(Slip Op. 03–100)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 92–04–00252

[Upon stipulation of the facts in lieu of trial regarding steel imports, judgment for the defendant.]

(Decided: August 8, 2003)

Sandler, Travis & Rosenberg, P.A. (*Beth C. Ring*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Aimee Lee*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Chi S. Choy*), of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This action consolidates claims by the plaintiff for refunds of duties assessed by the U.S. Customs Service on the full value of imports of stainless steel, as opposed to only on the value of its processing outside the United States per item 806.30 of the Tariff Schedules of the United States ("TSUS"), which duty exemption applied to

> [a]ny article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from processing outside of the United States, is returned to the United States for further processing[.]

I

To be "manufactured in the United States", there "must be transformation; a new and different article must emerge, 'having a dis-

tinctive name, character, or use.' " *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908). An article may be "subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product." *Tide Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898). A "process of manufacture" advances an article in condition or value such that the article is more than it was in its original state. *See, e.g., United States v. Oxford Int'l Corp.*, 62 CCPA 102, 106, 517 F.2d 1374, 1377–78 (1975); *United States v. Flex Track Equip. Ltd.*, 59 CCPA 97, 101, 458 F.2d 148, 151–52 (1972); *Ford Motor Co. v. United States*, 19 CCPA 69, 71, T.D. 44897 (1931). It is well-established, though, that certain processes are not manufacturing. *See, e.g., Lackawanna Steel Co. v. United States*, 10 Ct.Cust.Appls. 93, 94–95, T.D. 38359 (1920) (crushing rock such that it was "rendered into the imported sizes solely to facilitate and economize in transportation" not a manufacturing process); *Firestone Tire & Rubber Co. v. United States*, 71 Cust.Ct. 63, 66, C.D. 4474, 364 F.Supp. 1394, 1397 (1973) ("mere cleansing of an article, or 'getting it by itself', [ ] not a manufacturing process"). Morever, "[e]very application of labor is not a manufacturing process[,] and it has long been held that an operation which is necessary to get an article of commerce by itself is not such a process." *George Beurhaus Co. v. United States*, 32 Cust.Ct. 269, 271, C.D. 1612 (1954), citing *United States v. Sheldon & Co.*, 2 Ct.Cust.Appls. 485, T.D. 32245 (1912); *Cone & Co. v. United States*, 14 Ct.Cust.Appls. 133, T.D. 41672 (1926); *United States v. U.S. Rubber Co.*, 31 CCPA 174, C.A.D. 269 (1944); *V.W. Davis v. United States*, 10 Cust.Ct. 189, C.D. 751 (1943); *J.E. Bernard & Co. v. United States*, 30 Cust.Ct. 122, C.D. 1509 (1953). In *Beurhaus*, for example, pumpkin seed kernels were held to have been imported unmanufactured where their foreign processing consisted of removing the kernels from whole seeds and drying them out:

> * * * Defendant claims that the imported merchandise has been partially manufactured because shelling or peeling the seeds was one of the steps necessary to the development of the finished article. It might likewise be claimed that removing the seeds from the pumpkin and taking the pumpkin from the vine were such steps. All of those operations were, of course, necessary to the production of the finished article, but they were primarily required for the purpose of obtaining the seed kernels free from the pods.

32 Cust.Ct. at 271. Similarly, in *United States v. Salomon*, 1 Ct.Cust.Appls. 246, 249, T.D. 31277 (1911), the court held that cotton waste, which had been treated and bleached, was not "advanced in value by a [ ] * * * manufacturing process".

II

In the light of this law long settled, come the parties to this action with a Stipulation of Material Facts in Lieu of Trial, which the court has reviewed and approved as having "be[en] submitted for decision in lieu of trial on" its contents.[1] They include the following:

> 4. Plaintiff * * * is the surety on the customs bonds for the entries subject to this action.
>
> 5. The importer of record on the subject entries during the relevant time period[ ] was either Newmet Corporation or Newmet Steel Corporation (collectively referred to as "Newmet").* * *
>
> 6. Newmet was engaged in the business of selling in the United States[ ] finished or semi-finished stainless and electrical steel products which were purchased from foreign steel mills on a scrap conversion basis, meaning that Newmet supplied scrap to the foreign steel mills and paid them for converting the scrap into the imported stainless steel sheets, plates and strips.
>
> 7. Newmet obtained orders for the imported semifinished or finished stainless steel sheets, plates or strips from steel fabricators in the United States, which such fabricators would further process by straightening, slitting and cutting to size for further sale to manufacturers of a variety of stainless steel products.

