNITED STATES,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00025

OPINION

[Granting defendant's motion to dismiss for failure to state a claim on which relief can be granted and denying for futility plaintiff's subsequent motion to amend its first amended complaint]

Dated: December 12, 2006

Tuttle Law Offices (*James C. Tuttle*) for plaintiff.

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Stanceu, Judge: Plaintiff Sakar International, Inc. ("Sakar") challenges as unlawful an administrative decision issued on December 29, 2005 by the Bureau of Customs and Border Protection, United States Department of Homeland Security ("Customs"), assessing Sakar a mitigated penalty of $67,775 for the importation by Sakar of merchandise that Customs alleged to be counterfeit. Following a motion by defendant United States to dismiss for lack of subject matter jurisdiction and the failure to state a claim on which relief can be granted, plaintiff moved to amend its complaint, which it previously had amended once as a matter of course, to set forth additional grounds in support of its assertion of subject matter jurisdiction. The court grants defendant's motion to dismiss the first amended complaint for failure to state a claim on which relief can be granted and denies as futile plaintiff's motion to amend that complaint.

I. BACKGROUND

In an administrative decision dated December 29, 2005, Customs assessed Sakar a mitigated civil penalty of $67,775 "under the provisions of 19 U.S.C. § 1526(f)" and provided Sakar 30 days in which to pay the mitigated penalty. First Am. Compl. Ex. 1 at 1. According to plaintiff's pleading, Sakar did not pay the mitigated penalty and the United States has not instituted, in any court, a proceeding to recover on the penalty claim.

The facts surrounding the issuance of the December 29, 2005 decision are summarized herein based on plaintiff's pleading and the exhibits to plaintiff's submissions. On October 7, 2002, at the port of Newark, New Jersey, Sakar entered for consumption 500 travel chargers for personal digital assistants ("PDAs") and 2,311 mini-keyboards for PDAs, all of which were products of the People's Republic of China. *Id.* ¶ 16 & Ex. 1 at 2. Customs seized this merchandise on December 18, 2002 for alleged violations of subsection (e) of Section 526 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1526(e) (2000) ("Section 526"). *Id.* ¶ 18. Section 526(e) directs the seizure of merchandise bearing a counterfeit mark that is imported into the United States in violation of provisions of the Lanham Act. *See* 15 U.S.C. § 1124 (2000). With limited exceptions, merchandise so seized must be forfeited and destroyed. *See* 19 U.S.C. § 1526(e). Customs concluded that the travel chargers violated Section 526(e) because they bore a counterfeit mark of Underwriters Laboratories

and that the keyboards displayed, on a function key, a counterfeit "Flying Window" trademark of the Microsoft Corporation. First Am. Compl. Ex. 2 at 1.

Plaintiff petitioned Customs for relief from forfeiture. Customs denied Sakar any relief in the administrative forfeiture proceeding. *Id.* ¶ 19; *see* Def.'s Opp'n to Pl.'s Mot. for Stay of Execution of Penalty Enforcement or Collection and Def.'s Mot. to Dismiss Pl.'s Compl. 3 ("Def.'s First Mot. to Dismiss"). After that denial, plaintiff did not exercise its right, as provided in the Customs regulations, to demand that Customs initiate a judicial forfeiture proceeding. *See generally*, 19 C.F.R. Part 162, Subpart E–Treatment of Seized Merchandise (2002). As a result, Customs destroyed the imported merchandise on August 28, 2003. Def.'s First Mot. to Dismiss 3 & App. 8–9.

Customs then conducted an administrative civil penalty proceeding under Section 526(f), which subjects any person importing merchandise seized under Section 526(e) to a "civil fine." *See id.*; 19 U.S.C. § 1526(f). The fine for "the first such seizure" is "not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary [of the Treasury]." 19 U.S.C. § 1526(f)(2). The fine "[f]or the second seizure and thereafter" is "not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary [of the Treasury]." *Id.* § 1526(f)(3). Customs based the calculation of the fine on a finding that Sakar incurred penalties for two prior violations of 19 U.S.C. § 1526. *See* First Am. Compl. Ex. 1 at 2–3 (determining, in an internal Customs memorandum dated December 14, 2005, a mitigated penalty amount of $67,775 in response to Sakar's October 20, 2005 petition for mitigation); Def.'s First Mot. to Dismiss 3–4. In the administrative penalty proceeding, Customs originally determined the penalty amount to be $381,500 and later mitigated the penalty to half that amount, or $190,750. *See* First Am. Compl. Ex. 1 at 1. In the penalty decision challenged herein, Customs lowered its determination of manufacturer's suggested retail price from $190,750 to $67,775, assessed a penalty at twice that amount, and then mitigated the penalty by 50 percent to arrive at a final administrative civil penalty amount of $67,775. *Id.* ¶ 6 & Ex. 1 at 1.

Plaintiff's first amended complaint alleges that the penalty notice and underlying penalty determination by Customs are contrary to law in several respects.[1] Plaintiff contends that, contrary to the plain language of 19 U.S.C. § 1526(f)(2) and (3), no regulations were

[1] Plaintiff amended its original complaint as a matter of course following the court's denial of plaintiff's motion to stay any agency action to enforce the civil penalty claim pending finality of the judicial review. The court denied this motion due to plaintiff's failure to satisfy the requirements for preliminary injunctive relief, including, in particular, the require-

promulgated under which Customs may determine a manufacturer's suggested retail price. *Id.* ¶¶ 29, 44. Plaintiff alleges that Customs did not properly determine a "manufacturer's suggested retail price" for "genuine" merchandise because no such merchandise, and no such price, exist. *Id.* ¶¶ 30, 43. With respect to the travel chargers, plaintiff maintains that the Underwriters Laboratories mark was prematurely applied by the vendor of the travel chargers but that Underwriters Laboratories belatedly acknowledged its approval of the chargers within a few weeks of the arrival of the goods in the United States. *Id.* ¶¶ 35, 36. The keyboards, according to plaintiff, were not counterfeit because the display of the Microsoft Flying Window symbol on a function key was a fair use of that symbol and a technical use reference for the convenience of the keyboard user. *Id.* ¶¶ 38, 39. Further, the method Customs used to determine that both classes of merchandise were counterfeit was, in plaintiff's view, contrary to "empirical marketplace and method proof requirements, fair use notions, and related requisites for counterfeit goods legal determinations" as set forth in prior decisions of the Court of International Trade. *Id.* ¶ 42. Based on these allegations, plaintiff's first amended complaint seeks a judgment vacating the Customs penalty decision or, alternatively, a declaratory judgment holding that the Customs civil penalty determination is invalid as contrary to 19 U.S.C. § 1526(f)(3), is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States. *Id.* at 19.

