Decisions of the United States Court of International Trade

Slip Op. 06–5

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: Richard K. Eaton, Judge
Court No. 05–00615
Public Version

[Plaintiff's motion for a preliminary injunction denied]

Dated: January 11, 2006

Mayer, Brown, Rowe & Maw, LLP (*Andrew A. Nicely* and *Simeon Munchick Kriesberg*), for plaintiff.
Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Edward F. Kenny*); *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, of counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, (*Yelena Slepak*), for defendant.

MEMORANDUM OPINION

Eaton, Judge: This matter is before the court on the motion for a preliminary injunction of plaintiff International Custom Products, Inc. ("plaintiff" or "ICP"), and the opposition thereto of defendant the United States ("defendant" or the "Government").[1] For the reasons set forth below, the court denies plaintiff's motion.

[1] In addition to opposing plaintiff's motion for a preliminary injunction, defendant moves to dismiss based on lack of subject matter jurisdiction. Because the court will order more complete briefing on this issue, it declines to rule on the motion to dismiss here. *See U.S. Ass'n of Importers of Textiles and Apparel v. United States Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005) ("We see no abuse of discretion in the trial court's decision to delay consideration of the government's motion to dismiss until briefing was completed.").

BACKGROUND

Plaintiff is an importer and supplier of a milk-fat based white sauce product used as an ingredient in sauces, salad dressings, and other food products. On January 20, 1999, the United States Customs Service (now the Bureau of Customs and Border Protection) issued New York ruling letter D86228 ("Ruling Letter"), which classified the white sauce under the Harmonized Tariff Schedule of the United States ("HTSUS") 2103.90.9060 (later numbered 2103.90.9091) as "[s]auces and preparations therefor." Pl.'s Conf. Mem. of Points and Authorities in Supp. of Pl.'s App. for a Temporary Restraining Order and Mot. for a Prelim. Injunction ("Pl.'s Mem.") at 4. The current duty rate under HTSUS 2103.90.9091 is 6.4% *ad valorem. Id.*

On August 24, 2005, Customs published a Proposed Revocation of Ruling Letter [D86228] and Revocation of Treatment Relating to the Tariff Classification of White Sauce ("Proposed Revocation"). *See* 39 Cust. Bull. & Dec. 35 (Aug. 24, 2005).[2] By publication of the Proposed Revocation, Customs gave notice that it was commencing an administrative procedure to reclassify ICP's merchandise. ICP timely submitted comments disputing Customs' proposed classification on both technical and legal grounds. See Comments of ICP on Proposed Revocation (Sept. 23, 2005), Conf. R. Annex B.

On November 2, 2005, following completion of its administrative procedure, Customs issued HQ 967780 (the "Revocation"), which revoked ICP's Ruling Letter. The Revocation reclassified ICP's white sauce as a "dairy spread" under HTSUS 0405.20.3000, which is subject to a duty of $1.996 per kilogram, plus safeguard duties of $0.149 per kilogram. Customs' new classification has the effect of greatly increasing the duty on plaintiff's merchandise.[3] Upon publication of the Revocation, plaintiff filed the complaint in this action, in which, among other things, it asks the court to "enjoin[ ] [the Revocation] from taking effect during the pendency of this action and further enjoin[ ] Customs from classifying or liquidating ICP's white sauce in a

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[2] Prior to this motion for a preliminary injunction, there has been substantial litigation in this case. *See Int'l Custom Prods., Inc. v. United States*, 29 CIT ____ , ____ , 374 F. Supp. 2d 1311 (2005) (holding Customs' notice of action reclassifying ICP's white sauce to be null and void); *Int'l Custom Prods., Inc. v. United States*, 29 CIT ____ , ____ , slip op. 05–117 (Sept. 1, 2005) (not published in the Federal Supplement) (granting ICP's request for expedited briefing while holding that Customs did not violate a previous Court order by imposing continuous-entry bonds on ICP's white sauce); *Int'l Custom Prods., Inc. v. United States*, 29 CIT ____ , ____ , slip op. 05–145 (Nov. 8, 2005) (not published in the Federal Supplement) (finding ICP's claim concerning unlawful imposition of single-entry bonds on future entries to be moot and lacking a justiciable issue).

[3] The new rate amounts to an approximate 2400 percent increase from roughly [[ ]] per kilogram, the rate applied in accordance with the Ruling Letter. The [[ ]] figure is the result of calculating the rate as to volume so that it might be compared to HTSUS 0405.20.3000, which is calculated on volume. *See* Conf. R. Annex A, Ex. 6.

manner inconsistent with [the Ruling Letter] during the pendency of this action." Compl. of 11/14/05 at 21. Should an injunction be issued, plaintiff's merchandise entered prior to a final judicial determination would be liquidated[4] at the duty determined by the ultimate outcome. Should the injunction not issue, during the pendency of this action plaintiff could be required to pay or deposit the increased duty on its entries. Should plaintiff ultimately prevail, by protesting the liquidation it would receive a refund of the duties paid or deposited, plus interest. *See* 19 C.F.R. § 159.51 (2005) ("Liquidation of entries shall not be suspended simply because issues involved therein may be before the Customs Court[5] in pending litigation, since the importer may seek relief by protesting the entries after liquidation."). With respect to the relief requested in the underlying action, plaintiff asks that the Revocation be declared unlawful.[6] Plaintiff claims 28 U.S.C. § 1581(i)(4) as the basis of jurisdiction. Pl.'s Conf. Mem. of Points and Authorities in Supp. of Pl.'s Mot. for a Prelim. Injunction ("Pl.'s Mot.") at 6. While the validity of this jurisdictional claim is not without doubt, *see infra* Part IV (relating to likelihood of success on the merits), "it is not imperative that this court conclusively determine jurisdiction over an action as a predicate to ruling on the merits of such threshold equitable relief." *Ugine & Alz Belg., N.V. v. United States*, 29 CIT ____ , ____ , slip op. 05–113 at 5–6 (Aug.

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[4] Liquidation is the "final computation or ascertainment of the duties . . . or drawback accruing on an entry." 19 C.F.R. § 159.1 (2005); *see also Ammex, Inc. v. United States*, 419 F.3d 1342, 1345 n.1 (Fed. Cir. 2005).

[5] Prior to 1980, this Court was called the Customs Court. The Customs Court Act of 1980 changed not only the name of the Court to the United States Court of International Trade, but also altered its powers. *See* Customs Court Act of 1980, Pub. L. No. 96–417, 94 Stat. 1728.

[6] Plaintiff styles its request for relief as a

> request[ ] that the Court issue a preliminary injunction enjoining [the Revocation] from taking effect during the pendency of this action and further enjoining Customs from classifying or liquidating ICP's white sauce in a manner inconsistent with [the Ruling Letter] during the pendency of this action; and . . . that this Court enter judgment:
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> (1) declaring unlawful and setting aside [the Revocation];
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> (2) ordering Defendant not to enforce [the Revocation];
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> (3) declaring that ICP's white sauce is properly classified under HTSUS 2103.90.9091;
>
> (4) ordering that [the Ruling Letter] shall remain in effect;
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> (5) enjoining Defendant from taking any actions with respect to ICP's imports that are inconsistent with [the Ruling Letter];
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> (6) ordering Defendant to provide ICP with an additional 5 months to import from the effective date of the Revocation if the Revocation is upheld by this Court;
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> (7) ordering Defendant to pay ICP the reasonable attorney fees, expenses, and court costs incurred by ICP and as to which it is entitled under the Equal Access to Justice Act; and
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> (8) awarding ICP such other and further relief as the Court deems appropriate.

Compl. of 11/14/05 at 21–22.

29, 2005) (not published in the Federal Supplement). For the reasons set forth below, the court denies plaintiff's motion.

DISCUSSION

To obtain the extraordinary relief[7] of an injunction prior to trial, the movant bears the burden of establishing that: (1) it will suffer irreparable harm if preliminary relief is not granted; (2) the public interest would be better served by the relief requested; (3) the balance of the hardships tips in the movant's favor; and (4) the movant is likely to succeed on the merits at trial. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). In its analysis, the Court need not assign equal weight to each factor. Rather, the "crucial factor [in granting a preliminary injunction] is irreparable injury." *Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1354 (2002) (citing *Elkem Metals Co. v. United States*, 25 CIT 186, 190, 135 F. Supp. 2d 1324, 1329 (2001)). The court will address each part of the test in turn.

I. Irreparable Harm

In support of its motion, plaintiff has submitted the affidavits of (1) Dennis V. Raybuck, president and founder of ICP of DuBois, Pennsylvania ("Raybuck Declaration" or "Raybuck Decl."); (2) the president and chief operating officer[8] of what ICP refers to as "Supplier A" for purposes of confidentiality; and (3) Gregory L. Wade, the global Chief Technical Officer of MolsonCoors Brewing Company in Montreal, Quebec and Denver, Colorado ("Wade Decl."). *See* Conf. R. Annex A, Exs. 2,[9] 5; Conf. R. Annex B, Ex. 6.[10] Plaintiff relies primarily on the Raybuck Declaration to establish that, in the absence of a preliminary injunction, ICP will suffer irreparable harm. Irreparable injury or harm is harm "which cannot receive reasonable redress in a court of law." *Connor II v. United States*, 24 CIT 195, 197 (2000)

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[7] This Court recognizes that "[a] preliminary injunction is extraordinary relief that is available only on a special showing of need for relief *pendente lite*. . . ." *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

[8] [[ ]], the president and chief operating officer of [[ ]], the U.S. subsidiary of [[ ]]. Conf. R. Annex A, Ex. 5.

[9] ICP has submitted two different versions of the Raybuck Declaration. *See* Conf. R. Annex A, Ex. 2; Conf. R. Annex B, Ex. 5. The two documents contain the same information up to and including paragraph 22; however the document in Annex B stops at that paragraph, while the document in Annex A continues through paragraph 40. For purposes of this opinion, the court's citations are to the Annex A declaration.

[10] ICP has also proffered affidavits of Bernard D. Liberati, ICP's customs broker, and John F. Michel, the president and senior underwriter of Trade Risk Guaranty, Inc., the company that issues ICP its customs bonds. *See* Conf. R. Annex A, Exs. 3, 4. While these affidavits are not relevant to the instant motion, they may be relevant to the underlying action.

(not reported in the Federal Supplement) (internal quotation marks omitted) (internal citations omitted); *see also Zenith Radio*, 710 F.2d at 809.

ICP's primary claim[11] is that its importation business cannot survive if Customs is permitted to revoke its Ruling Letter and reclassify the white sauce as a dairy spread. *See* Pl.'s Mot. at 13. As ICP explains, "[t]he new classification would subject ICP's imports to prohibitively high tariffs, increasing the applicable duty rates by over 2400 percent. ICP cannot afford to remain in business with such exorbitant costs." *Id.*;[12] *see also* Conf. R. Annex A, Ex. 10.

ICP further argues that it will lose the goodwill of its largest supplier, Supplier A, if an injunction is not issued, since ICP will not be able to purchase the amount[13] of white sauce that it is contractually obligated to purchase. Pl.'s Mot. at 15. Indeed, ICP's president asserts that the company is "in serious danger of losing the goodwill of both [its largest customer,[14] which ICP refers to as "Customer A" for purposes of confidentiality], and Supplier A," resulting in "significant damage to [its] reputation in the industry." Raybuck Decl. ¶ 27 at 10–11. Thus, absent an injunction, ICP insists that it will suffer irreparable harm to its relationships with both its supplier and customer. *Id.* at 11.

Finally, ICP maintains that if Customs is not immediately enjoined from revoking the Ruling Letter, ICP will face substantial business uncertainty. Specifically, "[u]ntil [ICP] can be certain that [its] white sauce will be able to enter under the advance ruling, [ICP] [is] unable to give Supplier A the advance notice that it requires to accommodate ICP within its production cycle." Raybuck Decl. ¶ 24 at 9. ICP explains:

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[11] Plaintiff makes several other arguments concerning injury it claims will be suffered, in the absence of an injunction, by (1) a related company's manufacturing plant, *see* Raybuck Decl. ¶ 1 at 1, and (2) an unrelated purchaser of its merchandise, *see id.* ¶ 26 at 10. Because neither of these corporate entities is a party to this action, these arguments cannot be heard as proof of the irreparable harm facing ICP. *See Heartland By-Products, Inc. v. United States*, 23 CIT 754, 760, 74 F. Supp. 2d 1324, 1331 (1999), *rev'd on other grounds*, 264 F.3d 1126 (Fed. Cir. 2001) (holding that a party cannot demonstrate the presence or absence of irreparable harm "based on the potential financial abilities of a nonparty.").

[12] ICP claims that

> Just on the entries of white sauce that ICP is scheduled to make between October 1, 2005 and September 30, 2006 to meet its purchase and supply contracts for the fiscal year, the increased duties required by the Revocation equate to over [[ ]]. In contrast, ICP's entire net income during each of the last three fiscal years prior to 2005 was only about [[ ]]. In other words, the new duties for one year would amount to over [[ ]] ICP's net income for the year.