* * * * * * *

> 9. The imported merchandise consists of stainless steel sheets, plates and strips and are articles of metal other than precious metal.
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> 10. The merchandise covered by the subject entries * * * [was] processed abroad by foreign steel mills from stainless steel scrap that had been exported from the United States.
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> 11. The exported scrap (hereinafter also referred to, for purposes of this stipulation, as "prepared scrap") [ ] was the raw material from which the imported products were manufactured * * * by the foreign steel mills.
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> 12. The subject imported stainless steel sheets, plates and strips were imported into the United States for further processing into various stainless steel products.

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[1] The court's jurisdiction over this consolidated action is pursuant to 28 U.S.C. §§ 1581(a), 2631(a).
In addition to their stipulation, the plaintiff has filed a motion for summary judgment, and the defendant has countered with a motion for judgment upon the stipulation.

13. The subject entries were liquidated with duty assessed on the full value of the imported merchandise.

* * * * * * *

15. The "scrap" as it enters the * * * yard (hereinafter also referred to as "incoming scrap") was not solely of U.S. origin but consisted of scrap of U.S. and foreign origin that were commingled.

* * * * * * *

17. The Customs Service issued 2 rulings in connection with this matter: HQ 555096, July 7, 1989 and HQ 555557, April 15, 1991, which are attached to this stipulation.

* * * * * * *

19. The scrap yards dealt with two types of scrap: "obsolete" and "industrial".* * *

20. "Obsolete" scrap, also known as "old solids," consist of metal machinery that is no longer usable.

21. "Industrial" scrap is comprised of two types: (i) "turnings," and (ii) "new solids". "Turnings" are small pieces of metal, approximately 1 inch in size or smaller and less than 1/8 inch thick, that result from milling bars of stainless steel into the correct size, such as in the manufacture of screwdrivers or screws. About 10 percent of the incoming scrap consisted of turnings. "New solids" are the discarded trimmings resulting from the process of manufacturing articles and components from stainless steel sheets and bars.

* * * * * * *

23. The scrap yards generally perform three categories of operations on the incoming scrap: (i) testing and segregating; (ii) sizing; and (iii) packaging.

24. Testing and segregating consisted of identifying the alloy metal content of the incoming scrap and segregating it into containers based on its chemical composition. All incoming scrap was tested with a magnet after being unloaded from rail cars onto a conveyer belt with hydraulic or rail cranes. * * * The incoming scrap was then spark tested by placing the scrap against a grinding wheel to produce a spark. The color of the spark identified the metal. Where those tests did not definitively identify the chemical composition, further testing was performed by placing acid on the scrap or on grindings resulting from drilling a hole in the metal.* * *

These tests would be sufficient to identify about 90 percent of the incoming scrap. For the remaining 10 percent * * *, the

scrap yards had laboratories equipped with x-ray spectrometers and atomic absorption analyzers to test tiny pieces of scrap called grindings obtained from drilling a hole in the scrap.* * *

Large and irregularly-shaped incoming scrap was compacted or crushed before being tested, which allowed for a composite piece * * * for testing. Incoming scrap was sometimes decontaminated or upgraded. Decontamination was the process of cleaning and cutting out sections of non-alloy material from the scrap metal and was performed by cutting with an automatic torch or an abrasive saw. Upgrading was the separating out of nonstainless steel material from mixed shipments of stainless and non-stainless steel scrap received by the * * * yards.* * *

After the * * * alloy content was identified the scrap was sorted into containers corresponding to its grade. There were hundreds of grades.* * *

25. Sizing was the operation of cutting scrap to a size that would fit in the steel mill's furnaces and depended upon the shape and size of each individual piece of scrap. Sizing includes cutting, crushing, ripping, shearing or shredding.* * * Cutting refers to the cutting of scrap into smaller pieces using an automatic torch. Ripping, which was rarely needed, is the term used to separate stainless steel from non-stainless material. Shearing is the cutting of long strips of scrap into smaller pieces using alligator or heavy shears. Shredding is the cutting of scrap in a shredder into small thin pieces and was occasionally performed on special kinds of incoming scrap. Larger pieces of scrap were put through a crusher to break up big pieces of castings which could not be cut by other methods and could also be subject to another method of cutting, such as shearing and/or cutting, depending upon * * * size.* * *

26. Packaging was the weighing and accumulating of truck loads or railcar loads of a specific grade of solids or a sufficient amount of briquettes or bales of turnings to comprise a railcar load or truck load, to fill a customer order. Briquetting is the forcing, by using a briquetting machine, of turnings and small solids into blocks no larger than 3 ft. by 5 ft. by 2 ft. for ease of transport and utilization in the customer's furnace. Baling is performed by compressing very thin scrap into small square sized packs for the convenience of handling, transporting and furnace size.