Defendant moves to dismiss the first amended complaint under USCIT R. 12(b)(1) for lack of subject matter jurisdiction, or alternatively under USCIT R. 12(b)(5) for failure to state a claim on which relief can be granted. Def.'s Mot. to Dismiss Pl.'s Am. Compl. and Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss Pl.'s Compl. 3 ("Def.'s Second Mot. to Dismiss"). Defendant argues that 28 U.S.C. § 1581 (2000) does not grant the Court of International Trade jurisdiction over this action, that the issue is not ripe for judicial decision because the United States has not brought an action in any court to recover the civil penalty, and that the issuance of a civil penalty notice, absent an action to recover the penalty, does not constitute an injury in fact conferring on the plaintiff standing to sue. *Id.* at 11–12, 29–30, 36–38.

II. DISCUSSION

This case presents two issues pertaining to subject matter jurisdiction. The first issue is whether plaintiff's first amended complaint,

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ments pertaining to likelihood of success on the merits and irreparable harm. *Sakar Int'l, Inc. v. United States*, 30 CIT ____ , Slip Op. 06–24 (Feb. 22, 2006).

by itself or when considered with the proposed amendment, pleads facts sufficient to bring the case within 28 U.S.C. § 1581(a), under which the court has exclusive jurisdiction over cases contesting denials of administrative protests of decisions by Customs. The second issue is whether plaintiff's case falls within 28 U.S.C. § 1581(i), which grants the Court of International Trade exclusive jurisdiction to hear cases against the United States arising under various laws of the United States that § 1581(i) describes by subject matter.

Plaintiff has the burden of pleading facts from which the court could conclude that it has jurisdiction over the subject matter of this action. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (plaintiff "must allege in his pleading the facts essential to show jurisdiction"). For the reasons stated below, the court concludes that jurisdiction is lacking under 28 U.S.C. § 1581(a) but that the court may exercise jurisdiction over the subject matter of plaintiff's case pursuant to 28 U.S.C. § 1581(i).

A. Jurisdiction Is Lacking under 28 U.S.C. § 1581(a)

The first amended complaint, even when read as modified by the proposed amendment, reveals that plaintiff's case does not satisfy the jurisdictional prerequisites of 28 U.S.C. § 1581(a). Under 28 U.S.C. § 1581(a), the Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." Section 1515 provides for administrative review of protests filed pursuant to 19 U.S.C. § 1514. 19 U.S.C. § 1515 (2000). Once a party has filed with Customs a protest that satisfies the requirements of 19 U.S.C. § 1514, and Customs has acted on that protest, the party may contest a denial of the protest, in whole or in part, by timely filing a summons in the Court of International Trade. *See id.* §§ 1514(a), (c), 1515 (2000); 28 U.S.C. § 2636(a) (2000) (imposing a 180-day time limit on the commencement of a judicial action contesting the denial of a protest). The facts plaintiff has pleaded in its first amended complaint, and proposed to plead in its amendment, do not establish the filing of a valid protest, a protest denial, and a timely contest of a protest denial, so as to satisfy the requirements of 19 U.S.C. § 1514 and 28 U.S.C. § 2636(a).

Plaintiff alleges that it protested the exclusion of its merchandise from entry, a decision by Customs that specifically is made protestable by 19 U.S.C. § 1514(a)(4). However, plaintiff does not challenge in this litigation the exclusion of the merchandise from entry but instead challenges its liability for a civil fine stemming from the administrative proceeding in which Customs seized and forfeited, and subsequently destroyed, the merchandise. Even were the court to construe plaintiff's claim as challenging the exclusion of the merchandise, the court would conclude that plaintiff has failed to plead facts establishing jurisdiction under 28 U.S.C. § 1581(a). Plaintiff

has failed to allege facts demonstrating compliance with the procedural requirements applicable to protests.

Plaintiff asserts jurisdiction under § 1581(a) on the basis of 19 U.S.C. § 1499, under which the failure by Customs to make a final determination on the admissibility of detained merchandise within thirty days of the presentation of that merchandise for examination is treated as a decision by Customs to exclude the merchandise for purposes of the filing of a protest. 19 U.S.C. § 1499(c)(5)(A) (2000). A party may file a protest to challenge the deemed exclusion after the close of the thirtieth day. *Id.* If Customs does not act on such a protest within thirty days of the filing date of that protest, the protest is deemed denied on the thirtieth day. *Id.* § 1499(c)(5)(B).

In its proposed amendment to the first amended complaint, plaintiff implies that it validly contested, under 19 U.S.C. § 1514(a)(4), the denial of its protests of the exclusion of its merchandise. Pl.'s Mot. for Leave to File Amendments to First Am. Compl. 1–2 ("contesting defendant's denial of plaintiff's petition protests as to 'the exclusion of merchandise from entry or delivery . . . under any provision of the customs laws . . .' under 19 U.S.C. § 1514(a)(4)."") ("Pl.'s Mot. to Amend First Am. Compl."). In the proposed amendment, Sakar asserts jurisdiction "by virtue of the underlying 19 U.S.C. § 1514(a)(4) protest of CBP's deemed exclusion of Plaintiff's goods within terms of § 1514(a)(4), and § 1515(c) Review of Protests, said deemed exclusion having occurred, on information and belief, on or about November 8, 2002 (thirty (30) days following the presentation of the goods for customs examination on or about October 7-or-8, 2002). . . ." *Id.* at 2–3. In its response to defendant's motion to dismiss, plaintiff characterizes its March 3, 2003 petition as constituting a valid protest that was "denied" by a decision of Customs dated March 18, 2003. *See* Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss 21 & Ex. 1 at 3–8 ("Pl.'s Resp. to Def.'s First Mot. to Dismiss").