Pl.'s Mot. at 13; *see also* Conf. R. Annex A, Ex. 10.

[13] ICP claims that this amount is [[ ]] pounds. *See* Raybuck Decl. ¶ 23 at 9.

[14] [[ ]]. *See id.* ¶ 26 at 10.

> Supplier A has an eight-month production cycle. Supplier A begins its production of white sauce and other products in early August of each year, and it requires two months to plan the capacity of its plants for production during that annual period. The lead time needed by Supplier A means that ICP has already lost any potential supply of white sauce for the first six months of Supplier A's eight month production cycle, and it may lose another month during the course of this litigation.

Pl.'s Mot. at 19–20.[15]

Defendant first contends that any irreparable harm to ICP is self-created.

> On November 10, 2005, [lawyers for Customs] notified ICP . . . that jurisdiction was not proper under 28 U.S.C. § 1581(i), as jurisdiction appeared manifestlyadequate under 28 U.S.C. § 1581(a), and under 28 U.S.C. § 1581(h). . . . [Defendant] offered to work out an expedited schedule under those jurisdictional bases which would provide ICP with a very rapid resolution of its action. . . . [Defendant] informed ICP [that] [it]would be happy to work with ICP to obtain a denied protest within hours after the effective date of the ruling revocation. . . . [T]he parties could agree that ICP would bring in a test shipment of its dairy spread on January 2, 2006. The dairy spread would be liquidated that day . . . with ICP filing a protest on the day of liquidation. In addition, the protest would be denied immediately, so ICP would have the ability to timely commence an action under 28 U.S.C. § 1581(a) within a day or two of January 2, 2006.

Def.'s Mem. in Resp. to Pl.'s App. for Prelim. Injunction and in Supp. of Def.'s Mot. to Dismiss ("Def.'s Mem.") at 7, 10–11 (footnote omitted). Despite this offer, defendant maintains that ICP "knowingly chose a course of action which involved significant jurisdictional problems. . . ." *Id.* at 20.

Next, defendant argues that, even if ICP were to obtain a preliminary injunction, it would not provide ICP with any protection against alleged irreparable harm. Defendant explains:

> ICP is seeking a preliminary injunction preventing Customs from liquidating its entries as dairy spread (as opposed to seeking an injunction affirmatively requiring the liquidation of entries as a sauce preparation). However, the injunction styled by ICP would **not** provide it with **any** financial protection. As noted previously, ICP claimed its alleged financial harm arose from the uncertainty about the validity of [the Revocation]. Here, even if ICP were granted the preliminary injunction it

[15] *See also* [[ ]] Decl. ¶¶ 6, 7 at 2.

> seeks, and Customs were prevented from liquidating its entries as dairy spread during the pendency of the injunction, ICP would have no financial certainty because **if the Government prevails in this action, Customs will – properly – liquidate all of these entries subject to the preliminary injunction as dairy spread**.

Def.'s Mem. at 17 (emphasis in original). In other words, defendant argues that, should it prevail on the merits, Customs will liquidate all of the entries at the higher duty required of dairy spread. Thus, according to defendant, an injunction will remove none of the uncertainty as to the validity of the Ruling Letter because this uncertainty will only end at the conclusion of the underlying litigation.

More fundamentally, defendant argues that the evidence proffered by ICP is insufficient to establish irreparable harm. First, defendant asserts that a substitute domestic supply of white sauce is available to ICP, and that ICP's own witness bears this out. Defendant states:

> ICP's own expert Gregory L. Wade, in his declaration dated September 22, 2005, submitted as part of ICP's supporting documents, stated at paragraph 13:
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>> Dozens of manufacturers and refiners in the United States have the capacity to deliver fat preparations of almost infinite variety, using fat sources singly or in combination. These companies['] . . . principal mode of selling their products is through an employed sales force or sales agents that visit the sauce and dressing manufacturers and demonstrate how their fat preparation specifications meet the manufacturers' need.

Def.'s Mem. at 21 (emphasis omitted); Wade Decl. ¶ 13 at 5.

In addition, defendant insists that ICP has failed to document any of its present or prospective lost sales with contracts or sales figures. Rather, ICP's evidence "consisted mainly of a declaration from ICP's president and that of its chief dairy spread supplier."[16] Def.'s Mem. at 23.

The crucial factors in determining whether irreparable harm exists are the immediacy of the harm and the inadequacy of future corrective relief. *See Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986). Plaintiffs seeking preliminary injunctions bear an "extremely heavy burden," particularly with re-

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[16] With respect to economic harm, Mr. Raybuck states that:

> We are struggling to hold on to our white sauce suppliers, our white sauce customers, . . . and all the goodwill that we have built up over the 17 years of our white sauce business, without the major source of our income. I do not think we will be able to sustain this current situation much longer. Our import business will soon collapse. . . .

Raybuck Decl. ¶ 35 at 14.

spect to demonstrating irreparable harm. *Shandong Huarong Gen. Group Corp. v. United States*, 24 CIT 1279, 1282, 122 F. Supp. 2d 1367, 1369 (2000). "It is not enough merely to establish a possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown." *Id.* at 1282, 122 F. Supp. 2d at 1370 (internal quotation marks omitted).

As noted by defendant, in making its case for irreparable injury, ICP relies almost entirely[17] on the Raybuck Declaration. It has submitted no financials, contracts, or other proof to make its case. Considering the heavy burden it is required to carry, an examination of the Raybuck Declaration reveals that it is simply inadequate to its task.

First, ICP has failed to produce any probative evidence of the economic losses that would result from the imposition of the new duty. Rather, plaintiff has presented the unsupported conclusory statements of Mr. Raybuck. "[A] prayer for an injunction based solely on affidavits should be denied unless the affidavits attest with crystal clarity and without speculation to the imminence of real injury to the movant." *Leland v. Morin*, 104 F. Supp. 401, 404 (D.C.N.Y. 1952); *see also Shree Rama Enters. v. United States*, 21 CIT 1165, 1168, 983 F. Supp. 192, 195 (1997) ("[A]ffidavits submitted by interested parties are weak evidence, unlikely to justify a preliminary injunction."); *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001).

Second, even if the court were to credit plaintiff's claim that it would be financially unable to import white sauce at the new rate, ICP has not shown that it would be unable to purchase the white sauce from a domestic supplier. That such a supply is available is evident from both the Raybuck and Wade Declarations.[18] It is apparent, however, that ICP has made no effort, at least no effort that it is willing to reveal to the court, to determine if a domestic supply is available and, if so, at what price. Nor, for that matter, has plaintiff seemingly sought out an imported product that would fill its needs. This is particularly puzzling since it is apparent that, for a significant period prior to importing its own supply, ICP relied solely on another importer to satisfy its demands. *See* Raybuck Decl. ¶ 5 at 2.

Third, plaintiff has failed to provide this court with any specific evidence relating to the terms of its present contractual relationships or its financial situation. In addition, plaintiff has not substantiated its claim that, in the event plaintiff is forced to raise the price

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[17] The only other proof, the affidavit of Supplier A's president and CEO, pertains to the nature of Supplier A's production schedule and the prospective harm to Supplier A should it lose ICP's business. *See generally* [[ ]] Decl., Conf. R. Annex A, Ex. 5.

[18] Mr. Raybuck acknowledges the availability of a domestic source but further states that a domestic substitute would not be available "except at prices well above the price of [ICP's] imported white sauce." Raybuck Decl. ¶ 3 at 2.

of its white sauce to offset the effect of the new duty, its customers will choose to purchase white sauce from another source. Indeed, plaintiff has submitted, at best, weak evidence suggesting what effect a denial of its motion would have on the health of the company. *See Thyssen Steel Co., Sw. Div. of Thyssen Inc. v. United States*, 13 CIT 323, 326, 712 F. Supp. 202, 205 (1989) ("Plaintiff . . . must set forth sufficient documentation to support its allegations in establishing the threat of irreparable harm. Plaintiff bears a heavy burden in producing this evidence.") (citations omitted). Plaintiff has not "bolstered these affidavits through independent evidence indicating exactly how and when [the denial of the injunction] would force it out of business." *Shandong*, 24 CIT at 1283, 122 F. Supp. 2d at 1371; *see also Companhia Brasileira Carbureto de Calcio v. United States*, 18 CIT 215, 217 (1994) (not reported in the Federal Supplement) ("No hard evidence was submitted to the court indicating what specific effect loss of such sales would have upon [plaintiff]."); *Shandong*, 24 CIT at 1284, 122 F. Supp. 2d at 1371 (denying plaintiff's motion for a preliminary injunction because, among other things, "Plaintiff . . . offered no proof that it would be unable to . . . sustain its business throughout the course of this litigation.").

With respect to ICP's claim of prospective loss of goodwill owing to its inability to fulfill its contracts, plaintiff has presented no evidence other than Mr. Raybuck's declaration that this is the necessary result of the increased duties. For instance, it has not produced its contracts with either Supplier A or Customer A so it is impossible to know if a loss of goodwill will result under their provisions. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 19 CIT 281, 286, 876 F. Supp. 283, 287 (1995) (stating that, by not submitting substantive evidence indicating that "contract losses or a damaged reputation as a reliable supplier [would] occur," plaintiff failed to demonstrate irreparable harm).

Finally, plaintiff's claims with respect to financial uncertainty are unconvincing. That is, it is difficult to see how any financial certainty is achieved by the issuance of an injunction. This is because any certainty of what duties will finally be imposed must await a final determination on the merits.

Because plaintiff's claims concerning potential financial harm, loss of goodwill, and business uncertainty are either unsupported by objective evidence or lack a logical explanation, the court finds that plaintiff has failed to demonstrate that it will face immediate and irreparable loss should liquidation of its merchandise not be enjoined. Thus, plaintiff has not made a showing sufficient to support a finding of irreparable harm.

II. Public Interest

Although the "[f]ailure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunc-

tion, [without] conclusively determin[ing] the other criteria," in this case, the remaining factors merit examination. *Bomont Indus. v. United States*, 10 CIT 431, 437, 638 F. Supp. 1334, 1340 (1986); *see also Corus Group.*, 26 CIT at 942, 217 F. Supp. 2d at 1354. With respect to whether the grant of a preliminary injunction will better serve the public interest, plaintiff insists that

> When a small company like ICP has relied on Customs' "definitive interpretation of applicable law," to build its business, the public interest is served by permitting that company to remain in operation while it challenges the agency's reversal of that interpretation. Absent a preliminary injunction, ICP's import business will fail. If ICP is forced to close its doors, rather than resume its import business, the Government will be unable to collect any further revenue from ICP, the DuBois, Pennsylvania economy will suffer the loss of a viable business and prospective jobs, and current ICP employees would lose their livelihoods.
>
> And when so fundamental a principle of Customs' policy as "informed compliance" is thrown into doubt by a revocation supported by neither facts nor law, the public interest is served by enjoining that revocation until the merits can be fully and fairly considered.

Pl.'s Mot. at 62–63 (internal citations omitted).

Plaintiff is apparently claiming that the public interest is best served if the United States collects some, but not all, of the duties that may be ultimately owed, and that there is a public interest in the continuing employment of ICP's workers and the reliance on "informed compliance." While there may be some merit in plaintiff's arguments regarding its workers' continued employment and the usefulness of informed compliance,[19] ICP's argument with respect to the payment of duties misses the mark. Indeed, ICP's plan seems to be to default on its obligations with respect to duties owed should it lose on the merits. That is, one of plaintiff's primary arguments is that it is unable to pay the duties under the new tariff classification.[20] Should an injunction issue and defendant ultimately prevail, plaintiff's entries made during the pendency of this action will be liqui-

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[19] It is difficult, however, to see how the cause of informed compliance would be further advanced by the issuance of plaintiff's proposed injunction than it would be by a review of the underlying merits of plaintiff's case.

[20] Plaintiff insists that if an injunction does not issue, it will be unable to pay the duties under *either* classification, depriving the public fisc of the over [[ ]] ICP currently pays. Additionally, ICP argues, it "will no longer pay the approximately [[ ]] that it currently pays, further causing a loss of revenue to the Government." Pl.'s Mot. at 22 n.4.

dated at the new, higher rate. Plaintiff's inability to pay the assessed duties would result in its default and a loss of duties to the Treasury. As noted by the Government,

> [B]ecause ICP readily admits it cannot pay the increased duties required under [the Revocation], if ICP does not prevail on the merits of this action in the end, and Customs has to reliquidate these entries as dairy spread, the chance to actually recover the duty itself on these entries is permanently lost.

Def.'s Mem. at 48–49 (emphasis omitted). In other words, for defendant, the issuance of an injunction will not serve the public interest because of the potential loss of revenue should it prevail on the merits.