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29. The truck loads and railcar loads of prepared scrap were then exported to foreign steel mills in order to be processed into stainless steel sheets, plates, and strips.

> The parties further agree in paragraph 14 of this stipulation that the crux of their controversy is whether or not the merchandise was "manufactured in the United States or subjected to a process of manufacture in the United States" within the meaning of TSUS item 806.30, *supra*, and that "[a]ll other conditions of [that] item * * * are met."

A

The imports underlying this action, as described in their entry papers and also in the foregoing stipulation, were stainless steel sheets, plates, and strips produced overseas. And those products were "manufactured" there within any definition of that term. That is, plaintiff's exported pieces of metal underwent transformation, resulting in new and different articles, having distinctive names, characters or uses of the kind contemplated by *Anheuser-Busch*, *supra*, and other cases. Nothing which occurred in the United States prior thereto, as stipulated above by the parties, amounted to such manufacture.

The plaintiff does not argue otherwise, but it does contend that the afore-described preparation of the scrap for shipment for that foreign transformation was itself manufacture—in this country. Its briefs characterize the incoming metal as "junk"[2], perhaps in the hope that this court could and therefore would divine transformation into scrap. The court cannot do so on the evidence adduced, although at least some sources of that metal surely could satisfy someone's definition of junk[3]. But that definition would not necessarily differ materially from that for scrap[4]. Whichever definition, the substance of interest which entered the Newmet yard(s) remained that substance upon exit for export, including some originally from other lands. In short, the court is unable to conclude that Newmet's preparation of the articles of metal for export was "manufacture[ ] in the United States" in satisfaction of the statutory standard to support, if not save, dissipating U.S. industry.

This action thus comes down to consideration of whether that preparation subjected those articles to a "process of manufacture in the United States". On this issue, the plaintiff argues that,

> in enacting item 806.30, TSUS, Congress did not intend the phrases "manufactured in the United States" and "subject to a process of manufacture in the United States" to mean the same.

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[2] Memorandum in Support of Plaintiff's Motion for Summary Judgment [hereinafter "Plaintiff's Memorandum"], pp. 1, 2, 7, 12, 15; Plaintiff's Memorandum in Reply, pp. 2, 7, 15, 19.

gap period in its final orders as evidenced by language in a concurrent investigation. *See, e.g., Notice of Antidumping Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products From Argentina and the Republic of South Africa*, 66 Fed. Reg. 48,242, 48,243 (Dep't Commerce September 19, 2001).

[4] *Compare, e.g., id. with id.* at 2039.

> A contrary conclusion would render the words of the statute superfluous, a result the courts seek to avoid.[5]

This court concurs. And the plaintiff also points out that

> "Congress used the expression 'subjected to a process of manufacture' as synonymous with processing." * * * "Processing generally connotes an advancement of the material or article, as distinguished from manufacturing which is broader in scope," said the Customs Service in Headquarters Ruling 055038 dated June 16, 1978. Thus, less has to be done to "process" an article than to "manufacture" one.[6]

Cited by counsel for the last proposition is *Firestone Tire & Rubber Co. v. United States*, *supra*, which does indeed support it. In that case, metal top and bottom domes for liquid containers were manufactured in the United States and then sent to Canada for coating with rubber before return to this country. The court held that application to be "further processing" under TSUS item 806.30, overruling the contrary view of Customs, which had resulted in imposition of duties on the full appraised value of the returned, rubberized, metal domes. That view of the government was that,

> to come within the purview of item 806.30, TSUS, some process of manufacture comparable to machining, grinding, drilling, tapping, threading, punching, or forming must be performed on the metal itself. Defendant urges that these enumerated operations were the types of "further processing" contemplated by Congress in item 806.30, and that the rubber coating operation performed by Uniroyal in Canada was not comparable to any of the above enumerated operations.

71 Cust.Ct. at 66, 364 F.Supp. at 1397. The court concluded that Congress had not intended this "highly restrictive interpretation" and that the process at bar was a "manufacturing operation performed by Uniroyal in [Canada]". *Id*.

The result of that operation in that case, however, was a genuine change or advancement in the character of the merchandise. This the plaintiff does not show herein. Whatever the processing of its goods, as stipulated above, the unaltered facts are that scraps of stainless steel entered the Newmet yard(s) and that scraps of stainless steel exited those premises. Ergo, the plaintiff is not entitled to the benefit of item 806.30, TSUS, *supra*.