In the March 3, 2003 petition, plaintiff contests the administrative seizure and forfeiture of its merchandise. *See id.* Ex. 1 at 4–9. A petition contesting a seizure and forfeiture, however, usually does not qualify as an administrative protest of a decision by Customs to exclude merchandise for purposes of 19 U.S.C. § 1514. *See CDCOM (U.S.A.) Int'l, Inc. v. United States*, 21 CIT 435, 438–39, 963 F. Supp. 1214, 1218–19 (1997) (citing *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988) and *R.J.F. Fabrics, Inc. v. United States*, 10 CIT 735, 738, 651 F. Supp. 1431, 1433 (1986)); *see also* 19 U.S.C. § 1514(c)(1)(D) (requiring that a protest include "any other matter required by the Secretary by regulation"); *compare* 19 C.F.R. Part 171 (2002) (concerning Customs regulatory procedures for filing petitions for remission or mitigation of fines, penalties, and forfeitures) *with* 19 C.F.R. Part 174 (2002) (concerning Customs regulatory procedures for protests) *and* 19 C.F.R. § 174.13 (concerning the contents of a protest). Nothing in the March 3, 2003 petition indi-

cates that this submission was intended as a protest under 19 U.S.C. § 1514 or was intended to satisfy the requirements for protests established by the Customs regulations. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss Ex. 1 at 3–8. Moreover, after plaintiff declined to exercise its right to contest the forfeiture judicially, exclusion from entry arguably became moot upon the final administrative forfeiture and destruction of the merchandise.

Even if the court were to brush aside these difficulties and assume that the March 3, 2003 petition for relief could constitute a protest, the petition, because of untimeliness, could not constitute a timely protest on the facts that plaintiff has pleaded. Plaintiff alleges a date "on or about November 8, 2002" as the date of the deemed exclusion, based on an examination date of October 7 or 8, 2002. Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss Pl.'s First Am. Compl. 20 ("Pl.'s Resp. to Def.'s Second Mot. to Dismiss"). To be timely under 19 U.S.C. § 1514(c) as in effect at that time, any protest against the deemed exclusion would have had to have been filed no later than ninety days after the date of the decision being challenged. 19 U.S.C. § 1514(c)(3)(B).[2] If the November 8, 2002 date of deemed exclusion is correct, plaintiff would have had to file a valid protest challenging the deemed exclusion by February 6, 2003, nearly a month before the filing of plaintiff's first petition.[3] *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss Ex. 1 at 3–8. Moreover, although the Customs protest "denial" is alleged to have occurred on March 18, 2003, the summons in this case was filed on January 25, 2006, long after the 180-day period for the filing of a summons expired. *See* 28 U.S.C. § 2636(a). For these several reasons, the court concludes that plaintiff has failed to plead facts sufficient for the exercise of jurisdiction under 28 U.S.C. § 1581(a) based on 19 U.S.C. § 1499.

B. Jurisdiction Is Lacking under 28 U.S.C. § 1581(i)(4) as it Relates to § 1581(a)

Plaintiff invokes jurisdiction under § 1581(i)(4) as it relates to protest denials under § 1581(a). First Am. Compl. ¶ 4. Under § 1581(i)(4), the Court of International Trade is granted exclusive jurisdiction of any civil action against the United States that arises

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[2] Congress amended 19 U.S.C. § 1514(c)(3) to lengthen the protest period to 180 days. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, § 2103(2)(B), 118 Stat. 2434, 2597–98 (2004). The amendment to § 1514(c)(3) applies to merchandise entered on or after December 18, 2004. *Id.* § 2108.

[3] The amended complaint and attachments indicate that the other petitions cited by plaintiff as protests were filed after the March 3, 2003 petition. Plaintiff filed a petition dated October 15, 2003 in response to the penalty notice issued by Customs in which Customs sought a penalty of $381,500. First Am. Compl. Ex. 1 at 2. Plaintiff filed a supplemental petition dated October 14, 2005 in response to the decision of Customs in which Customs mitigated the penalty by 50 percent to $190,750. *Id.* Ex. 3. Customs issued the final decision in response to the supplemental petition. *Id.* Ex. 1 at 1.

out of any law of the United States providing for administration and enforcement with respect to the matters referred to in the various other subsections of § 1581, including subsection (a). In support of its argument for jurisdiction under these provisions, plaintiff relies principally on *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), a case overturned on jurisdictional grounds by the Supreme Court in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988).

In *Vivitar*, the Court of Appeals for the Federal Circuit ("Court of Appeals") held that the Court of International Trade properly had exercised jurisdiction under subsections (i)(3) and (i)(4) of 28 U.S.C. § 1581 to hear a challenge to the regulations promulgated by the Department of the Treasury interpreting Section 526(a). 761 F.2d at 1560. Section 526(a) provides that merchandise of foreign manufacture bearing a registered and recorded trademark owned by a U.S. citizen, corporation, or association is prohibited generally from importation absent the written consent of the trademark owner. *See* 19 U.S.C. § 1526(a). The Court of Appeals concluded that the general import prohibition of Section 526(a) constituted an "embargo" within the meaning of 28 U.S.C. § 1581(i)(3). *Vivitar*, 761 F.2d at 1560. The Court of Appeals further held in *Vivitar* that the Court of International Trade had exclusive jurisdiction pursuant to 28 U.S.C. § 1581(i)(4), as a corollary to protest jurisdiction under § 1581(a). *Id*.

The Supreme Court overturned the jurisdictional holding of *Vivitar in K Mart Corp.*, reasoning that the Court of International Trade did not have jurisdiction under 28 U.S.C. § 1581(i)(3) because Section 526(a) did not create an "embargo" within the meaning of the statute. *See K Mart Corp.*, 485 U.S. at 183–84.[4] Further, the Supreme Court rejected the "corollary to protest jurisdiction" reasoning, under which the Court of Appeals in *Vivitar* found jurisdiction to exist under 28 U.S.C. § 1581(a) when read together with § 1581(i)(4), because no actual protest was involved in the case. *Id.* at 190–91. Because plaintiff has not pleaded facts under which the court may conclude that this case involves a valid protest, the court rejects plaintiff's contention that the court may exercise jurisdiction under 28 U.S.C. § 1581(i)(4) as it relates to § 1581(a).