The court finds that, while ICP has not demonstrated that the public would be better served by the issuance of a preliminary injunction, the defendant's arguments with respect to the potential loss of revenue to the government have merit, and that this part of the four-part test favors defendant.

III. Balance of Hardships

"An inquiry into the balance of hardships requires this Court to 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). This court has already determined that plaintiff has not shown that it will be irreparably harmed absent an injunction. Nonetheless, there can be little doubt that having to pay the higher duty under the new tariff classification, or having to find a domestic source for its merchandise would amount to a substantial hardship. The court also finds, however, that defendant will endure a significant hardship of its own should an injunction be granted and plaintiff not prevail in the underlying action, i.e., the aforementioned loss of revenue in the event that the duty contained in the Revocation is ultimately found to be correct. Given that both parties face significant hardships based on the adjudication of this motion, this factor does not tip in favor of plaintiff.

IV. Likelihood of Success on the Merits

With respect to the question as to whether plaintiff has demonstrated that it is likely to succeed on the merits, two issues are presented: first, whether this court has the jurisdiction to hear plaintiff's case, and second, whether the merits of plaintiff's cause indicate that the court will find for it at trial.

Regarding the first issue, the Court of Appeals for the Federal Circuit ("Federal Circuit") has indicated that the question of jurisdiction closely affects a plaintiff's likelihood of success on the merits. *See U.S. Ass'n of Importers of Textiles and Apparel v. United States Dep't*

of Commerce, 413 F.3d 1344, 1348 (Fed. Cir. 2005). In urging that this court has jurisdiction over its case, plaintiff relies on two theories: (1) that the substantially larger duties ICP would be required to pay if the Revocation is upheld would prohibit the continued importation of its white sauce because resale at a reasonable price after importation would be impossible and, thus, ICP will cease business prior to obtaining a final court ruling, thereby rendering other judicial remedies inadequate; and (2) that, since no other subsection of § 1581 would permit both the expedited treatment necessary for the company to survive and the entry of an injunction, those subsections are manifestly inadequate.[21] Pl.'s Mot. at 6. Specifically, plaintiff contends that

> Jurisdiction under Section 1581(a) is . . . inadequate here because . . . ICP would be out of business by the time a Section 1581(a) case could be brought. Furthermore, jurisdiction under Section 1581(h) is inadequate because the relief that ICP seeks is not limited to declaratory relief, which is the only form of relief available under Section 1581(h).

Id. at 7. Defendant claims that the court lacks jurisdiction because, in its view, 28 U.S.C. §§ 1581(a) and 1581(h) each provide adequate bases upon which this court may grant relief. Indeed, defendant states that "Congress did not intend section 1581(i) to be used as a vehicle to circumvent the jurisdictional scheme when another basis of jurisdiction is adequate. Moreover, . . . section 1581(i) was not intended to create new causes of action, nor was it meant to supersede more specific jurisdictional provisions." Def.'s Mem. at 8–9. Pending final briefing on the issue of jurisdiction, the court finds that the parties' arguments are sufficiently strong so as to prevent this issue

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[21] Where the relief provided by the other subsections of 28 U.S.C. § 1581 is manifestly inadequate, 28 U.S.C. § 1581(i) grants this court residual jurisdiction over

> any civil action commenced against the United States . . . that arises out of any law of the United States providing for —
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of 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.

28 U.S.C. § 1581(i) (2000); *see also Mukand Int'l, Ltd. v. United States*, 29 CIT _____ , _____ , slip op. 05–164 at 4 (Dec. 22, 2005) (not published in the Federal Supplement) ("Litigants may not invoke jurisdiction under § 1581(i) '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.' " (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987))).

from favoring either. As a result, on the issue of jurisdiction, plaintiff does not find aid for its claim that it will prevail on the merits.

As to whether the strength of plaintiff's case indicates that it will succeed on its claims in the underlying action, the court again finds that each side has a substantial case. In support of its argument that success on the merits favors its motion, plaintiff says:

> ICP demonstrates . . . that the premises of the Revocation are fabricated. . . . ICP shows that its white sauce is correctly classified under HTSUS 2103 in accordance with General Rule of Interpretation ("GRI") 1. . . . ICP establishes that classification under HTSUS 2103 also is consistent with GRI 3(a). . . . ICP [also] shows that the white sauce is properly classified under HTSUS 2103 in accordance with GRI 3(c). . . . Finally, . . . ICP demonstrates that the Revocation unlawfully deprives ICP of its due process rights. Because the Revocation is wholly without merit and reflects a reckless disregard for the law, ICP is highly likely to prevail in this action.

Pl.'s Mot. at 22.

Defendant maintains that the Ruling Letter was properly revoked "because [Customs] determined that the ruling was in error and not in accord with Customs' current views." Def.'s Mem. at 28 (footnote omitted). Moreover, defendant sets out, in considerable detail, its case asserting that Customs' classification of plaintiff's white sauce under HTSUS heading 0405 was not arbitrary and capricious and was in accordance with the law. *See id.* at 28–29; *see generally id.* at 32–37 (analyzing Customs' classification under the factors set forth in *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (Fed. Cir. 1976)).

At present, the law concerning the standard for establishing likelihood of success on the merits at trial is unclear. In a recent case, the Federal Circuit articulated the competing standards as "serious, substantial, difficult, and doubtful questions regarding the merits . . . [;] [whether] the likelihood of success and harm-related prongs are viewed as a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness . . . [;] [and whether] the movant [demonstrated] at least a fair chance of success on the merits. . . ." *U.S. Ass'n of Importers*, 413 F.3d at 1347 (internal quotation marks omitted). The Court, however, refrained from clarifying the standard stating that "we need not, and thus do not, resolve the dispute over the legal standard applicable in the Federal Circuit. . . ." *Id.* This court has held that "[w]here it is clear that the moving party will suffer substantially greater harm by the denial of the preliminary injunction . . . it will ordinarily be sufficient that the movant has raised serious, substantial, difficult and doubtful questions that are the proper subject of litigation." *Ugine-Savoie Imphy*, 24 CIT at 1251, 121 F. Supp. 2d at

689 (internal quotation marks omitted); *see also Int'l Bhd. Of Elec. Workers v. United States*, 29 CIT ____ , ____ , slip op. 05–11 at 13 (Jan. 27, 2005) (not published in the Federal Supplement). In any event, "the movant's evidence and arguments must actually be weighed against those of the non-movant to determine whether the movant [has established] likelihood of success" on the merits. *U.S. Ass'n of Importers*, 413 F.3d at 1347.

In this case, plaintiff has failed to demonstrate that it will suffer greater harm by the denial of injunctive relief than would be suffered by defendant should the injunction be granted. That being the case, plaintiff cannot claim that it has met the "serious, substantial, difficult and doubtful questions" standard. As noted above, weighing each side's case has demonstrated that neither party has shown that it is likely to prevail on the merits. Thus, as to the fourth part of the four-part test, plaintiff has failed to establish its entitlement to relief.

CONCLUSION

Because the court has found that plaintiff has satisfied no part of the four-part test, its motion for a preliminary injunction is denied. Judgment shall be entered accordingly.

SLIP OP. 06–6

BEFORE: HON: EVAN J. WALLACH, JUDGE

ORLANDO FOOD CORP., INC., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 02–00593

JUDGMENT IN CONFORMITY WITH MANDATE

In conformance with the mandate issued by the United States Court of Appeals for the Federal Circuit on December 13, 2005, in Orlando Food Corp. v. United States, Appeal No. 04–1612, reversing this Court's decision at Slip Op. 04–95 (August 3, 2004), it is hereby

ORDERED THAT U.S. Customs and Border Protection shall pay interest in accordance with 19 U.S.C. §§ 1505(b) and (c) on the amount previously refunded on the subject entry pursuant to Section § 1408 of the Tariff Suspension and Trade Act of 2000, Pub. L. 106–476, 114 Stat. 2101, 2148 (Nov. 9, 2000), calculated from the date of deposit of estimated duties to the date of reliquidation, plus interest on that amount as provided by law.

Slip Op. 06–7

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

UNITED STATES OF AMERICA, Plaintiff, v. FORD MOTOR COMPANY, Defendant.

Court No. 05–00284

[Defendant's Motion to Dismiss is granted. Case dismissed.]

January 13, 2006

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, (*David A. Levitt*); of counsel: *Kathleen Bucholtz*, United States Customs and Border Protection, for the United States, plaintiff.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Robert B. Silverman*, *David M. Murphy*, *Steven P. Florsheim*, *Robert F. Seely*, and *Frances P. Hadfield*); of counsel: *Paulsen K. Vandevert*, for Ford Motor Company, defendant.

OPINION

TSOUCALAS, Senior Judge: Ford Motor Company, ("Ford"), defendant, moves for dismissal pursuant to USCIT R. 12(b) on the grounds that (1) issue preclusion prevents the Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs")[1], plaintiff, from litigating the current action and (2) the statute of limitations has run on Customs' claims before the present action was initiated. Specifically, Ford contends that Customs is barred from litigating the present action under the doctrine of issue preclusion as they are disregarding previous court findings on the same issues, factual findings and conclusions. Ford further asserts that the statute of limitations bars Customs from seeking penalties and duties as no valid waiver was in place when Customs commenced the present action. Customs responds that the litigation is not barred under the doctrine of issue preclusion as previous court findings do not settle the present question of penalties. Customs further responds that a valid waiver of the statute of limitations did exist when it filed the case at bar.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582 (2000).

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

STANDARD OF REVIEW

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Halperin Shipping Co., Inc. v. United States*, 13 CIT 465, 466 (1989). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A pleading that sets forth a claim for relief must contain "a short and plain statement" of the grounds upon which jurisdiction depends and "of the claim showing that the pleader is entitled to relief. . . ." USCIT R. 8(a). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993). Accordingly, the Court must decide whether plaintiff is entitled to offer evidence in support of its claim, and not whether plaintiff will prevail in its claim. *See Halperin*, 13 CIT at 466.

DISCUSSION

I. Background

This action involves eleven entries of engines and transmissions ("Complaint Entries"). *See* Mem. Law Supp. Def.'s Mot. Dismiss ("Ford's Mem.") at 1; Mem. Opp'n Def.'s Mot. Dismiss Compl. ("Customs' Mem.") at 5. In 1983, Ford applied to the Foreign Trade Zone Board ("FTZ Board") for approval in establishing a Foreign Trade Subzone ("FTSZ") in Louisville, Kentucky. *See* Ford's Mem. at 3; Customs' Mem. at 2. The FTZ Board granted Ford's request in 1984. *See* Ford's Mem. at 4; Customs' Mem. at 2. A FTSZ is a geographic area located within the United States that can be treated as being outside the customs territory of the United States. *See* Ford's Mem. at 3; Customs' Mem. at 2. Importers can choose to pay duties on goods either at the rate applicable to the foreign merchandise upon admission to the area, or on the emerging product if used in manufacturing within the FTSZ. *See id.*; Customs' Mem. at 2.

In 1985 and 1986, the duty rate on finished imported cars was 2.6 percent *ad valorem* while the duty rate for foreign-made engines and transmissions was 3.3 percent *ad valorem*. *See* Ford's Mem. at 3; Customs' Mem. at 2. The duty rate on finished imported trucks was 25 percent *ad valorem*. *See* Ford's Mem. at 3; Customs' Mem. at 5. Ford intended to take advantage of the duty differential between the parts and the completed car through an "inverted tariff program" by admitting car engines and transmissions into the FTSZ as foreign

merchandise. *See* Ford Mem. at 3–4; *see also* Customs' Mem. at 2. The merchandise would then be incorporated into finished cars within the FTSZ and subsequently be withdrawn for entry into the United States. *See id.*; *see also* Customs' Mem. at 2. Ford was required to file Customs Form ("CF") 214 in order to obtain the inverted tariff benefit by designating all car parts as "non privileged foreign" ("NPF") and all truck parts as "privileged domestic" ("PD"). *See* Ford Mem. at 4; Customs' Mem. at 3.

Ford incorrectly marked the CF 214 checkbox for the Complaint Entries as NPF instead of PD. *See* Ford's Mem. at 5; Customs' Mem. at 5. Customs investigated the Complaint Entries and determined that the parts used in the manufacture of trucks were dutiable at the finished truck rate of 25 percent *ad valorem*. *See* Ford's Mem. at 6; Customs' Mem. at 5. Thus, Ford owed additional duties of approximately 5.3 million dollars. *See id.* at 6; Customs' Mem. at 5. Customs then liquidated the entries at the 25 percent rate, which Ford timely paid and protested. *See* Ford's Mem. at 6–7; Customs' Mem. at 5.