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[5] Plaintiff's Memorandum, p. 11, citing *Carey & Skinner, Inc. v. United States*, 42 CCPA 86, C.A.D. 576 (1954).

[6] Plaintiff's Memorandum, pp. 11–12, erroneously attributing in toto the first quoted sentence to *A.F. Burstrom v. United States*, 44 CCPA 27, [31,] C.A.D. 631 (1956).

III

In view of the foregoing, plaintiff's motion for summary judgment must be denied; judgment for the defendant, dismissing this action, will enter accordingly.

(Slip Op. 03–101)

CORUS STAAL BV, AND CORUS STEEL USA INC. PLAINTIFFS, *v.* UNITED STATES DEPARTMENT OF COMMERCE DEFENDANTS, AND NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS.

Consolidated Court No. 02–00003

[Antidumping Duty Determination Remanded]

(Dated: August 12, 2003)

Steptoe & Johnson LLP (Richard O. Cunningham, Joel D. Kaufman, and *Alice A. Kipel)* for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*), for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

OPINION

RESTANI, *Judge:* This consolidated matter is before the court following its decision in *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) ("*Corus I*"), in which the court remanded a single aspect of the final determination made by the United States Department of Commerce ("Commerce") in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 50,408 (Dep't Commerce Oct. 3, 2001), *as amended* by 66 Fed Reg. 55,637 (Dep't Commerce Nov. 2, 2001) ("*Final Determination*"). Familiarity with that decision is presumed. The sole remaining issue involves the appropriate period for collection of provisional measures.

BACKGROUND

Commerce issued its preliminary determination in this matter on May 3, 2001. *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 22,146 (Dep't Commerce May 3,

2001). Respondents Corus Staal BV and Corus Steel USA Inc. (collectively "Corus") subsequently requested an extension of the final determination pursuant to 19 C.F.R. § 353.210(b).[1] In its request, Corus agreed to an extension of provisional measures from a four-month period to not more than six months. *See* Corus' May 22, 2001 Letter to Commerce.[2] Commerce granted postponement and stated that it would issue its final determination by September 15, 2001. *Postponement of Final Determination for Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 32,600 (Dep't Commerce June 15, 2001). Due to the events of September 11, the time-frame for issuing the determination was extended by four (4) days. Commerce published the final determination on October 3, 2001, and an amended final determination on November 2, 2001. *See Final Determination* and accompanying Issues and Decision Memorandum, *amended by* 66 Fed. Reg. 55,637 (Dep't Commerce November 2, 2001).

On November 15, 2001, the International Trade Commission ("ITC") notified Commerce of its affirmative material injury determination. *See Hot Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (November 15, 2001). Commerce published the antidumping order on November 29, 2001. *See Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce November 29, 2001).

In challenging the *Final Determination* before this court, Corus argued, *inter alia*, that provisional measures should not have been collected more than six months after the preliminary determination

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(a) Deposit of estimated antidumping duty under section 1673b(d)(1)(B) of this title

If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—

(1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or

(2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

Id.

[2] As explained in *Corus I*, the agreement for provisional measures was "required by regulation, 19 C.F.R. § 351.210(e)(2), and reflects the limitation on provisional measures set forth in 19 U.S.C. § 1673b(d) that prohibits the assessment of antidumping duties during the gap period after the expiration of the six month period until issuance of the order." *Corus I*, 259 F. Supp. 2d at 1272. Section 1673b(d) provides, in relevant part:

(d) Effect of determination by the administering authority. If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority [shall (1) order the posting of appropriate cash deposits and (2) order the suspension of liquidation.]

* * * * * * *

The instructions of the administering authority under paragraphs (1) and (2) may not remain in effect for more than 4 months, except that the administering authority may, at the request of exporters representing a significant proportion of exports of the subject merchandise, extend that 4-month period *to not more than 6 months*.

Id. (emphasis added). As a result, Commerce may not collect cash deposits, in this context, based upon the preliminary determination for more than six months. The period between the end of the six month period and the time that Commerce may resume collection of deposits based upon the final antidumping order is referred to as the "gap period."Commerce concedes that it is inappropriate to collect deposits during this gap period.

was issued on May 3, 2001. Commerce agreed[3] and requested remand to include appropriate language in the order. While both Commerce and Corus agreed that remand was in order, they disagreed as to the final date of collection of provisional measures, i.e. the start date of the gap period. Corus argued that, because Commerce had previously interpreted six (6)
months to equal 180 days, collection should have ended on October 30, 2001. Commerce responded that six months equals six calendar months and, therefore, collection should have ended on November 3, 2001—184 days in this case.