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[4] The Supreme Court granted certiorari in *K Mart Corp.* to resolve a jurisdictional conflict among the Circuits arising from challenges to the implementation of the Treasury regulations interpreting Section 526(a). In *Coalition to Preserve the Integrity of Am. Trademarks v. United States*, 790 F.2d 903 (D.C. Cir. 1986) and *Olympus Corp. v. United States*, 792 F.2d 315 (2d Cir. 1986), jurisdiction to challenge the Treasury regulations was held to lie in the district courts and not in the Court of International Trade.

C. Jurisdiction Is Lacking under 28 U.S.C. § 1581(i)(4) as it Relates to § 1581(i)(1)

In its proposed amendment to the first amended complaint, plaintiff seeks to add text asserting jurisdiction under 28 U.S.C. § 1581(i)(1) and (i)(4). Under § 1581(i)(1), the Court of International Trade is granted exclusive jurisdiction of any civil action commenced against the United States that arises out of any law of the United States providing for "revenue for imports or tonnage." Plaintiff argues that subsection (i)(1), when construed in conjunction with subsection (i)(4), confers jurisdiction upon the court. According to plaintiff, this case arises out of a law providing for "administration and enforcement with respect to matters in" § 1581(i)(1). Pl.'s Mot. to Amend First Am. Compl. 1. Plaintiff points to the Tariff Act of 1930, of which Section 526(f) is a part, as a law providing for revenue for imports. Pl.'s Resp. to Def.'s Second Mot. to Dismiss 14. On the facts pleaded, the court must consider this case to arise out of Section 526. As an alternative, plaintiff characterizes Section 526(f)(3) as raising "some de facto revenue to the government." Pl.'s Resp. to Def.'s First Mot. to Dismiss 13. Section 526(f), which imposes civil fines associated with seizures of imported counterfeit merchandise, is not, in any ordinary sense, a law providing for revenue from imports.

D. Subject Matter Jurisdiction Is Available under 28 U.S.C. § 1581(i)(4)

Plaintiff invokes jurisdiction under 28 U.S.C. § 1581(i)(3) and (4), under which the Court of International Trade has jurisdiction of any civil action against the United States that arises out of any law of the United States providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" or arises out of any law of the United States providing for "administration and enforcement with respect to the matters referred to" in, *inter alia*, § 1581(i)(3). First Am. Compl. ¶¶ 2–3; *see* 28 U.S.C. § 1581(i)(3)–(4). The court concludes that plaintiff has pleaded facts sufficient to bring its case within 28 U.S.C. § 1581(i)(4).

The threshold question is whether plaintiff's case arises out of subsection (e) of Section 526, which is a seizure and forfeiture provision applying to imported merchandise bearing counterfeit marks, or out of subsection (f), which is a related, but separate, provision subjecting to a civil fine any person who directs the importation of merchandise for sale or public distribution that is seized under Section 526(e). Plaintiff appears to characterize its case as arising out of Section 526(e). Plaintiff refers in its amended complaint to "the 19 U.S.C. 1526 Import Prohibition and seizure provisions as to violative goods" and describes these provisions as amounting "to an 'embargo' or 'other quantitative restriction' in terms of 28 U.S.C. 1581(i)(3) as

an Import Prohibition of a class of violative goods that are subject to government exclusion from the Customs Territory." First Am. Compl. ¶ 2.

Despite plaintiff's characterization, the court concludes that Sakar's civil action arises out of Section 526(f), not Section 526(e). Because Section 526(e) is a seizure and forfeiture provision, not a civil penalty provision, an action that arises solely out of Section 526(e) would be an *in rem* seizure and forfeiture proceeding. An action arising out of Section 526(f) is of a different character in that it necessarily entails an *in personam* civil penalty proceeding. Plaintiff's case is *in personam* in character because it contests the liability of Sakar for a civil fine. Any *in rem* cause of action on which Sakar ever could have sued in any court to contest the seizure and forfeiture of its goods was extinguished when the administrative forfeiture of its merchandise became "final," *i.e.*, no longer appealable. The extinguishing event occurred when Sakar waived its right to request that the United States commence a judicial forfeiture proceeding to adjudicate whether the United States could take title to the imported merchandise. The court concludes that plaintiff has not pleaded facts sufficient to state a case arising out of the seizure and forfeiture provision established in Section 526(e). It follows that jurisdiction over plaintiff's case does not lie solely under 28 U.S.C. § 1581(i)(3). The court's jurisdictional analysis, however, cannot end there.

The court is granted jurisdiction under 28 U.S.C. § 1581(i)(4) of cases against the United States that arise out of a law providing for "administration and enforcement" of the matters referred to in § 1581(i)(3), which matters would include an "embargo" within the meaning of the latter provision. Therefore, the court next considers whether § 1581(i)(4) would confer jurisdiction over plaintiff's case if Section 526(e) were deemed to provide for "embargoes or other quantitative restrictions" within the meaning of those terms as used in 28 U.S.C. § 1581(i)(3). As to this question, the parties disagree. Plaintiff argues that Section 526(e) imposes an embargo in banning counterfeit goods from entry into the Customs territory. Pl.'s Resp. to Def.'s Second Mot. to Dismiss 17. Defendant relies on the Supreme Court's holding in *K Mart Corp.* for the proposition that Section 526(e) does not create an "embargo" within the meaning of 28 U.S.C. § 1581(i)(3) and also argues that jurisdiction does not exist thereunder because the district courts, not the Court of International Trade, are granted jurisdiction to hear seizure and forfeiture cases. Def.'s Second Mot. to Dismiss 22–25 (citing *K Mart Corp.*, 485 U.S. at 184–85).