On January 22, 1992, Ford filed a protest action in this Court challenging Customs' assessments on the Complaint Entries.[2] *See* Ford's Mem. at 7. After much litigation, on April 12, 2002, the Court of Appeals for the Federal Circuit ("CAFC") held that Customs' investigation was unreasonable and that the "entries must be deemed liquidated under 19 U.S.C. § 1504(a)." *Ford IV*, 286 F.3d at 1343. As a result this court further ordered that Customs "refund to Ford Motor Company the increase in duties assessed together with interest from the date of payment of the increased duties to the date of reliquidation." *Ford VI*, 26 CIT at 1292.

During the above mentioned proceedings, Ford drafted letters waiving the statute of limitations period in 19 U.S.C. § 1621 on ten separate occasions in response to a request from Customs. *See* Ford's Mem. at 8; Customs' Mem. at 24. The first nine waivers, dated between November 5, 1990, and February 15, 2002, were signed by Customs "acknowledging receipt and acceptance." *See* Ford's Mem. at Ex. I. In the tenth letter, dated January 13, 2003, Customs crossed out the words "and acceptance." *See* Ford's Mem. at Ex. I. Customs followed up with a letter dated January 22, 2003, informing Ford that under its current procedures, Customs now "only acknowledge[s] receipt of waivers." *See* Ford's Mem. at Ex. I. On April 12, 2004, Customs amended its original penalty notice to include a claim for civil penalties and duties under 19 U.S.C. § 1592(d) demanding

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[2] The relevant facts in this case have been heavily litigated in *Ford Motor Co. v. United States* ("*Ford I*"), 21 CIT 983, 979 F. Supp. 874 (1997), *Ford Motor Co. v. United States* ("*Ford II*"), 157 F.3d 849 (Fed. Cir. 1998), *Ford Motor Co. v. United States* ("*Ford III*"), 24 CIT 775, 116 F. Supp. 2d 1214 (2000), and *Ford Motor Co. v. United States* ("*Ford IV*"), 286 F.3d 1335 (Fed. Cir. 2002), *Ford Motor Co. v. United States* ("*Ford V*"), 26 CIT 1246 (Oct 18, 2002), *vacated by Ford Motor Co. v. United States* ("*Ford VI*"), 26 CIT 1292 (Oct 28, 2002).

that Ford repay duties in the amount of $5,275,329. *See* Ford's Mem. at Ex. D. Subsequently, Ford moved requesting dismissal of the case at bar.

II. Contentions of the Parties

A. Ford's Contentions

Ford argues that Customs, in commencing the present action, is disregarding the CAFC's decision in *Ford IV*, and as such, issue preclusion prevents further litigation. *See* Ford's Mem. at 2. Ford stresses that "[t]he assessment of duties on the Complaint Entries, and the reasonableness of Customs' actions and investigation of Ford with respect to those entries, was exhaustively litigated" during the past decade.[3] Ford's Mem. at 1. Ford states that both this court and the CAFC made a number of findings of fact and conclusions of law in the prior action which involved the Complaint Entries. *See id.* at 2. Ford notes that the CAFC held in *Ford IV* that the length of Customs' investigation of the Complaint Entries was unreasonable, and as a result, Ford received duty refunds of $5,275,379 with interest. *See id.* at 7. Ford further contends that the CAFC decision indicates that the Complaint Entries have been liquidated by operation of law in accordance with 19 U.S.C. § 1504. *See id.* While admitting that "the instant action is a claim for penalties and duties under [19 U.S.C. § 1]592, and not an importer's claim for duty refunds under 19 U.S.C. § 1514, as was the prior action," Ford argues that the operative facts between both the prior and the current actions are essentially the same. *Id.* at 12. Ford further asserts that the present case should be dismissed as its continuation would go against public policy because it calls for the relitigation of prior findings and holdings by the courts. *See id.* at 13. Ford stresses that if the CAFC felt that Customs' 592 penalty case had merit, the CAFC would not have ordered a duty refund in *Ford IV*. *See id.* at 29. Ford rationalizes that the only reasonable conclusion to be drawn from *Ford IV* is that the CAFC intended not only to award Ford a duty refund, but to preclude the present penalty action. *See id.*

Ford further argues that there was no actual loss of revenue, rather Customs can only seek a potential loss of revenue. *See* Ford's Mem. at 15–18. Ford contends that 19 U.S.C. §§ 1514 & 1592(a) state that if the loss of revenue claim did not result from a violation of § 1592(a) and if there are no lawful duties to be restored, then recovery actions are barred. *See id.* at 18–19. Ford stresses that when Customs liquidated the Complaint Entries at 25 percent *ad valorem* in 1989, it paid these duty increases. *See id.* at 19. Ford argues that its protest action under 19 U.S.C. § 1514, and the CAFC holding which returned the duty increases to Ford, do not change the fact

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[3] *See supra* footnote 2 for a list of the cases.

that Customs received lawful duties owed when it rate advanced the Complaint Entries. *See id.* Thus, Ford concludes that the duties Customs now seeks are not lawful duties to which Customs is entitled. *See id.*

Furthermore, Ford contends the errors that it made on the CF 214s were not fraudulent. *See* Ford's Mem. at 23. Ford points out that Customs' past characterizations are inconsistent with its present fraud action because it previously described Ford's conduct as a "mistake of law." *Id.* at 23. Additionally, Ford contends that even if fraud is found under 19 U.S.C. § 1592(4)(a), penalties can not exceed 100 percent of the lawful duties owed because it made a prior disclosure to Customs. *See id.* at 16. In a letter dated February 14, 1986, Ford disclosed the CF 214 error to Customs. *See* Ford's Mem. at Ex. A. Customs then began its civil fraud investigation under 19 U.S.C. § 1592 in August of 1986. *See* Ford's Mem. at 15. Since Ford's letter disclosed the CF 214 error before Customs began its investigation, Ford argues that it made a valid prior disclosure which limits them to a maximum liability of $5.3 million dollars. *See id.* at 16.

Finally, Ford argues that the case should be dismissed as the statute of limitations has run on both claims for penalties and duties. *See* Ford's Mem. at 30. Ford claims that Customs refused to accept its tenth waiver offer by striking the words "and accepted" from the waiver. *See id.* at 24. Previous to the tenth waiver, Customs had always signed the waivers with the language "acknowledged and accepted" intact. *See id.* The ninth waiver expired on April 7, 2003. *See id.* In addition, Ford argues that the scope of the waivers were limited only to penalties. *See id.* at 26. Ford contends that because Customs' request for a waiver did not include the collection of unpaid duties, it never issued a waiver applying to such duties. *See id.* Accordingly, Ford concludes that as the ninth waiver regarding penalties "acknowledged and accepted" by Customs expired in 2003, and as there was never a waiver issued by Ford dealing with unpaid duties, the statute of limitations has expired on both issues. *See id.* at 26–28. Therefore, this case should be dismissed. *See id.* at 26–28.

B. Customs' Contentions

Customs replies that Ford has failed to establish that duties are not owed on the Complaint Entries. *See* Customs' Mem. at 2. Specifically, Customs asserts that it is not barred from seeking duties as a result of the issue preclusion or the statute of limitations arguments raised by Ford. *See id.* at 1. Customs argues that in *Ford IV* the CAFC ruled on "whether the Government properly extended the liquidations of the entries under [19 U.S.C. §] 1504, and whether Ford's failure to pay duties before entering the truck engines into the FTSZ constituted a correctable clerical error under [19 U.S.C. §] 1520(c)." *Id.* at 21. Customs claims that the prior action concerned its conduct when extending the liquidations and Ford's actions when it placed

its merchandise in its FTSZ. *See id.* "Ford's culpability when it *withdrew* its merchandise from the FTSZ," which is at issue here "was simply not addressed." *Id.* (emphasis retained). Customs asserts that the CAFC has yet to rule on Ford's culpability as it relates to the § 1592 penalty action. *See id.* at 21. Customs asserts that issue preclusion or collateral estoppel, applies only when the identical issue was actually litigated in a prior proceeding and the losing party was afforded a full and fair opportunity to litigate its position. *See id.* at 16. Customs argues that *Ford IV* and the present action differ substantially enough to bar Ford's argument of issue preclusion. *See id.* at 16.

Customs further contends that its § 1592 complaint is not precluded by the statute of limitations. *See* Customs' Mem. at 22–29. Customs argues that waivers of statutes of limitations are unilateral acts that do not require acceptance from the non-waiving party. *See id.* at 22. Thus, Customs asserts that when it struck the word "accepted" from Ford's tenth waiver, it did not diminish or cancel the waiver's effect. *See id.* at 24–25. Furthermore, Customs asserts, the waivers are unlimited in scope because they "contain no exclusions with respect to unpaid duties" and as such, the waivers do not exclusively apply to penalty issues. *Id.* at 27. Customs then concludes that since Ford waived the statute of limitations in its tenth waiver, set to expire on April 7, 2005, and Customs filed the present action on April 6, 2005, its § 1592 complaint is not precluded by the statute of limitations. *See id.* at 28–29. Furthermore, as the CAFC has not previously addressed the present § 1592 penalty action, Ford's motion to dismiss should be denied. *See id.*

III. Analysis

A. The Statue of Limitations for Filing a 19 U.S.C. § 1592 Complaint has Expired.

A legal waiver, such as a waiver of a statute of limitations "is an intentional release of a known right" in which the following elements must be met: "1) a right must exist at the time of the waiver; 2) the party who is accused of waiver must have constructive or actual knowledge of the right in question; and 3) the party intended to relinquish its right." *Broad. Satellite Int'l, Inc. v. Nat'l Digital Television Ctr., Inc.*, 323 F.3d 339, 345 (5th Cir. 2003). Customs is required to publish notice of any modification to long standing policy or practice in the Customs Bulletin. *See* 19 U.S.C. § 1625(c) (2001). Treasury Decision 76–33 states that Customs "has the authority to accept an offer to 'waive' the running of the period of limitation . . . if it appears that further administrative consideration would promote final disposition of the matter." T.D. 76–33, 41 Fed. Reg. 4,302 (Jan. 29, 1976). Treasury Decision 90–11 altered T.D. 76–33 by stating that "[a]bsent compelling circumstances, Customs will not, as a matter of policy, favorably entertain offers to waive the statute for a

shorter period of time than the two-year period." T.D. 90–11, 55 Fed. Reg. 3,682 (Feb. 2, 1990). Customs had, however, exercised its right to accept waiver offers of under 24 months when it accepted Ford's ninth waiver dated February 15, 2002, although it only covered a period of 12 months. *See* Ford's Mem. at Ex. I.

In an internal Customs memorandum ("June Memo"), dated June 16, 1999, the Chief of the Penalties Branch of the Office of Regulations & Rulings advised Fines, Penalties and Forfeitures Officers that "submission of a waiver request represents a unilateral act of the submitting party, not requiring acceptance by Customs." *See* Customs' Mem. at Ex. 11. Customs later issued Treasury Decision 01–65 in September of 2001, which it claims reiterates the language from June Memo. *See* Customs' Mem. at 25; *see also* T.D. 01–65, 66 Fed. Reg. 48,170 (Sept. 18, 2001). Treasury Decision 01–65 states that Customs Headquarters would delegate to Fines, Penalties and Forfeiture Officers the authority to "acknowledge waivers of the statute of limitations from parties who might otherwise be entitled to assert the statute of limitations as a defense against civil suit." T.D. 01–65, 66 Fed. Reg. 48,170. The June Memo explicitly contains language revoking the "acceptance" requirement, and states that Customs will treat waivers as unilateral acts. *See* Customs' Mem. at Ex. 11. The June Memo also contains a new sample waiver form reflecting this alteration. *See id.* Treasury Decision 01–65, however, contains no such language. *See* T.D. 01–65, 66 Fed. Reg. at 48,170–71.

An executive agency, such as Customs, must be held to the standard by which it claims "to be judged." *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959)(Frankfurter, J., concurring in part and dissenting in part). "Accordingly, if [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed." *Id.* at 546–47. Customs asked for a waiver of the statute of limitations from Ford soon after it issued Ford a pre-penalty notice. *See* Customs' Mem. at Ex. 2. All subsequent ten Ford letters of waiver continued to contain the language "I hereby acknowledge receipt and acceptance of the above waiver" printed above the Customs' signature line. *See* Ford's Mem. at Ex. I. Customs accepted Ford's first waiver on November 5, 1990. *See id.* The ninth waiver, dated February 15, 2002, was the last letter which Customs signed and dated without making any modification to the waiver language. *See* Ford's Mem. at Ex. I. Customs altered the tenth waiver, signed January 17, 2003, by striking out the word "acceptance." *See id.* Customs additionally sent a letter dated January 22, 2003, advising Ford that it now only "acknowledge[s] receipt of waivers." *See id.* Customs had, however, continued to both "acknowledge and accept" Ford's waivers over two years after it issued the June Memo changing its acceptance policy. *See* Customs' Mem. at Ex. 11. By selectively enforcing the June Memo, Customs was not holding itself to the policy change that it

claims it was enforcing. Furthermore, Customs never published a *revocation* of its previous policy relating to acceptance of waivers as required by 19 U.S.C. § 1625. *See* T.D. 01–65, 66 Fed. Reg. 48,170 (T.D. 01–65 as published in the Federal Register does not specifically reference Customs' shift to unilateral acceptance of waivers.). As such, Ford's tenth waiver letter was never accepted by Customs. Accordingly, the ninth and last valid waiver ended on April 7, 2003. Therefore, the statute of limitations had expired when Customs filed the present action. The case at bar is dismissed in its entirety. *See* 19 U.S.C. § 1621.