The court sustained Commerce's final determination in other regards but remanded the matter "*for the sole purpose* of revising its antidumping order to preclude collection of provisional measures beyond the six month period." *Corus I*, 259 F. Supp. 2d at 1273 (emphasis added). Because Commerce's standard method for calculating the provisional measures time period was unclear, the court ordered that, upon remand, Commerce explain its common practice "and revise the order consistent with that practice." *Id.* In short, the sole issue was whether Commerce normally interprets six months to equal 180 days or six calendar months.

In its remand results, Commerce agreed that its "practice with respect to our interpretation of 'six months' in the context of provisional measures * * * has not been consistent." *Remand Determination* at 2. Commerce, therefore, states that its "current practice is to interpret 'six months' as 180 days." *Id.* at 3.[4] Commerce explained that, if its redetermination is affirmed, Commerce "will revise the antidumping duty order to include the appropriate language lifting suspension of liquidation 180 days from the date of publication of the preliminary determination in the Federal Register," which in this case would be October 30, 2001.[5] *Id.* As would be expected, Corus agrees with Commerce's finding on that issue. *See Corus Objections to Remand Determination* at 2.

Commerce, however, has raised a new issue in its *Remand Determination*. Although the parties now agree on the proper start date for the gap period, Commerce has taken a new position as to the end date. Commerce argues that the gap period should end at the time the ITC's final injury determination is published, rather than on the date of publication of the antidumping duty order. Here, the ITC in-

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[3] Commerce admits that it failed to include customary language lifting the suspension of liquidation during the

[4] In addition to the cases cited by Corus, *see, e.g., Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Antidumping Duty Investigation of Low Enriched Uranium from France*, 67 Fed. Reg. 6,680 (Dep't Commerce February 13, 2002), Commerce acknowledges that it has also interpreted six months to equal 180 days in other cases. *See, e.g., Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65,947 (Dep't Commerce October 29, 2002). As will be discussed, *see* discussion *infra* at 7, Commerce provided an explanation of why it considered this practice reasonable.

[5] Commerce points out that, although Corus contended that provisional measures should not be collected after October 30, 2001 (Corus Br. at 39), the proper instruction requires that provisional measures not be collected after October 29, 2001, because the collection of the provisional measures starts on the date of publication of the preliminary determination.

jury determination was published on November 15, 2001. The final antidumping duty order was published on November 29, 2001. In other words, Commerce argues that the gap period should run from October 30, 2001 to November 15, 2001 while Corus argues that the gap period should end on the date preceding the publication date of the antidumping duty order, November 28, 2001. With respect to Commerce's new position, Corus argues that (1) Commerce should be foreclosed from changing the end date at this late date under the "rule of mandate" and "law of the case doctrine"; and (2) that Commerce's proposed end date is otherwise erroneous and counter to its past practice.

DISCUSSION

I. Beginning of Gap Period

As discussed, the parties agree that the start date for the gap period should be October 30, 2001 (i.e., 180 days after May 3, 2001). Commerce suggests that its revised practice, calculating the gap period based upon days rather than calendar months, is reasonable for two reasons. First, Commerce contends that the practice is more in line with its regulation for countervailing duty investigations wherein the limit on the provisional measures time period is also set forth in days. *See* 19 C.F.R. 351.210(h) (providing for a 120-day period after the publication of the preliminary determination). Second, Commerce argues that time periods based upon days, rather than months, "provides consistency across all cases whereas the period covered within a six month time frame can vary or each case depending upon how many months within the six month period consists of 28, 30, or 31 days." *Remand Determination* at 3. The court agrees and finds no error in this regard.

II. End of the Gap Period

A. Rule of Mandate

As discussed, Commerce, for the first time, argues that the appropriate date to resume collection of cash deposits is the date that the ITC publishes its final affirmative injury determination. *Remand Determination* at 4. In briefing before this court, Commerce previously agreed with Corus that the end date related to the issuance of the final order[6] and at no time suggested that the end of the gap period was in doubt. Although there seems to be some confusion on the part of Commerce, there is no question that the sole issue on remand was the start date of the gap period (October 30, 2001 or November

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[6] In its brief in *Corus I*, Commerce stated:
Commerce inadvertently excluded appropriate language from the antidumping order as published in the Federal Register that would lift the suspension of liquidation six months after the Preliminary Determination (i.e., November 3, 2001) and *before the issuance of the antidumping order (i.e. Novermber 28, 2001).*

Commerce Br. at 45–46 (emphasis added).