The court is not persuaded by defendant's argument that *K Mart Corp.* resolves the question of whether subsection (e) of Section 526 creates an embargo for purposes of 28 U.S.C. § 1581(i)(3). The Court of International Trade, in the somewhat different context of an im-

porter seeking to invoke § 1581(i)(3) jurisdiction for a challenge to a seizure effected under Section 526(e), previously has concluded that Section 526(e), in providing for the seizure of counterfeit goods, does not create an embargo or other quantitative restriction for purposes of § 1581(i)(3). *CDCOM (U.S.A.) Int'l, Inc.*, 21 CIT at 440, 963 F. Supp. at 1218–19. Defendant cites to *CDCOM (U.S.A.) Int'l, Inc.* in support of its motion to dismiss. Def.'s Second Mot. to Dismiss 24–25. The narrow question of whether subsection (e) of Section 526 creates an "embargo" within the meaning of that term as used in 28 U.S.C. § 1581(i)(3) is, however, one that the Supreme Court did not have occasion to consider in *K Mart Corp.*, and on which the Court of Appeals for the Federal Circuit has not ruled. The Supreme Court's conclusion in *K Mart Corp.* that the Customs regulations interpreting Section 526(a) could not be challenged in the Court of International Trade under 28 U.S.C. § 1581(i)(3) rested on the Court's view that an embargo did not result from subsection (a) of Section 526. *See* 485 U.S. at 185–90. Subsection (e) of Section 526 was not relevant to that analysis.

In *K Mart Corp.*, the Supreme Court concluded that "the ordinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction–of zero–on the importation of merchandise." *Id.* at 185 (quoting 28 U.S.C. § 1581(i)(3)). "An importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." *Id.* Subsection (a) of Section 526, according to the Supreme Court, relates to enforcement of a private right and is very different from an embargo because, in addition to the trademark owner, any other importer having the owner's consent may import the good without limitation. *Id.* at 185–86.

Subsection (e) of Section 526 protects the rights of owners of genuine trademarks from importations of counterfeit goods, but the scope of the provision is much broader than that. It provides that any merchandise imported into the United States in violation of 15 U.S.C. § 1124 "shall be seized." 19 U.S.C. § 1526(e). Under 15 U.S.C. § 1124, a provision of the Lanham Act, no article of imported merchandise bearing a counterfeit trademark, as defined therein, "shall be admitted to entry at any customhouse of the United States." 15 U.S.C. § 1124. The provision incorporates only a limited exception for classes of articles, as identified by regulation under Section 526(d), that are imported by travelers for personal use. *Id.*; *see* 19 U.S.C. § 1526(d). Thus, Section 526(e) and the related provision of 15 U.S.C. § 1124 together establish a general prohibition on the importation of, and the exclusion from entry of, counterfeit merchan-

dise, and both form the predicate for assessment of civil fines under Section 526(f). This statutory scheme does not permit the owner of a trademark to import counterfeits of its trademarked merchandise. Nor does it permit goods bearing a counterfeit trademark to be released into commerce, even with the consent of the owner of the genuine trademark. The trademark owner's consent has the effect under subsection (e) only of allowing, in the discretion of the Treasury Secretary, a limited exception to the required forfeiture and destruction of merchandise already seized: if the owner consents, and the counterfeit trademark is obliterated, the merchandise may be donated to a government agency or eleemosynary organization or, if no such agency has a need for the merchandise, sold by Customs at public auction. 19 U.S.C. § 1526(e).

The reason for the import restraint of subsection (e) of Section 526 differs from that of subsection (a). As the Supreme Court observed in *K Mart Corp.*, the subsection (a) import control does not reflect what the Supreme Court considered to be a "governmental" restriction but instead provides a mechanism by which a private party might, at its own option, enlist the government's aid in restricting the quantity of imports bearing the genuine trademark in order to enforce a private right. *See K Mart Corp.*, 485 U.S. at 185. Prohibiting the importation of goods bearing a counterfeit, as opposed to genuine, trademark not only serves the private interest of the trademark owner but also reflects the government's interest in the strict enforcement of intellectual property law to protect the U.S. economy and to protect the consuming public from the effects of a counterfeit good. *See* Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104–153, § 2, 110 Stat. 1386, 1386 (1996) ("Anticounterfeiting Act"). For these reasons, the court concludes that the statutory scheme controlling the importation of counterfeit merchandise that is established by subsection (e) of Section 526 and the related provision of 15 U.S.C. § 1124 is sufficiently dissimilar to subsection (a) of Section 526 that the Supreme Court, in *K Mart Corp.*, cannot be considered to have decided the question of whether Section 526(e) and 15 U.S.C. § 1124 impose an "embargo" within the meaning of that term as used in 28 U.S.C. § 1581(i)(3).

The Supreme Court's discussion in *K Mart Corp.* is instructive in describing the widely-varying forms in which embargoes may be fashioned. "An embargo is a '[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.' " 485 U.S. at 184 (quoting Black's Law Dictionary 468 (5th ed. 1979)). "It is '[a] policy which prevents goods from entering a nation' and which 'may be imposed on a product or on an individual country.' " *Id.* (quoting J. Berenyi, The Modern American Business Dictionary 103 (1982)). The Supreme Court's opinion in *K Mart Corp.* noted that "embargoes" as referred to in 28 U.S.C. § 1581(i)(3) are not confined to "embargoes that are grounded in trade policy" but typically serve

a governmental purpose in being directed to specific categories of goods, for example, public health or safety, morality, law enforcement, foreign affairs, or ecology. *Id.* Section 526(e) incorporates by reference, and enforces through seizure and forfeiture, the specific exclusion from entry that the Lanham Act, in 15 U.S.C. § 1124, applies to imported merchandise bearing counterfeit trademarks. Together, the two statutory provisions establish an import control that falls within the definitions of "embargo" on which the Supreme Court based its analysis of Section 526(a) and 28 U.S.C. § 1581(i)(3).

The next question is whether the embargo established by Section 526 and 15 U.S.C. § 1124 falls within the broader terms of 28 U.S.C. § 1581(i)(3), which grants the Court of International Trade jurisdiction over cases arising under a law providing for "embargoes . . . for reasons *other than* the protection of the public health or safety." 28 U.S.C. § 1581(i)(3) (emphasis added). Subsection (e) was added to Section 526 by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 211, 92 Stat. 888, 903–04 (1978). The text of the added subsection (e) demonstrated that Congress, in enacting import prohibitions on merchandise bearing counterfeit marks, was aware that counterfeit merchandise could pose a risk to public health and safety. The added subsection (e) provided that "merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws." *Id.*[5] Subsection (e) allowed four alternatives for the disposal of the goods seized. *Id.* The fourth alternative required disposal by destruction "if the merchandise is unsafe or a hazard to health." *Id.*; *see* 19 U.S.C. § 1526(e)(4) (1982).