B. Customs is Not Entitled to Relief under 19 U.S.C. § 1592(d).

As the statute of limitations has expired, the dismissal of this case renders moot the question of whether Ford committed fraud, negligence or gross negligence under 19 U.S.C. § 1592(a) (1982). Even if the statute of limitations had not expired, Customs would still not be entitled to a repayment of duties in the amount of $5,275,329 under 19 U.S.C. § 1592(d) (1982). Customs' duty repayment request matches the dollar amount that the CAFC and this court ordered to be refunded to Ford. *See* Customs' Mem. at Ex. 4; *Ford IV*, 286 F.3d at 1343; *Ford VI*, 26 CIT at 1292. 19 U.S.C. § 1592(d) states that "if the United States has beendeprived of lawful duties as a result of a violation of subsection (a) of this section, [the Customs Service] shall require that suchlawful duties be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). The eleven Complaint Entries were liquidated on December 1, 1989, with duties assessed at the rate of 25 percent *ad valorem*. *Ford I*, 979 F. Supp. at 878. The court held that "Ford timely protested the liquidations and ultimately paid the additional duties assessed." *Id.* Customs' repayment of duty claims under 19 U.S.C. § 1592(d) ceased upon Ford's timely payment of duties following the December, 1989 liquidations because the United States was no longer deprived of lawful duties. The court held that the 25 percent *ad valorem* duties paid on the Complaint Entries were not lawful duties to which Customs was entitled to because Customs' fraud "investigation and the manner in which Customs conducted the investigation [was] unreasonable." *Ford IV*, 286 F.3d at 1343. Since Customs is not entitled to any further lawful duties on the Complaint Entries, Customs cannot seek relief under 19 U.S.C. § 1592(d).

CONCLUSION

The Court holds that Customs has proven no set of facts in support of its claim which would entitle it to relief. Customs' claims under 19 U.S.C. § 1592 extinguished when the statute of limitations

expired. For the foregoing reasons, Ford's motion to dismiss is granted. Judgment will be entered accordingly.

SLIP OP. 06–8

BEFORE: GREGORY W. CARMAN, JUDGE

WHEATLAND TUBE COMPANY and ALLIED TUBE & CONDUIT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and SAHA THAI STEEL PIPE COMPANY, LTD., Defendant-Intervenor.

Court No. 04–00568

[Plaintiffs' Motion for Judgment on the Agency Record is granted in part and denied in part. Case remanded to the United States Department of Commerce for further proceedings consistent with this opinion.]

Dated: January 17, 2006

Schagrin Associates (*Roger B. Schagrin*), Washington, D.C., for Plaintiffs.
Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*David S. Silverbrand*), for Defendant.
O'Melveny & Myers LLP (Veronique Lanthier & Greyson Bryan), Washington, D.C., for Defendant-Intervenor.

OPINION & ORDER

CARMAN, JUDGE: This case comes before the Court on Plaintiffs' Motion for Judgment on the Agency Record. Plaintiffs, Wheatland Tube Company and Allied Tube & Conduit Corporation, contest the treatment accorded certain duty drawback adjustments and § 201 duties[1] by the United States Department of Commerce ("Defendant" or "Commerce") in *Certain Welded Carbon Steel Pipes and Tubes from Thailand* ("Final Results"), 69 Fed. Reg. 61,649 (Dep't Commerce Oct. 20, 2004) (final results). Based upon the reasons that follow, the Court finds for Plaintiffs in part and Defendant in part and remands this case to Commerce for recalculation of the antidumping ("AD") margin for Defendant-Intervenor, Saha Thai Pipe Company, Ltd. ("Saha Thai" or "Respondent"), in a manner consistent with this opinion.

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[1] Sections 201 and 203 of the Trade Act of 1974, 19 U.S.C. §§ 2251 and 2253 (2000) permit the President of the United States to impose safeguard measures in reaction to threats posed to domestic industry by identified imported items.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

On April 21, 2003, Commerce issued a notice of initiation of an AD duty administrative review for circular welded carbon steel pipes and tubes ("pipe") from Thailand. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* ("Notice of Initiation"), 68 Fed. Reg. 19,498 (Dep't Commerce Apr. 21, 2003) (notice of initiation). Plaintiffs are U.S. producers of pipe and were the petitioners in the administrative review. (Br. of Pls.' Wheatland Tube Co. & Allied Tube & Conduit Corp. in Supp. of R. 56.2 Mot. for J. on the Agency R. ("Pls.' Br.") at 3.) The period of review ("POR") was March 1, 2002, through February 28, 2003. *Notice of Initiation* at 19,499. The review involved a single Thai producer of subject pipe: Saha Thai. *Id.*

On March 5, 2002, the President of the United States imposed § 201 safeguard duties on imports of certain steel products, including the subject pipe. *Proclamation No. 7529* ("Proclamation 7529"), 67 Fed. Reg. 10,553 (Mar. 7, 2002). When entered for consumption between March 20, 2002, through March 19, 2003, the Proclamation 7529 mandated payment of an *additional* 15% duty on imported covered steel products. *Id.* at 10,590.

On April 8, 2004, Commerce issued the preliminary results of the pipe administrative review. *Certain Welded Carbon Steel Pipes and Tubes from Thailand* ("Preliminary Results"), 69 Fed. Reg. 18,539 (Dep't Commerce Apr. 8, 2004) (preliminary results). Because Saha Thai is not affiliated with its U.S. customers, Commerce calculated the export price ("EP") of the subject pipe based upon the price from Saha Thai to the first unaffiliated U.S. purchaser in accordance with § 772(a) of the Tariff Act of 1930[2] (the "Act"). *Id.* at 18,540.

As required by § 772(c)(2) of the Act,[3] Commerce deducted–where appropriate–foreign inland freight, foreign brokerage and handling, foreign inland insurance, bill of lading charges, ocean freight to the U.S. port, U.S. brokerage and handling charges, and U.S. duty. *Id.* During the preliminary review, Saha Thai requested that certain ad-

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[2] Section 772(a) of the Act defines the "export price" as

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an *unaffiliated* purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

19 U.S.C. § 1677a(a) (2000) (emphasis added).

[3] Section 772(c)(2)(A) of the Act requires that Commerce decrease EP by the amount of "any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A) (2000).

justments be made to the EP in accordance with § 772(c)(1)(B) of the Act. Section 772(c)(1)(B) requires that Commerce increase the EP by "the amount of any import duties imposed by the country of exportation which have been rebated, or *which have not been collected*, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B) (2000) (emphasis added). Saha Thai claimed that it was eligible for an increase in EP due to its use of a Thai customs bonded warehouse, which entitled Saha Thai to an exemption from duties on imports of raw materials used in the manufacture of exported pipe. *Prelim. Results*, 59 Fed. Reg. at 18540. Upon verification, Commerce adjusted Saha Thai's EP upward to reflect the exempted import duties. *Id.*

During the preliminary review, Commerce also considered whether it should deduct from EP the § 201 duties Saha Thai paid upon importation of subject merchandise into the United States after March 20, 2002. *Id.* at 18,541. Because the agency had never before addressed this issue, Commerce made no adjustment to the EP for § 201 duties for purposes of the Preliminary Results. *Id.*

After considering a number of other issues, Commerce calculated Saha Thai's preliminary weighted-average dumping margin at 2%. *Id.* at 18,542.

The Final Results differed from the Preliminary Results. *Final Results*, 69 Fed. Reg. at 61,649. In the Final Results, Commerce calculated Saha Thai's weighted-average margin to be 0.17%. *Id.* at 61,650. Because the margin in the final results was *de minimis*, Saha Thai's cash deposit rate for the POR was zero. *Id.* The variance between the Preliminary and Final Results is the effect of Commerce permitting Saha Thai to add certain billing adjustments for § 201 duties to the EP of the subject pipe and to minor corrections to the margin program. *Id.*

ISSUES PRESENTED

1. Whether Commerce should exclude from EP § 201 duties paid by Saha Thai on subject goods imported into the United States.
2. Whether Commerce should revise EP upward to reflect billing adjustments Saha Thai requested to account for post-sale invoices it dispatched to its customers.
3. Whether Commerce erred in permitting Saha Thai to claim a drawback adjustment to EP absent proof that Saha Thai paid import duties on inputs used in the production of subject merchandise sold in the domestic market.

PARTIES' CONTENTIONS

I. *Plaintiffs' Contentions*

Plaintiffs raise two primary issues on review by this Court: Commerce's treatment of 1) § 201 duties applicable to Saha Thai's imports and 2) drawback adjustments requested by Saha Thai.

A. *Section 201 Duties*

Plaintiffs take issue with Commerce's treatment of the § 201 duties for three reasons. First, Plaintiffs contend that Commerce's failure to deduct § 201 duties from the EP violates 19 U.S.C. § 1677a(c)(2)(A). (Pls.' Br. at 16.) Plaintiffs submit that § 201 duties are "import duties" that must be deducted from EP in compliance with the statute. Plaintiffs reason that if the § 201 duties are not deducted from EP they are transformed "into a credit against the antidumping margins that would otherwise exist." (*Id.* at 16–17.) Plaintiffs point out that the § 201 duty payment credit may completely eliminate dumping margins, as it did in this matter. (*Id.* at 17.) Further, Plaintiffs allege that had the § 201 duties remained in place for three or more years the § 201 duty credit "could result in a series of negative or *de minimis* results leading to the final revocation of the antidumping duty order and the termination of relief from unfair dumping." (*Id.*)

Second, Plaintiffs insist that it was improper for Commerce to permit upward adjustments to EP due to supplemental invoices Saha Thai issued to its customers for the § 201 duties. Plaintiffs maintain that "[t]he upward adjustment is improper on its face because the transaction price of the sale had already been established and the post-sale adjustment was attributable solely to the newly applicable Section 201 duty." (*Id.* at 18.)

Third, Plaintiffs claim that Commerce's treatment of § 201 duties "countermands the President's action" in imposing § 201 relief. (*Id.* at 19.) According to Plaintiffs, because the President's proclamation implementing § 201 acknowledged the on-going effect of AD duties, Commerce's decision to accept § 201 "duty-inclusive prices" was a usurpation of the President's power and privilege to impose § 201 relief. (*Id.* at 18–19.)

B. *Drawback Adjustments*

Plaintiffs state that the rationale for the duty drawback adjustment is "to offset duties that are paid on inputs used in production of merchandise sold in the home market." (*Id.* at 9 (quotation & citation omitted).) Plaintiffs argue that Commerce failed to follow a "clearly enunciated" policy and "established statutory interpretation" that were designed to achieve the purpose of the drawback adjustment. (*Id.*) In support of its position, Plaintiffs cite an unrelated (to this case) Commerce final determination in *Silicomanganese from*

Venezuela ("Silicomanganese"), 67 Fed. Reg. 15,533 (Dep't Commerce Apr. 2, 2002) (final determination). (*Id.*)

Plaintiffs seek to bind Commerce to the position it took in *Silicomanganese*, which Plaintiffs claim support their position here. Plaintiffs assert that the present case is similar to *Silicomanganese*, and therefore, the cases–absent justification–must be treated the same. (*Id.* at 12.) According to Plaintiffs, in *Silicomanganese*, Commerce denied drawback adjustments claimed by Hevensa (the respondent) because Hevensa failed to establish that it paid import duties on goods used to produce merchandise for the domestic market. (*Id.* at 10.) On review, this court upheld Commerce's denial of the Hevensa's claimed drawback adjustments. *Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States*, 27 CIT ____ , 285 F. Supp. 2d 1353 (2003). Therefore, Plaintiffs argue that payment of duties on imported inputs used in production of subject goods for sale in the domestic market must be proved before a respondent may avail itself of a drawback adjustment to EP.

Plaintiffs also argue that drawback adjustments should be treated like other circumstances of sales adjustments, "which 'are made when the seller incurs certain costs in its home market sales that it does not incur when selling to [the] United States market.' " (*Id.* at 15 (citation omitted).) Because Saha Thai had no duty costs for inputs used to produce subject goods sold in the domestic market, Plaintiffs' position is that no drawback adjustment should be allowed.

II. ***Defendant's Contentions***

Defendant argues that § 201 duties are "special duties," which are not considered "United States import duties" for purposes of the Act and therefore are *not* deductible from EP. The government also contends that because Saha Thai satisfied the requisite two-pronged test, Commerce's allowance of the drawback adjustment was proper.