3, 2001). Corus argues that, because Commerce did not raise the issue before, it cannot do so now because it is bound by the limited remand instruction under the so-called "mandate rule."[7]

Under the mandate rule, a lower court[8] or agency[9] may consider a new issue on remand only if there is a showing that (1) controlling legal authority has changed dramatically; (2) significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in a "serious injustice." *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (quoting *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)). Commerce has not argued that the controlling legal authority has changed and the "new evidence" exception is inapplicable in this circumstance. As such, Commerce may only adjust the end date of the gap period on remand if failure to previously do so was clear error. The court finds that it was not.

Although both Commerce and Corus cite various agency decisions to suggest that Commerce has previously acted in one way or the other with respect to defining the gap period, for the purposes of this case, the threshold issue is whether there was a clear error in the agency's initial determination that must now be corrected to avoid injustice. To establish clear error in this context, Commerce must show that equating the end date for the gap period with the publication date of the final antidumping order is contrary to the statutory or regulatory scheme.

Along those lines, Commerce argues that, because 19 U.S.C. § 1673f(a) (2002) provides that provisional measures shall be collected upon entries "before notice of the affirmative determination of the Commission under section 1673d(b) of this title," definitive duties are in place upon publication of the ITC's final affirmative injury determination. This is wrong for two reasons. First, this provision was not intended to define the time period for collection of provisional measures but, rather, explains how Commerce should treat the "difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order."[10] While there

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[7] In addition, Corus argues that Commerce was precluded from addressing the end date of the gap period under the "law of the case" doctrine, under which a court "should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). The law of the case rule is inapplicable here because the court did not decide the final date of the gap period, explicitly or implicitly.

[8] A lower court generally is bound by the appellate court's decree and "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255(1895); *see also Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) (finding that the lower court "has no power or authority to deviate from the mandate issued by [this Court].").

[9] "Although primarily applicable between courts of different levels, the [law of the case] doctrine and the mandate rule apply to judicial review of administrative decisions, and 'require[ ] the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.'" *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002) (quoting *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998)).

[10] 19 U.S.C. § 1673f(a) reads:
Treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order

may be some other applicable provision, Commerce has not cited it. Second, that provisional measures are collected only before the ITC determination does not mean that the ITC determination triggers the collection of final duties. As such, setting the end of the gap period to coincide with publication of the final order does not conflict directly with the statute.[11] Because collecting deposits upon publication of the final order is not clearly contrary to the statute, the court cannot find that Commerce committed clear error by acquiescing in Corus' position that the gap period should have ended on November 28.

This conclusion is further supported by the fact that Commerce has itself previously found that the gap period ends on the date preceding publication of the final antidumping duty order. In *Low Enriched Uranium from France*, Commerce concluded that

> Section 733(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months, unless exporters representing a significant proportion of exports of the subject merchandise request that the period be extended to not more than 6 months. As noted in the preliminary determination (66 FR 36743), the respondent made such a request on July 2, 2001. Therefore, entries of low enriched uranium made on or after January 9, 2002, and *prior to the date of publication of this order in the Federal Register*, are not liable for the assessment of antidumping duties due to the Department's discontinuation, effective January 9, 2002, of the suspension of liquidation.

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Low Enriched Uranium From France, 67 Fed. Reg. 6680, 6681 (Dep't Commerce Feb. 13, 2002) (emphasis added); *see also Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65947 (Dep't Commerce Oct. 29, 2002) (finding that no duties should be assessed on subject entries during the start of the gap period and "the day preceding the date of publication of this notice [the final antidumping duty order] in the Federal Register.").[12] The court does not decide whether the gap period generally should end on the publication date of the ITC injury determination or the publication date of

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[11] For the same reason, there is no problem under the related regulation, 19 C.F.R. § 351.212(d).

[12] The court finds it curious that, although Corus pointed to 19 C.F.R. 351.210(h), which addresses the collection of provisional measures in countervailing duty cases, as a comparator to support defining the period for collection of provisional measures in days rather than months, *see* discussion *supra* at 6–7, Commerce does not acknowledge the obvious importance of the final order in that context. The regulation provides that:

> If the Secretary postpones a final countervailing duty determination, the Secretary will end any suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, *and will not resume it unless and until the Secretary publishes a countervailing duty order*.