Subsection (e) remained unchanged until Congress, in enacting the Anticounterfeiting Act in 1996, amended the section to modify subsection (e) and to add subsection (f), the aforementioned civil

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[5] Upon the amendment of Section 526 in 1978 to add subsection (e), subsection (e) provided in relevant part:

> Any such merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, obliterate the trademark where feasible and dispose of the goods seized –
>
> (1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
>
> (2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise,
>
> (3) more than 1 year after the date of forfeiture, by sale by appropriate customs officers at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2), or
>
> *(4) if the merchandise is unsafe or a hazard to health, by destruction.*

Customs Procedural Reform and Simplification Act of 1978, § 211, 92 Stat. at 903–04 (emphasis added).

penalty provision. Anticounterfeiting Act, §§ 2, 9–10, 110 Stat. at 1386, 1388–89. Section 2 of the 1996 statute set forth as findings that

> [t]he counterfeiting of trademarked and copyrighted merchandise–
> (1) has been connected with organized crime;
> (2) deprives legitimate trademark and copyright owners of substantial revenues and consumer goodwill;
> (3) poses health and safety threats to United States consumers;
> (4) eliminates United States jobs; and
> (5) is a multibillion-dollar drain on the United States economy.

Id. § 2, 110 Stat. at 1386. Thus, Congress indicated in Section 2 that protection of the public health and safety from risks associated with counterfeit merchandise was a matter of concern. The 1996 amendments modified subsection (e) by integrating subsection (e)(4) into the main portion of subsection (e), thereby requiring generally the destruction of merchandise bearing a counterfeit trademark and allowing an exception to destruction only "if the merchandise is not unsafe or a hazard to health." *Id*. § 9, 110 Stat. at 1388.[6] Specifically, under subsection (e) as amended, only if the merchandise was determined not to be unsafe and not a hazard to health could the Secretary, upon obtaining the consent of the trademark owner, "obliterate the trademark where feasible and dispose of the goods seized" via one of the three remaining alternatives in subsection (e). *Id*.; 19 U.S.C. § 1526(e).

The enactment of the 1996 amendments to Section 526(e) demonstrates that protection of the public health and safety was among the reasons for maintaining and expanding the statutory regime directed against the importation of counterfeit merchandise. But it

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[6] As amended in 1996, Section 526(e) provided in relevant part:

> Any such merchandise bearing a counterfeit mark . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the merchandise. Alternatively, *if the merchandise is not unsafe or a hazard to health*, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized –
>
> (1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
>
> (2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or
>
> (3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2).

See Anticounterfeiting Act, § 9, 110 Stat. at 1388 (emphasis added).

also demonstrates that Congress, in Section 526(e), was furthering not only private trademark rights but also governmental objectives that are distinct from the protection of public health and safety, including preserving jobs in the United States and preventing a multibillion-dollar drain on the United States economy.

Neither the plain meaning nor the legislative history of 28 U.S.C. § 1581(i)(3) indicates that Congress intended to exclude from the jurisdiction of the Court of International Trade cases arising out of a law providing for an embargo for which *any* reason relates to the public health or safety. To the contrary, the report of the House Committee on the Judiciary on the Customs Courts Act of 1980, in discussing the mark-up of the bill, H.R. 7540, that resulted in § 1581(i)(3) in its current form, explained that the draft jurisdictional provision as set forth in the previous version of the bill had generated concerns of witnesses, specifically the American Importers Association, that the Court of International Trade would exercise jurisdiction of civil actions under the Federal Food, Drug and Cosmetic Act and the Toxic Substances Control Act, that the public health or safety questions thereunder should be treated the same whether a court is dealing with domestic or imported goods, and that such public health or safety questions more appropriately should come within the jurisdiction of the district courts. H.R. Rep. No. 96–1235, at 47–48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759. The embargo created by Section 526(e) and the related 15 U.S.C. § 1124 bars importation and entry of counterfeit goods whether or not those goods pose a threat to public health or safety. That a good could pose a threat to public health or safety related to congressional motivation for the enactment but was not a condition precedent to the exclusion from entry of any specific good. The determination of whether a particular good falls within the embargo requires a court to determine whether the trademark borne by the good is counterfeit within the meaning of the Lanham Act, not whether the good itself poses a threat to the public health or safety. Because questions of health or safety do not arise when a court determines the scope of this embargo, it is not the type of embargo that generated the concern of dual jurisdiction that was expressed in the House committee report. For these several reasons, the court concludes that the embargo created by Section 526(e) in conjunction with 15 U.S.C. § 1124 satisfies the requirement of 28 U.S.C. § 1581(i)(3) that the law in question provide for "embargoes . . . for reasons other than the protection of the public health or safety."

The court disagrees with defendant's argument that plaintiff's case lacks jurisdiction under § 1581(i)(3) because Congress has placed jurisdiction over seizure and forfeiture cases in the district courts. Under 28 U.S.C. § 1355, the district courts are granted jurisdiction generally over forfeiture actions; under 28 U.S.C. § 1356, the district courts possess jurisdiction of "any seizure under any law of

the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title." 28 U.S.C. §§ 1355, 1356 (2000). Defendant's argument does not take into consideration that the case plaintiff has pleaded does not contest a seizure or a forfeiture effected under Section 526(e) but instead contests liability or potential liability for a civil fine under Section 526(f).

In summary, plaintiff has pleaded facts sufficient to demonstrate that its case arises out of a law, Section 526(f), that in providing for administration and enforcement of the import prohibition established by Section 526(e) and the exclusion from entry required by 15 U.S.C. § 1124, creates an embargo on the importation of counterfeit goods for reasons other than the protection of the public health or safety. The court therefore is granted jurisdiction over the general subject matter of plaintiff's case by 28 U.S.C. § 1581(i)(4).

E. Plaintiff Has Not Stated a Claim upon which Relief Can Be Granted

Defendant asserts various grounds in support of its argument that plaintiff has failed to establish jurisdiction or to state a claim on which relief can be granted. In addition to its arguments pertaining to the scope of 28 U.S.C. § 1581(i), defendant argues that plaintiff has failed to establish standing to sue and, submitting that no final agency action is available for review, that plaintiff's case lacks ripeness. *See* Def.'s Second Mot. to Dismiss 28–31, 36–38.