A. *Section 201 Duties*

Commerce argues that it is owed deference in its construction of 19 U.S.C. § 1677a(c)(2)(A), which requires deduction of "United States import duties" from EP. (Def.'s Mem. in Opp'n to Pls.' Mot. for J. upon the Agency R. ("Def.'s Br.") at 18.) In arriving at its statutory interpretation of "United States import duties," Commerce explains that it analyzed the legislative history of § 201. Commerce concluded that § 201 duties are not "United States import duties" and should be treated the same as AD and countervailing ("CV") duties, which are not deducted from EP. (*Id.* at 17.) Commerce reasons that–like AD and CV duties–§ 201 duties "are imposed following a determination of 'material injury.' " (*Id.* at 17–18.) Because AD and CV duties are "special duties," Commerce points out that this court has upheld Commerce's practice of not deducting them from EP. (*Id.* at

18.) Commerce claims that "deducting special duties would 'double-count' those duties." (*Id.* at 19.) Commerce maintains that "[t]o avoid such double-counting, it is therefore appropriate not to reduce the United States price in the amount of the section 201 duties." (*Id.*)

With regard to the upward adjustment to EP to reflect Saha Thai's price revisions for § 201 duties, Commerce insists that it "properly adjusted United States price to accurately reflect the sales price" because "Saha Thai's sales contracts were 'duty inclusive.' " (*Id.* at 21.) According to Commerce, the duty-inclusive sales price consists of a § 201 duty component that must be added to EP when separately invoiced to Saha Thai's unrelated United States customers. (*Id.*)

B. *Drawback Adjustments*

Commerce explains that it has a long-standing practice of evaluating claims for a duty drawback adjustment pursuant to § 772(c)(1)(B) of the Act, 19 U.S.C. § 1677a(c)(1)(B), using a two-pronged test. (*Id.* at 9.) According to Commerce, the test is based upon the criteria set forth in the Act and requires the respondent to establish that

> (1) the import duties and rebates are directly linked to and are dependent upon one another, and (2) there are sufficient imports of raw materials to account for the duty drawback received on exports of the manufactured product.

(*Id.* at 10 (quotation & citation omitted).) Commerce restates that "the statute requires that Commerce grant a duty drawback adjustment if (1) 'import duties [are] imposed' and (2) not collected 'by reason of the exportation of the merchandise to the United States.' " (*Id.* at 11 (quoting 19 U.S.C. § 1677a(c)(1)(B)) (brackets in original).)

Commerce notes that Plaintiffs do "not dispute that Saha Thai established that import duties are imposed upon the imported inputs it utilized to produce the Thai pipes exported to the United States, and that those duties were not collected because Saha Thai exported the Thai pipes to the United States." (*Id.* at 11–12.) Further, Commerce is satisfied that "the Thai import duty regime satisfied prong one of Commerce's duty drawback test." (*Id.* at 12.) During its verification, Commerce also confirmed that "Saha Thai had imported a sufficient quantity of raw materials to account for the [drawback duty] exemption." (*Id.*) Thus, Commerce concluded that Saha Thai met the second prong of Commerce's test.

Commerce next asserts that "nothing in the legislative history suggests respondents must provide proof of import duties actually paid upon imported inputs used in the home market." (*Id.*) Further, Commerce contends that the legislative history does not mandate that respondents consume duty-paid, imported inputs on subject goods sold in the domestic market to be eligible to receive a duty drawback adjustment. (*Id.* at 13.)

Commerce advises this Court that the court recently rejected Plaintiffs' argument that respondents must prove payment of import duties to be eligible for a drawback adjustment. (*Id.* (*citing Allied Tube & Conduit Corp. v. United States*, 29 CIT ____ , 374 F. Supp. 2d 1257, 1261 (2005).) Commerce points out that the *Allied Tube* court held that the "clear language of 19 U.S.C. § 1677a(C)(1)(B) [sic] does not require any inquiry into whether the price of products sold in the home market includes duties paid for imported inputs." (Def.'s Br. at 14 (quotation & citation omitted).)

Commerce argues that the court's ruling in *Hevensa* is inapposite. Commerce explains that in *Hevensa* an absence of evidence necessitated Commerce's request for further proof to substantiate the claim for a duty drawback adjustment. Commerce submits that "in *Hevensa*, the respondent failed to provide adequate documentation to validate its claims that duties were payable absent exportation." (*Id.*) Commerce did not encounter such an absence of evidence in this matter and urges this Court to find the same.

Lastly, Commerce notes that Plaintiffs do not challenge Commerce's finding that Saha Thai satisfied the two-pronged test. (*Id.* at 15.) Therefore, Commerce concludes that Saha Thai properly received a duty drawback adjustment to EP.

III. ***Defendant-Intervenor's Contentions***[4]

Saha Thai claims that Commerce would improperly double-count the § 201 duties were the agency to require their deduction from EP. Saha Thai also maintains that there is no requirement that import duties be paid on inputs used in the production of subject merchandise sold in the domestic market to qualify for a drawback adjustment to EP. Lastly, Saha Thai suggests that Plaintiffs' misinterpreted the outcomes in *Silicomanganese* and *Hevensa.*

A. *Section 201 Duties*

According to Saha Thai, "deducting Section 201 duties from respondent's export price in an antidumping duty review would result in the imposition of double remedies, a scenario that is inappropriate and not [in] accordance with U.S. law or our WTO obligations." (Mem. in Opp'n to Pls.' Mot. for J. upon the Agency R. ("Resp't Br.") at 14.) Further, Saha Thai argues that § 201 duties should be considered similar to AD and CV duties for purposes of the deduction from EP for import duties. (*Id.*) Saha Thai reasons that § 201 duties and AD duties are analogous because both "are remedial in purpose and effect." (*Id.* at 15.) As Saha Thai's logic goes, because Commerce

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[4] In large part, Saha Thai's arguments mirror Commerce's. Only where they differ or provide further explanation does the Court note Saha Thai's arguments either here or in the Discussion section of this opinion.

does not deduct AD duties from EP, it should also not deduct § 201 duties from EP. (*Id.* at 16–17.)

Saha Thai explains that § 201 safeguard duties are "designed to remedy the actual or potential injury to the domestic industry posed by the imports in question." (*Id.* at 18.) Saha Thai argues that

> deducting Section 201 duties from U.S. price cannot then be viewed as legitimately fulfilling the statutory goals of Section 201, as those objectives would have been already met by the application of Section 201 itself, a result not properly accomplished through the circular and duplicative antidumping margins that would be produced by deducting Section 201 duties.

(*Id.*)

Saha Thai notes that had Commerce not allowed the upward adjustment to EP for its § 201 reimbursements Plaintiffs likely would "have complained of absorption[5] of the Section 201 duties by Saha Thai." (*Id.* at 19.) Therefore, Saha Thai argues that Commerce's treatment of the § 201 billing adjustments was proper.

B. *Drawback Adjustments*

Saha Thai points out that Commerce has consistently applied the same two-part test in determining whether a respondent is eligible for a drawback adjustment. (*Id.* at 5.) Saha Thai reminds the Court that Plaintiffs concede that it met Commerce's two-pronged test. In addition, Saha Thai notes that Commerce's test does not require that the respondent "use imported inputs to produce domestic merchandise and demonstrate that it has paid import duties on such inputs." (*Id.* at 5–6.) Further, Saha Thai presses that Commerce has specifically rejected adding "a third prong requiring that a respondent demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market." (*Id.* at 6.) Moreover, Saha Thai submits that there is no judicial precedent for requiring that "a respondent must use imported inputs to produce domestic merchandise and demonstrate that it has paid import duties on those imported inputs in order to receive a duty drawback adjustment." (*Id.* at 8.)

Saha Thai places no weight on either *Silicomanganese* or *Hevensa* and posits that Plaintiffs misunderstand the holding in the matters. According to Saha Thai, the facts of *Silicomanganese* differ from those before the Court. In *Silicomanganese*, Saha Thai explains that Hevensa used both imported and domestic inputs to produce subject

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[5] Saha Thai's reference to "absorption" apparently refers to Commerce's regulation that it will "deduct the amount of any *antidumping* duty or *countervailing* duty which the importer or producer: (A) *Paid directly* on behalf of the importer; or (B) Reimbursed to the importer." 19 C.F.R. § 351.402(f) (2002) (emphasis added). However, the regulation appears only to apply to CV and AD duties and not to § 201 duties.

merchandise for both domestic and export markets. Although Hevensa's participation in Venezuela's duty drawback regime was not in dispute, Hevensa failed to prove that it was required to pay duty on the imported inputs used to produce subject goods for the domestic market. (*Id.*) Saha Thai states that "[g]iven that HEVENSA could not establish that the duty exemption was granted only for inputs used to produce export merchandise, [Commerce] could only conclude that the statutory requirement that the duty exemption be 'by reason of the exportation of the subject merchandise' was not met." (*Id.* at 9.) In other words, Saha insists that *Silicomanganese* and the court's holding in *Hevensa* relate to a failure of proof that "the import duty and rebate are directly linked and dependent on one another." (*Id.* at 5.) Saha Thai maintains that the *Hevensa* court upheld Commerce's imposition of a requirement that Hevensa prove payment of import duties on imported inputs used to produce domestic subject merchandise to establish "that the exemption granted *under the circumstances of this case* was in fact due to the exportation of the merchandise and not as part of a general scheme to exempt all inputs from duties." (*Id.* at. 9 (emphasis in original).) Because there has been no suggestion that Saha Thai would not have been required to pay duty on imported inputs for use to produce subject goods for the domestic market and because Commerce and this court have adhered to Commerce's two-pronged test in matters arising subsequent to *Silicomanganese*, Saha Thai urges this Court to uphold Commerce's treatment of its drawback adjustments. (*Id.* at 10–12.)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

I. *Substantial Evidence*

In reviewing a challenge to Commerce's final determination in an AD administrative review, the Court will uphold Commerce's decision unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Tariff Act of 1930, § 516A(b)(1)(B) (codified as amended at 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted); *see also Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (" 'Substantial evidence' has been defined as 'more than a mere scintilla,' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "). "As long as the agency's methodology and procedures are reasonable means of effectuating the statu-

tory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

II. *Agency Deference*

In determining whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake a two-step analysis. First, the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, the matter is at an end. *Id.*

If the statute is silent or ambiguous concerning the issue before it, the Court must assess whether the agency's interpretation of the statute is reasonable. *See, e.g. NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291 (2002) ("[T]his is an inquiry into the reasonableness of Commerce's interpretation."). To evaluate whether Commerce's statutory interpretation is reasonable, the Court will consider several factors, including, but not limited to, the following: "the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Id.*

"[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citation omitted). The Court owes Commerce deference in these cases because it has special expertise in administering AD law. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002); *see also Koyo Seiko*, 36 F.3d at 1570 ("[A]n agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws.").

DISCUSSION

For the reasons that follow, the Court finds that Commerce's allowance of the § 201 duty billing adjustments and import duty drawback adjustments were proper and in accordance with law. However, the Court finds that Commerce's failure to deduct § 201 duties from EP was unreasonable and not in accordance with law. Therefore, this case is affirmed in part and remanded to Commerce for recalculation of Saha Thai's AD margin after deduction of § 201 duties from EP.

I. *Section 201 Adjustments*

In their motion for judgment on the agency record, Plaintiffs argue that Saha Thai should not be allowed to increase the EP of the sub-

ject pipe by the amount of the § 201 billing adjustments. Plaintiffs also argue that Saha Thai should be required to deduct the amount § 201 duties from the EP because they are "import duties" within the meaning of the statute. The Court disagrees with Plaintiffs on the first point and agrees with Plaintiffs on the second.

A. *Billing Adjustments*

The President's imposition of § 201 duties occurred after Saha Thai entered into sales contracts that resulted in imports of subject pipe. Upon importation, Saha Thai paid the § 201 duties and later issued invoices to its customers for the § 201 duties. Saha Thai issued the invoices, which are presently at issue, to account for the increase in the price of the subject pipe due to the imposition of the § 201 duties after Saha Thai's sales contracts were negotiated. *Issues & Decision Mem. for the Antidumping Duty Admin. Review of Certain Welded Carbon Steel Pipes & Tubes from Thailand* ("Decision Memorandum"), A–549–502, POR 02–03, at 4 (Oct. 5, 2004), *available at* http://www.ia.ita.doc.gov/frn/summary/thailand/E4-2727-1.pdf. Commerce permitted the billing adjustments because Saha Thai executed the duty-inclusive sales contracts for which the billing adjustments were claimed before the § 201 duties became effective on March 20, 2002. *Id.* at 5. (*See also Def.'s Br.* at 21.) Commerce verified Saha Thai's payment of § 201 duties and re-invoicing of its U.S. customers and found no discrepancies. *Dec. Mem.* at 5. Consequently, Commerce added the billing adjustments to Respondent's EP. *Id.*

The § 201 billing adjustments represent part of the actual prices paid for subject pipe by Saha Thai's unaffiliated customers in the United States. As such, the billing adjustments form part of the EP. Therefore, the billing adjustments for § 201 duties that Commerce permitted were based upon substantial evidence and otherwise in accordance with law.[6]

B. *Deduction from EP*

Whether § 201 duties must be deducted from EP in accordance with section 772 of the Act, 19 U.S.C. § 1677a(c)(2)(A),[7] as "United States import duties" is a question of first impression. Plaintiffs ar-

[6] In its reply brief, Plaintiffs concede this point. (Reply Br. of Pls. to Mem. of Def., the United States, & Def. Intervenor, Saha Thai, in Opp'n to Mot. for J. on the Agency R. ("Pls.' Reply") at 14–15 ("To be clear, Wheatland is not objecting to Commerce's addition of Saha Thai's section 201 billing adjustments to Saha Thai's originally-contracted prices, because the addition of the billing adjustments to the negotiated prices establishes the actual prices paid by the unaffiliated purchasers in the United States for sales involving billing adjustments.").)