Id. (emphasis added).

the final antidumping duty order. Rather, the court finds that Commerce has not shown the clear error required to raise this new issue following the court's limited remand instruction in the initial challenge.

CONCLUSION

For the foregoing reasons, the court sustains that portion of Commerce's *Remand Determination* agreeing that the provisional measures should not have been collected more than 180 days after the preliminary determination (i.e. not after October 29, 2001). The court reverses that portion of the *Remand Determination* in which Commerce now seeks to define the end date for the gap period as November 15, 2001. The court orders Commerce to revise its determination within 20 days hereof to reflect the last day of the gap period as November 28, 2001 and to advise the court of its issuance so that judgment may be entered.

(Slip Op. 03–102)

CEMEX, S.A., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT COMPANY OF CALIFORNIA, DEFENDANT-INTERVENORS AND CROSS-PLAINTIFFS

Consol. Court No. 93–10–00659

[Motion to enforce judgment denied.]

(Dated: August 12, 2003)

Manatt, Phelps & Phillips (Irwin P. Altschuler, Jeffrey S. Neeley and *Donald S. Stein)* for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director Commercial Litigation Branch, Civil Division, United States Department of Justice *(David S. Silverbrand), Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, for defendant.

King & Spalding, LLP, (Joseph W. Dorn, Michael P. Mabile and *Jeffrey M. Telep)* for defendant-intervenors and cross-plaintiffs.

OPINION

RESTANI, *Judge:* This matter is before the court on the motion of the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and National Cement Company of California (collectively "Ad Hoc") to enforce the judgment entered in this matter against Plaintiff Cemex, S.A. ("Cemex"), a Mexican exporter of gray portland

cement. Ad Hoc represents domestic producers who succeeded in this matter in obtaining increases in the calculation of antidumping duties over the amount originally calculated by the Department of Commerce ("Commerce") for the second administrative review period, August 1, 1991, to July 31, 1992. *See Cemex, S.A. v. United States*, 20 CIT 1272 (1996), *aff'd*, 133 F.3d 897 (Fed. Cir. 1998). Various entries[1] were deemed liquidated as entered at rates under 60%, instead of at the antidumping duty rate sustained by the courts, which was over 106%. Cemex and the United States assert that deemed liquidation under 19 U.S.C. § 1504(d) is proper, as Customs[2] did not liquidate the entries within six months of receiving notice of the lifting of the suspension of liquidation from Commerce.

BACKGROUND

In this case, as has happened in many others, *see, e.g.*, *NEC Solutions (America), Inc. v. United States*, No. 01–00147, slip op. 03–80 at 12 n.15 (Ct. Int'l Trade July 9, 2003) ("*NEC*"), after the mandate of the Federal Circuit issued on March 2, 1998, no notice of the amended final results was published. However, unlike certain other matters, liquidation instructions were promptly issued from Commerce to Customs. The instructions were posted on Customs' internal use only electronic bulletin board. As indicated, Customs did not act timely, and, pursuant to Customs Headquarters directions for the 140 Nogales entries, public bulletin notice of "no change" or "deemed" liquidation was posted on April 6, 2001. The one "lost" El Paso entry was posted as a "no change" entry on March 14, 2003. The one "lost" Los Angeles entry has not yet been posted as a "deemed" or "no change" liquidation.[3]

Although Ad Hoc alleges it is merely pursuing its rights to have the proper competition equalizing duties imposed, apparently it is also motivated by the Continued Dumping and Subsidies Offset Act of 2000, Pub. L. 106–387 (19 U.S.C. § 1675(c)) ("Byrd Amendment"). Under the Byrd Amendment, producers with qualifying expenditures for a particular year may obtain a share of the antidumping duties collected by Customs for that year.

In 2001, when the deemed liquidated duties were collected, at least one producer made a claim for Byrd Amendment moneys and received them. These movants, or the producers they represent here, did not. Nor did they immediately object to the "no change" or "deemed" liquidation at Nogales, which was posted publicly.[4] There

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[1] To wit: 140 entries at Nogales, one entry at El Paso, and one entry at Los Angeles (not yet posted as liquidated)

[2] The then United States Customs Service is now known as the Bureau of Customs and Border Patrol of the Department of Homeland Security.

[3] In the case of increases occasioned by court review, "no change" or "deemed" liquidation signals that the earlier lower rate is assessed.

[4] Ad Hoc, in fact, has sought expedited disposition of this matter in an attempt to have collection made prior to

is no statutory provision for domestic producers to "protest" a liquidation under 19 U.S.C. § 1514, as importers may. Exactly what measures Ad Hoc should have taken is not clear, but Cemex asserts that because liquidations are final as to "all persons" if no protest is filed within ninety days of liquidation, failing to take some action within 90 days of the Nogales liquidation terminated Ad Hoc's rights. *See* 19 U.S.C. §§ 1514(a) and (c).