Under USCIT Rule 8(a)(2), the pleading requirement is satisfied by "a short and plain statement of the claim showing the pleader is entitled to relief." In ruling on a motion to dismiss, the court accepts as true the facts alleged in plaintiff's pleading and construes all inferences in the plaintiff's favor. *See Shearin v. United States*, 992 F.2d 1195, 1195–96 (Fed. Cir. 1993). The court may not dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts consistent with the plaintiff's allegations that would entitle the plaintiff to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Sakar's amended complaint and associated submissions, when evaluated under these standards, reveal that Sakar has failed to plead a cause of action under which it would be entitled to relief.

In addition to citing the jurisdictional provision of 28 U.S.C. § 1581(i), plaintiff's amended complaint cites, as the basis for its action, 28 U.S.C. §§ 2632(a), (b), and 2640(e). First Am. Compl. 1. Neither of these sections creates a cause of action. The provisions of § 2632 specify how a civil action is commenced in the Court of International Trade, *i.e.*, generally by the filing of a summons and complaint pursuant to subsection (a) or by the filing of a summons only

in the instance of a civil action brought under 19 U.S.C. §§ 1515 or 1516 pursuant to subsection (b). 28 U.S.C. §§ 2632(a)–(b) (2000). The statute, in § 2640(e), defines the scope and standard of review for civil actions not specified in subsections (a) through (d) of that section and, therefore, directs how the Court of International Trade is to review a matter within the subject matter jurisdiction of § 1581(i). 28 U.S.C. § 2640(e) (2000). In so doing, § 2640(e) does not create a cause of action under which a plaintiff may challenge an agency decision but instead refers to the scope and standards of review applicable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2000). *Id.*

A case brought under the jurisdiction of 28 U.S.C. § 1581(i) may rely for its cause of action on the APA "right of review" provision, 5 U.S.C. § 702, which generally entitles any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . to judicial review thereof." 5 U.S.C. § 702 (2000); *see Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–06 (Fed. Cir. 2004) (concluding that jurisdiction is proper under 28 U.S.C. § 1581(i)(4) and that an importer has a cause of action under 5 U.S.C. § 702 to challenge the liquidation of entries conducted pursuant to erroneous instructions of the Department of Commerce). Plaintiff's amended complaint does not ascribe Sakar's cause of action to the APA. Even had it done so, the amended complaint would not suffice to state a valid claim under the APA, which limits agency review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704 (2000). The action taken by Customs in issuing under Section 526(f) the mitigated penalty decision of December 29, 2005 is not expressly made reviewable in a suit against the United States, either by Section 526(f) or by any other statute. To be reviewable under the APA, the agency action being challenged must be "final" such that it "must mark the consummation of the agency's decisionmaking process" and, in addition, "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted).

The December 29, 2005 letter states that "*this decision constitutes the final administrative review analysis available under the provisions of Part 171 of the Customs Regulations. No further petitions will be accepted*." First Am. Compl. Ex. 1 at 1 (replying, in the Customs decision dated Dec. 29, 2005, to Sakar's supplemental petition for mitigation of the civil penalty). However, it does not necessarily follow that the December 29, 2005 decision marks the consummation of the agency's decision making process. Under Section 526(f), "[t]he imposition of a fine under this subsection shall be within the discretion of the Customs Service." 19 U.S.C. § 1526(f)(4). By statute, therefore, the United States could initiate no judicial action to re-

cover a penalty unless Customs, in the discretion of the Customs Commissioner, first makes a decision to go forward with such an action, which it would do initially by means of a referral to the Department of Justice. *See* 19 C.F.R. § 171.22 (providing that where payment of a mitigated penalty is not made within the effective date of a mitigation decision, referral will be made to the Department of Justice unless other action has been directed by the Customs Commissioner). Plaintiff's pleading does not indicate that this discretionary decision by Customs has been made; in any event, it cannot be said for certain whether, and on what alleged facts, the Department of Justice will bring an action in district court on behalf of Customs to recover from Sakar a civil fine under Section 526(f). The Department of Justice may do so only by bringing an action in district court under 28 U.S.C. § 1355(a). That statutory provision grants the district courts original jurisdiction of any action to recover or enforce a civil fine or penalty incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1582. *See* 28 U.S.C. § 1355(a); 28 U.S.C. § 1582 (2000) (excluding Section 526(f) penalties from among those for which a collection action may be instituted in the Court of International Trade).

Accordingly, the facts and circumstances presented in plaintiff's submissions do not establish that the December 29, 2005 decision is the culmination of the Customs decision making process. Even were the court to presume the decision to be such a culmination, plaintiff's case still would be deficient in stating an APA claim. Plaintiff has failed to allege facts under which the court may conclude that the December 29, 2005 decision, after the close of the 30-day effective period of that decision, determined rights or obligations or gave rise to further legal consequences. According to plaintiff's pleadings and documentation, the Customs administrative proceeding was based on findings of fact and conclusions of law made by Customs and culminated in the assessment of a mitigated civil penalty of $67,775. First Am. Compl. ¶¶ 5–7. Sakar did not pay the penalty within the 30 days allowed by Customs for acceptance of the mitigated penalty decision. *See id*. ¶¶ 6–8, Ex. 1 at 1. That decision, as a result, has expired and is now of no legal effect. *See* 19 C.F.R. § 171.22 (providing that a mitigated penalty decision is in effect for a limited time as specified in the decision and that the failure to pay within the effective period will result in the full penalty being deemed applicable and referral of the claim to the Department of Justice unless the Customs Commissioner determines otherwise).

An action brought by the United States to recover a penalty from Sakar under 28 U.S.C. § 1355(a) would be a *de novo* proceeding before the district court. In granting to the district courts generally the original jurisdiction to hear civil penalty actions, Congress did not allow in 28 U.S.C. § 1355 for a proceeding under which the district court could review on the agency record a matter such as is de-

scribed in plaintiff's pleading. *See* 28 U.S.C. § 1355; *Griekspoor v. United States*, 433 F. Supp. 794, 799 (M.D. Fla. 1977) (observing in *dicta* that had the government sought to collect a civil penalty under 28 U.S.C. § 1355, "a full dress hearing and trial would have taken place . . . in the District Court."). For these reasons, the findings of fact and conclusions of law that Customs made during the administrative proceeding are no longer of any binding legal effect.