[7] *See supra* note 4.

gue that § 201 duties are "United States import duties" that Commerce is required to deduct from EP. The Court agrees.

Because Congress did not define "United States import duties," the Court must determine whether it is reasonable for Commerce to interpret the statute to exclude § 201 duties. *See NSK*, 26 CIT at 654. While Commerce's determination need not be the only possible outcome, *Koyo Seiko*, 36 F.3d at 1570, the interpretation generally must meet the objectives of the statute, *NSK*, 26 CIT at 654. The Court finds that Commerce's failure to deduct § 201 duties from EP does not satisfy the objectives of the statute or trade remedy legislation–in general–and is, therefore, not in accordance with law.

In interpreting the phrase "United States import duties," this Court looks first to the statute itself. *Chevron*, 467 U.S. at 842–43. The Trade Act does not define "United States import duties." However, the Trade Act of 1974, which gives rise to the dispute over the deductibility of § 201 duties, does provide guidance on the meaning of the phrase and Congress' intention.

Section 201 of the Trade Act of 1974 permits the President to impose safeguard measures in reaction to threats posed to domestic industry by identified imported goods. Section 202(d)(1)(A) of the Trade Act of 1974 directs the International Trade Commission ("ITC") to "recommend the action that would address the serious injury, or threat thereof." 19 U.S.C. § 2252(e)(1) (2000). One such action that the ITC may recommend is "an increase in, or the imposition of, any *duty* on the imported article." 19 U.S.C. § 2252(e)(2)(A) (2000) (emphasis added). By way of Proclamation 7529, the President imposed "an increase in *duties on imports*" of the subject merchandise. 67 Fed. Reg. at 10,555 (emphasis added). Section 601(1) of the Trade Act of 1974 defines "duty" as including "the rate and form of any *import duty*, including but not limited to tariff-rate quotas." 19 U.S.C. § 2481(1) (emphasis added). Clearly, Congress envisioned that the duties imposed under § 201 would be considered "import duties" for purposes of the legislation.[8]

Commerce undertook a different analysis in interpreting the phrase "United States import duties" and concluded that the legislative history of the provision distinguishes between "special duties" and "normal duties." (Def.'s Br. at 17.) According to Commerce, "special duties" need not be deducted from EP pursuant to 19 U.S.C. § 1677a(c)(1)(B), while "normal duties" must be deducted.

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[8] Plaintiffs assert that the Supreme Court has defined import duties as "charges which are collected on, or in connection with, the importation of goods." (Pls.' Reply at 5 (*quoting Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993).) While this definition is helpful to Plaintiffs' case, the Supreme Court was merely quoting the definition of "import duties and taxes" ascribed by the Customs Convention on Containers ("Convention"), Dec. 2, 1972, Art. I, 988 U.N.T.S. 43. The question of defining an "import duty" was not before the Supreme Court, and the Supreme Court did not adopt, as Plaintiffs suggest, the Convention's definition of "import duties" for all purposes.

In support of its position, Commerce cites the Senate report that accompanied the Antidumping Act of 1921, which referred to AD duties as "special dumping duties" and to "normal customs duties" as "United States import duties." *Stainless Steel Wire Rod from the Republic of Korea* ("SSWR"), 69 Fed. Reg. 19,153, 19,159 (Dep't Commerce Apr. 12, 2004) (final results).[9] From this reference, Commerce deduced that

> Congress has long recognized that at least *some* duties implementing trade remedies–including at least antidumping duties–are special duties that should be distinguished from ordinary customs duties. Accordingly, Commerce consistently has treated AD duties as special duties not subject to the requirement to deduct "United States import duties" (normal customs duties) from U.S. prices [EP] in calculating dumping margins.

Id. (emphasis added).

Even Commerce leaves open the possibility that "some" "special duties" may also be "normal customs duties" that must be deducted from EP as "United States import duties." The Court finds that § 201 duties are such duties, though the Court is reluctant to ratify the terminology of "special duties" and "normal customs duties" adopted by Commerce.

Commerce likens § 201 duties to AD duties because "section 201 duties are imposed only following a determination of injury." (Def.'s Br. at 20.) *See also SSWR*, 69 Fed. Reg. at 19,159–60 ("201 duties are imposed only following a finding of serious injury to the industry in question"). This is simply a misstatement of the law. The President may impose § 201 duties after an ITC finding that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, *or the threat thereof*, to the domestic industry." 19 U.S.C. § 2251(a) (2000) (emphasis added). Because no actual injury to domestic industry is necessary prior to the imposition of § 201 duties, Commerce is incorrect to suggest that § 201 duties are the product of a review "akin to antidumping duties." (Def.'s Br. at 21.)

AD duties are intended to offset price discrimination from overseas competitive industries. The AD duty rate generally is established for an individual manufacturer based upon a complicated

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[9] Because Commerce had not previously considered the deductibility of § 201 duties, the agency requested public comments. *Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53,104 (Dep't Commerce Sept. 9, 2003) (request for public comment). In *SSWR*, Commerce discussed the various comments submitted from the public and from the petitioners and the respondents in *SSWR* and provided a detailed analysis of its position on the matter. Because Commerce relied on *SSWR* in its Decision Memorandum for this case, the Court can infer that Commerce's justification for its treatment of § 201 duties derives not only from Commerce's brief and Decision Memorandum, but also from Commerce's position as set forth in *SSWR.*

analysis of economic, manufacturing, cost, price, and other data. Commerce must then revise EP based upon an array of statutorily-dictated adjustments before it can compare EP to normal value. Once Commerce completes these complex calculations, the agency can determine the dumping margin and appropriate AD dumping deposit rate or final cash deposit rate.

In contrast, § 201 duties are set forth by Presidential fiat to counter a surge in imports. Unlike AD duties, § 201 duties are not "intended to offset the effect of discriminatory pricing between . . . two markets." *AK Steel Corp. v. United States*, 21 CIT 1265, 1280, 988 F. Supp. 594 (1997), *aff'd*, 215 F.3d 1342 (Fed. Cir. 1999) (quotation & citation omitted). Rather, § 201 duties are remedial duties designed to provide "*temporary* relief for an industry suffering from serious injury, or the *threat* thereof, so that the industry will have sufficient time to adjust to the freer international competition." S. Rep. No. 93–1298, at 119 (1974) (emphasis added). Because they specifically address two distinct types of harms, AD and § 201 duties may be "complementary," but they are not "interchangeable," as Commerce suggests. *SSWR*, 69 Fed. Reg. at 19,161. Simply because § 201 and AD duties are each remedial in nature does not–as Saha Thai urges–create a "single trade practice." (Resp't Br. at 17.)

Section 201 duties are "not intended to protect industries which fail to help themselves become more competitive through reasonable research and investment efforts, steps to improve productivity and other measures that competitive industries must continually undertake." S. Rep. No. 93–1298, at 122. Moreover, it is clear from the legislative history of § 201 that Congress did not intend for § 201 duties to replace–or be "interchangeable" with–AD duties.

> The [International Trade] Commission would be required, whenever in the course of its investigation it has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of the Antidumping Act, the countervailing duty statute (section 303 of the Tariff Act of 1930), the unfair import practices statute (section 337 of the Tariff Act of 1930), or other remedial provisions of law, to *notify promptly* the appropriate agency so that such action may be taken as is *otherwise authorized* by such provisions of law. *Action under one of those provisions when appropriate is to be preferred over action under this chapter.* This provision is designed to assure that the United States *will not needlessly invoke the escape-clause* (article XIX of the GATT) [§ 201] and will not become involved in granting compensatory concessions or inviting retaliation in situations where the *appropriate remedy* may be action under one or more U.S. laws against unfair competition for which no compensation or retaliation is in order.

Id. at 122–23 (emphasis added). The legislative history enunciates that Congress expects that Commerce will address antidumping using the appropriate trade remedy laws and that § 201 is *not* an appropriate remedy for antidumping. In fact, Congress recognizes that to attempt to remedy antidumping by way of § 201 would be in violation of the United States' obligations under the General Agreement on Tariffs and Trade (GATT). It does *not* follow from this legislative history that "to the extent that 201 duties may lower the dumping margin, this is a legitimate remedy for dumping." (Dec. Mem. at 3 (*quoting SSWR*, 69 Fed. Reg. at 19,160).)

Further, "[i]n determining whether to provide relief [pursuant to § 201] and, if so, in what amount, the President will continue the practice of taking into account relief provided under other provisions of law, such as the antidumping and countervailing duty laws." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, Vol. 1, at 964 (1994) ("SAA"). Thus, the Court may presume that when setting the level of § 201 duties the President took into consideration the existing AD orders on the affected products. Given that AD duties and § 201 duties are designed to remedy distinct harms, the Court may also presume that the President would not expect that Commerce would revise AD duties downward in response to the President's action.

Commerce seems to agree and reasons that "any adjustment for the potential overlap between 201 and AD remedies is to be made *by the President* in setting the level of the 201 duties." *SSWR*, 69 Fed. Reg. at 19,160 (emphasis added). Further, Commerce claims that "it is not Commerce's place to upset that balance by subtracting the 201 duties from U.S. prices [EP] in calculating dumping margins." *Id.* However, by its failure to deduct § 201 duties, Commerce has effected the very result that it intended to avoid. By failing to deduct § 201 duties from EP, Commerce improperly negates the § 201 duty imposed by the President, artificially decreases Respondent's AD margin, and upsets the balance between § 201 and AD duties. This result is aptly demonstrated by the elimination of Saha Thai's dumping margin from the preliminary results to the final determination.[10]

This Court does not take issue with Commerce's long-standing position not to deduct AD duties from EP in calculating the dumping

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[10] Had Saha Thai not issued the billing adjustments, Commerce would presume that § 201 duties were included in Saha Thai's sales price. (Pls.' Reply at 11 n.10, 13–14); *see also SSWR*, 69 Fed. Reg. at 1,159 n.18. Thus, the risk of creating a dumping margin where none previously existed would depend wholly on the respondent's allocation and absorption of its selling expenses. *See* Def.'s Br. at 19; *SSWR*, 69 Fed. Reg. at 19,160. The method by which exporters and producers allocate and absorb expenses is always a consideration in the administration of AD laws. Commerce should treat § 201 duties no differently than any other deductible movement charge (i.e., foreign inland freight, foreign brokerage and handling, foreign inland insurance, bill of lading charges, ocean freight to the U.S. port, U.S. brokering and handling charges, and U.S. duty) to Saha Thai .

margin. This court, *see id.* at n.23, and Congress, *see id.* at n.25, have sanctioned this practice for good reason: deducting AD duties from EP would result in double-counting AD duties. *See, e.g.*, *Hoogovens Staal BV v. United States*, 22 CIT 139, 146, 4 F. Supp. 2d 1213 (1998) ("deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margin"); *AK Steel*, 21 CIT at 1280 ("making an additional deduction from [United States price] for the same antidumping duties that correct this price discrimination would result in double-counting" (quotation & citation omitted)).

Plaintiffs explain that "Commerce has traditionally not deducted AD duties from the EP or [constructed export price] because the AD duty is the *result* of the AD margin calculation, and not a component of it. Thus, deducting AD duties in determining the EP or [constructed export price] double-counts the AD duty, once as a component of the calculation of the duty, and a second time as the AD duty itself." (Pls.' Reply at 7 (emphasis added).) Because § 201 duties are not determined based upon a margin calculation, no such double-counting occurs with § 201 duties. In fact, Commerce acknowledges that no "circular logic" affects the consideration of whether to deduct § 201 duties, as it does with AD duties.[11] *SSWR*, 69 Fed. Reg. at 19,159.