Despite the expired status of the December 29, 2005 decision, the prayer for relief in plaintiff's first amended complaint seeks "a judgment reversing, setting aside, and vacating the agency's December 29, 2005 2X MSRP Civil Penalty Decision determination . . . ." First Am. Compl. 19. Sakar seeks, in the alternative, a declaratory judgment holding that the civil penalty decision is invalid as contrary to Section 526(f)(3), arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and a denial of due process. *Id.* Sakar essentially asks the Court of International Trade to grant a declaratory judgment on facts, which Sakar has pleaded, that pertain solely to the now-concluded administrative proceeding. In summary, because that proceeding was concluded without a penalty being paid, and because the United States has not asserted any penalty claim under 28 U.S.C. § 1355(a), Sakar has failed to allege facts under which the court could find that the Customs decision now has any effect on Sakar's rights or obligations.

Nor has Sakar alleged any facts pertaining to the December 29, 2005 decision under which that decision has resulted in further legal consequences sufficient to justify APA review. In responding to the motion to dismiss, plaintiff directs the court's attention to a July 23, 2004 letter in which Customs notified Sakar that it had received no response to a notice of penalty of $259,000, dated May 24, 2004, that Customs had sent to Sakar. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss 27 & Ex. 3. The letter stated that if no response was received within thirty days, "th[e] case will be referred to the Department of Justice for collection action and the Internal Revenue Service where a lien will be placed against your income tax return." *Id.* Ex. 3 at 1. Plaintiff includes with its first amended complaint an affidavit of its Chief Operating Officer referring to the July 23, 2004 letter from Customs and stating that Sakar would be irreparably injured in the event of a collection action and income tax lien. *Id.* Ex. 5 at 2.

The threat of a collection action and tax lien, as was stated in the July 23, 2004 letter and characterized in the affidavit of Sakar's Chief Operating Officer, does not suffice as an allegation that the December 29, 2005 decision has occasioned legal consequences for Sakar. That letter, according to the May 24, 2004 penalty notice in the amount of $259,000, pertains to Customs penalty case no. 2004–4601–300365–01, which is a different penalty case than the penalty case that is the subject of this action. *See id.* Ex. 3 at 2–3. The penalty case at issue in this action, according to the documentation

plaintiff provides, is Customs penalty case no. 2003–4601–300404–01. First Am. Compl. Ex. 1 at 1–2. Plaintiff's submissions do not allege facts or cite to documentation establishing that the United States has imposed, or threatened to impose, a tax lien in the penalty proceeding that forms the basis of plaintiff's claim.

For the foregoing reasons, plaintiff has pleaded no cause of action that could entitle it to relief under the APA. In the absence of a valid APA cause of action, and in the absence of another statute under which the Customs decision of December 29, 2005 is made reviewable, plaintiff's case may proceed beyond the pleadings stage if it alleges facts allowing the court to conclude that Sakar has an available remedy under a "nonstatutory," *i.e.*, constitutional, cause of action. *See Motions Systems Corp. v. Bush*, 437 F.3d 1356, 1359 (2006). Plaintiff's pleadings attempt to assert such a claim in alleging that the Customs decision was "unconstitutional as a Denial of Due Process of Law." First Am. Compl. 2. The court concludes that this is not a statement of a claim upon which relief can be granted. The December 29, 2005 penalty decision imposed a mitigated penalty of $67,775 but did not state any consequence that would attend the failure of Sakar to pay the mitigated penalty within the 30-day period in which the decision was in effect. *Id*. Ex. 1 at 1. Nor did the decision initiate any further proceeding. As discussed previously, the facts alleged reveal that the seizure and forfeiture of Sakar's merchandise are now final and beyond the jurisdiction of any court to review. The only alleged fact to which plaintiff has directed the court that conceivably could relate to a due process claim involves a threat of a tax lien in an entirely different penalty proceeding. *See* Pl.'s Resp. to Def.'s First Mot. to Dismiss Ex. 3 at 1–2.

F. Plaintiff's Proposed Amendment Fails to Cure the Insufficient Complaint

Finally, the court addresses the remaining issue involving plaintiff's motion to amend its first amended complaint and concludes that the proposed amended complaint does not cure the insufficient pleading of a claim on which relief can be granted. *See* Pl.'s Mot. to Amend First Am. Compl. The court previously discussed this proposed amendment in the context of subject matter jurisdiction. Although, as provided by USCIT R. 15(a), leave to amend a pleading is to be "freely given when justice so requires," a court may deny a motion to amend a pleading when doing so would be futile. *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1296–98 (Fed. Cir. 2006). In this instance, no purpose would be served by the court's granting plaintiff's motion to amend its complaint.

In the proposed amendment, plaintiff seeks to allege additional facts pertaining to a denial of a protest as the predicate on which plaintiff would have the court exercise jurisdiction under 28 U.S.C. § 1581(a). Pl.'s Mot. to Amend First Am. Compl. 1–2. Under 19

U.S.C. §§ 1514 and 1515, a plaintiff is expressly given the right to challenge judicially the denial of a protest of any of the specified categories of decisions of Customs. It is, therefore, theoretically possible that a validly pleaded cause of action would have resulted had plaintiff pleaded facts allowing the court to find a valid protest, a denial thereof, and the timely filing of a summons to contest that denial. As discussed previously, the facts as alleged in the first amended complaint, even as augmented by the proposed amendment, are insufficient to establish a basis for jurisdiction under 28 U.S.C. § 1581(a). Plaintiff fails to allege the filing of any document that could constitute a valid protest, and plaintiff did not file a timely summons to challenge what plaintiff alleges was a protest denial. The proposed amendment, accordingly, fails to cure plaintiff's failure to plead a claim entitling it to relief.

III. CONCLUSION

Plaintiff's first amended complaint, whether considered alone or in conjunction with its proposed amendment thereto, fails to state a claim on which the court could grant relief. Plaintiff has asserted no valid cause of action under the APA or any other statute. There is no set of facts that plaintiff could prove that would entitle it to relief consistent with the constitutional due process claim that plaintiff has stated in its pleadings. Plaintiff's motion to amend its first amended complaint does not allege facts sufficient to cure the defective pleading and therefore is futile. Judgment granting defendant's motion to dismiss and denying for futility plaintiff's motion to amend the complaint will be entered accordingly.