Double-counting is not the only justification for not deducting AD duties from EP. This court has previously found that AD duties are not deductible from EP pursuant to 19 U.S.C. § 1677a(c)(2)(A) because deposits of estimated dumping duties may not accurately reflect the final deposit rate calculated by Commerce. *Federal-Mogul Corp. v. United States*, 17 CIT 88, 108, 813 F. Supp. 856 (1993). The court held that Commerce should "deduct estimated import duties from [United States price] only to the extent that the actual duties to be collected can be determined at the time [Commerce] is calculating the current dumping margins." *Id.* The court found that Commerce correctly deducted "only deposits of the actual normal import duties owed which [could] be *accurately determined.*" *Id.* (emphasis added).

Commerce concedes that § 201 duties are import duties, albeit a "special type." *SSWR*, 69 Fed. Reg. at 19,160. *Federal-Mogul* supports the finding that import duties must be deducted from EP if they "can be determined at the time [Commerce] is calculating the current dumping margins." 17 CIT at 108. Unlike AD duties, § 201 duties are fixed and certain at the time of importation. Proclamation 7529, 67 Fed. Reg. at 10,557, 10,590. Therefore, Commerce and Saha

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[11] "Circular logic" refers to the double-counting that would occur if AD duties were deducted from the EP used to calculate the very dumping margin that is then used to determine the AD dumping duty deposit rate. (Def.'s Br. at 19.)

Thai cannot argue that § 201 duties deposited at importation do not accurately reflect the final duty to be assessed. Thus, Commerce must deduct from EP the § 201 duties, which are accurate, fixed, and determinable, when Commerce calculates the current dumping margin. *See Federal-Mogul*, 17 CIT at 108. Commerce did not act in accordance with law when it failed to make such a deduction.

In further considering the application of section 772(c)(2)(A) of the Act, 19 U.S.C. § 1677a(c)(2)(A), to AD duties, this court noted that

> If Commerce were to deduct existing antidumping duties as a matter of course in its administrative review, it would reduce the U.S. price [EP]–and increase the margin–artificially. As discussed earlier, an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or extra "cost" or "expense" to the importer–*it is an element of a fair and reasonable price.*

Hoogovens Staal, 22 CIT at 146 (emphasis added). As the *Hoogovens Staal* court indicated, AD duties–and by extension CV duties, *see AK Steel*, 21 CIT at 1280–are *not* deductible from EP because they are part of the "fair and reasonable price" of the imported subject goods, as opposed to deductible costs, expenses, or United States import duties. *Hoogovens Staal*, 22 CIT at 146. The same cannot be said for § 201 duties because § 201 duties are not intended to redress price discrimination.

In addition, Commerce's failure to deduct § 201 duties "violates the fundamental principle of antidumping law." (Pls.' Br. at 17 n.8.) This principle requires that Commerce adjust EP to permit comparison of EP and normal value at a " 'common' point in the chain of commerce." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (1983). Commerce defines the "common" point for purposes of the comparison of EP to normal value as ex-factory. Dep't Commerce, Import Administration, *Antidumping Manual* ("AD Manual"), at 13 (1998).[12]

The Trade Act requires Commerce to deduct from EP "additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A). Because § 201 duties are incurred after the point of shipment and are not–like AD duties–part of the "fair and reasonable price" of the subject merchandise, *Hoogovens Staal*, 22 CIT at 146, § 201 duties fall within the ambit

[12] Plaintiffs note that *Smith-Corona* suggests that the "common" point for comparison may be "f.o.b. foreign port." (Pls.' Reply at 14 (*quoting Smith-Corona*, 713 F.2d at 1572).) Because defining the common point for comparison is not relevant to the outcome of this case, the Court defers to Commerce's conclusion that the common point is the "factory at which the merchandise was produced." *AD Manual* at 13.

of "United States import duties." Commerce acknowledges as much. *SSWR*, 69 Fed. Reg. at 19,160 ("While 201 duties are a special type of import duty, they are nevertheless a species of import duty, and are thus covered, if at all, by the phrase 'United States import duties.' ") Further, in its questionnaire response, Saha Thai itself described the § 201 duties it paid as "additional expenses incurred for shipping merchandise to the United States." (App. of Docs. in Supp. of Def.'s Mem. in Opp'n to Mot. for J. upon the Agency R., Tab 1 (Antidumping Questionnaire Resp.) at 2.) Thus, Commerce must treat § 201 duties as deductible movement charges in accordance with 19 U.S.C. § 1677a(c)(2)(A).

It is clear from legislation and the legislative history that Congress intended § 201 duties to be considered "import duties." Further, because AD and § 201 duties are intended to redress dissimilar trade distortions and are calculated in methods unique to each, it is not reasonable for Commerce to treat the two types of duties similarly for purposes of section 772(c)(2)(A) of the Tariff Act of 1930, 19 U.S.C. § 1677a(c)(2)(A). Commerce's failure to deduct § 201 duties from EP vitiates § 201 duties, arbitrarily reduces Saha Thai's dumping margin, and obstructs the purpose of both § 201 and AD trade remedies. Moreover, Commerce can accurately determine the amount of § 201 duties at the time the AD margin is calculated. Therefore, Commerce's failure to deduct § 201 duties from EP was not in accordance with law. Accordingly, this Court remands this matter to Commerce to recalculate Saha Thai's dumping margin after deducting § 201 duties from EP in accordance with 19 U.S.C. § 1677a(c)(2)(A).

II. ***Duty Drawback Adjustment***

Section 772(c)(1)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(1)(B), requires Commerce to increase EP for eligible duty drawback received in the respondent's home market. This practice is commonly known as a "duty drawback" adjustment. The duty drawback adjustment is limited to "the amount of any import duties imposed by the country of exportation which have been rebated, or *which have not been collected*, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B) (emphasis added). The duty drawback adjustment is intended to prevent dumping margins from being created or affected by the rebate or exemption of import duties on inputs used in the production of exported merchandise. *See Hevensa*, 285 F. Supp. 2d at 1358; *Allied Tube*, 374 F. Supp. 2d at 1261.

> In other words, a duty drawback adjustment takes into account any difference in the prices for home market or normal value and export sales accounted for by the fact that such import duties have been paid on inputs used to produce the merchandise

> sold in the home market, but have not been paid on inputs used to make the merchandise exported to the United States.

Hevensa, 285 F. Supp. 2d at 1358.

To determine whether a respondent is eligible for a duty drawback adjustment, Commerce developed a two-pronged test. (Def.'s Br. at 9.) The test requires the respondent to establish that

> (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.

Allied Tube, 374 F. Supp. 2d at 1261. The first prong establishes a link between an import duty imposed and a rebate or exemption from such duty. *Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1215, 838 F. Supp. 608 (1993). In addition, the first prong enables Commerce to verify that the home country allows rebates or exemptions *only* for those imported inputs used to produce exported merchandise. "The second prong of the test focuses more specifically on the respondents'[sic] conduct and requires the foreign producer to demonstrate that it has imported a sufficient amount of raw materials to account for the drawback received upon export of the finished product." *Id.* at 1216 (citation omitted). This court has consistently upheld Commerce's two-pronged test to assess duty drawback eligibility. (Def.'s Br. at 10.) *See also Avesta Sheffield*, 17 CIT at 1215.

Both Commerce (Def.'s Br. at 11–12) and Saha Thai (Resp't Br. at 3) assert that Saha Thai satisfied Commerce's two-pronged duty drawback eligibility test. Further, both Commerce (Def.'s Br. at 11–12) and Saha Thai (Resp't Br. at 6) claim that Plaintiffs concede that Saha Thai met Commerce's two-pronged test. The Court defers to Commerce on whether Saha Thai satisfied the two-pronged test and agrees that Plaintiffs concede this point.

The issue before this Court is not whether Saha Thai satisfied the two-pronged test or even whether the two-pronged test is valid. Rather, the issue before this Court is whether–in addition to complying with the two-pronged duty drawback eligibility test–Saha Thai must establish that it paid duty on imported inputs used in the production of subject merchandise sold in the domestic market. (Pls.' Br. at 2.) This Court finds that there is no requirement in the statute or in Commerce's reasonable interpretation thereof that Saha Thai prove that it paid duty on imported inputs used in the production of subject merchandise sold in the domestic market to qualify for a duty drawback adjustment.

Plaintiffs rely on *Silicomanganese* and this court's subsequent opinion in *Hevensa* in support of their position. As Commerce and Saha Thai point out, Plaintiffs' reliance is misplaced. The court's

holding in *Hevensa* is limited to the facts before that court, which are distinguishable from the facts before this Court.

Like this matter, *Hevensa* involved the application of a duty drawback exemption program. *Hevensa*, 285 F. Supp. 2d at 1359. Venezuela, Hevensa's home country, operated a duty exemption regime whereby Hevensa was "exempt from paying, rather than receiving a rebate on, import duties on certain inputs used to produce silicomanganese for export." *Id.* In verifying whether Hevensa was eligible for a duty drawback adjustment to EP, "Commerce examined whether import duties were not collected (*i.e.*, exempted) on imported inputs because those inputs were used to produce silicomanganese that was exported." *Id.* The petitioners asserted that "Hevensa did not pay duties on imported materials used in the production of silicomanganese sold during the POI *in either the home or export markets.*" *Issues & Decision Mem. for the Final Determination of the Antidumping Investigation of Silicomanganese from Venezuela*, A–307–820, POI 00–01, at cmt.6 (Apr. 2, 2002), *available at* http://www.ia.ita.doc.gov/frn/summary/venezuela/02-7953-1.txt. The silicomanganese petitioners noted that Hevensa's *total* consumption of certain inputs was nearly identical to the amount of those same inputs on which Hevensa claimed duty exemption. *Id.* Thus, the petitioners contended that "Hevensa did not pay import duties on those inputs, regardless of whether they were used to produce silicomanganese sold in the home market or export markets during the POI." *Id.* The petitioners insisted that Hevensa must provide Commerce with evidence that it paid duties on a percentage of raw materials equal to the percentage of home market sales to total silicomanganese sales. *Id.* Commerce agreed with the petitioners that Hevensa was not eligible for a duty drawback adjustment. *Id.*

Both Commerce (Def.'s Br. at 14) and Saha Thai (Resp't Br. at 9) submit that *Silicomanganese* and *Hevensa* involve a failure of proof. According to Commerce and Saha Thai, Hevensa failed to satisfy the first prong of the duty drawback eligibility test. As Commerce stated, Hevensa "failed to provide adequate documentation to validate its claims that duties were payable absent exportation." (Def.'s Br. at 14.) This court recently considered very similar arguments in *Allied Tube*, 374 F. Supp. 2d. at 1259.

In *Allied Tube*, the court rejected the plaintiffs' assertion that to qualify for a duty drawback adjustment the respondent was required to prove that it paid import duties on inputs used in the production of subject merchandise sold in the domestic market. *Id.* at 1261. In reaching its decision, the court analyzed *Hevensa* and held that

> *Hevensa* did not create a separate, third prong to the duty drawback test. Rather, the Court [sic] affirmed the first prong of Commerce's test whereby a party seeking a duty drawback adjustment must demonstrate that either rebate and import duties are dependent on one another, or that exemption from

> import duties is linked to exportation of the subject merchandise.

Allied Tube, 374 F. Supp. 2d at 1263. The Court also considered whether it was relevant that the respondent "did not pay any import duties on raw materials used to produce subject merchandise for the home market." *Id.* The court concluded that Commerce's decision to grant the duty drawback adjustment was reasonable because Commerce found that the drawback regime was reliable and that the respondent satisfied both prongs of the duty drawback eligibility test.[13]

This Court finds no reason to deviate from the court's well-reasoned decision in *Allied Tube.* "The clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price for products sold in the home market includes duties paid for imported inputs." *Id.* at 1262. The Trade Act "allows a full upward adjustment," *Avesta*, 17 CIT at 1216, to EP for the duties "which have not been collected," 19 U.S.C. § 1677a(c)(1)(B). Further, this Court explicitly rejects Plaintiffs' "contention that, as a prerequisite to receiving [a] duty drawback [adjustment], a company must demonstrate the payment of duties upon raw materials used to produce merchandise sold in the home market." *Allied Tube*, 374 F. Supp. 2d at 1261.

Insofar as Plaintiffs do not challenge Commerce's finding that Saha Thai satisfied the two-pronged duty drawback eligibility test, this Court finds Commerce's allowance of the duty drawback adjustment reasonable and in accordance with law.

CONCLUSION

For the reasons stated herein, the Court finds that Commerce's allowance of § 201 duty billing adjustments and import duty drawback adjustments were reasonable and in accordance with law. However, the Court finds that Commerce's failure to deduct § 201 duties from Respondent's EP was not reasonable and not in accordance with law. Therefore, this case is affirmed in part and remanded to Commerce for recalculation of Saha Thai's AD margin after deduction of § 201 duties from EP. Commerce's remand results must be filed with the United States Court of International Trade on or before March 1, 2006.

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[13] The court noted that the respondent provided Commerce with evidence that it paid duties on some imported inputs used for production of subject merchandise sold in the domestic market, but the court did not rely upon this evidence in reaching its conclusion.