Disposition on such a basis will not dispose of the El Paso entry, which was liquidated less than 90 days before this action was filed, or the Los Angeles entry which remains unliquidated. Thus, the court turns to the central deemed liquidation issue.

DISCUSSION

Determining whether the entries are deemed liquidated involves first determining what version of 19 U.S.C. § 1504(d) applies. If, under the applicable version, deemed liquidation occurs if Customs does not liquidate the entries within six months of the receipt by Customs of notice of the end of suspension of liquidation, then the court must decide if the proper notice was given.

Ad Hoc's position that deemed liquidation is improper rests on the applicability of pre-1993 versions of 19 U.S.C. § 1504(d). Section 1504 was originally enacted in 1978 to apply to post April 1, 1979 entries. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 209(b), 92 Stat. 888, 905 (1978). The purpose of the provision was to give importers finality as to their duty obligations by providing for deemed liquidation at the rate claimed by the importers, unless actual liquidation occurred within specified time limits. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002) ("*Int'l Trading*");[5] *see also United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997) ("The 'deemed liquidated' provision of section 1504 was added to the customs laws in 1978 to place a limit on the period within which importers and sureties would be subject to the prospect of liability for a customs entry."). Under this earlier version of § 1504(d), generally deemed liquidation would occur within one year of entry or within four years if suspension intervened. If liquidation continued to be suspended beyond the four year limit, liquidation was to occur within 90 days of the removal of suspension.

September 30, 2003, so that certain domestic producers may make claims for qualifying expenditures for this year.

[5] In *Int'l Trading*, the Court of Appeals explained:

> Before section 1504 was enacted, there was no statutory restriction on the length of time Customs could take to liquidate an entry. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). "Customs could delay liquidation as long as it pleased, with or without giving notice." *Int'l Cargo & Surety Ins. Co. v. United States*, 779 F.Supp. 174, 177 (Ct. Int'l Trade 1991). In 1978, Congress enacted section 1504 to impose a four-year time limit for liquidation. The primary purpose of section 1504 was to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993) (internal quotations and citation omitted).

281 F.3d at 1272.

In *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 615, 691 F. Supp. 364, 367 (1988), *aff'd*, 884 F.2d 563 (Fed. Cir. 1989), however, the 90-day period was found to be directory rather than mandatory, so that entries, the liquidation of which was suspended for more than four years, were not subject to deemed liquidation. Unfortunately for Ad Hoc, the statute was again amended in 1993. The 1993 amendment became effective on December 8, 1993, without a limitation to entries made after that date, and it provides for deemed liquidation if liquidation does not occur within six months of Customs receipt of notice of the removal of suspension. Pub. L. No. 103–182, 107 Stat. 2057, 2219, § 641(1)(A).[6]

Ad Hoc argues, however, that application of the 1993 amendment would be a retroactive application of a statute to 1991–1992 entries, where the intent to apply the statute retroactivity has not been made clear by Congress. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (retroactive affect only if clear congressional intent). It is somewhat difficult to determine what is a retroactive application where unliquidated entries are at issue, and suspension was in effect when the statute was enacted. *American Permac, Inc. v. United States* provides some guidance on this issue. 191 F.3d 1380 (Fed. Cir. 1999). In that case, the six months deemed liquidation provisions were found to effect an improper amendment when the time period had already expired before the law was enacted. *Id.* at 1382. Here the liquidation periods had not run and there were no settled expectations as to deemed liquidation as to the entries at issue here. As applied here, the 1993 act does not impair vested rights, increase liability for past conduct, or impose new duties in the broad sense. *See Landgraf*, 511 U.S. at 280. Thus, it is proper to assume that Congress' unlimited effective date applies and the application of the 1993 statute is not a retroactive application.

Ad Hoc alternatively relies on the 1994 amendments, which may provide different remedies other than deemed liquidation, or in addition to deemed liquidation, an issue which the court does not decide. The 1994 amendments, however, apply to post January 1, 1995, administrative reviews. Pub. L. No. 103–465 § 291. They are not applicable. Ad Hoc also relies on the addition of the 1996 amendments, which are effective as of December 8, 1993. Pub. L. No. 104–295 § 3(b). Those amendments, however, did not eliminate deemed liquidation.

Under the 1993 amendment, the next issue is whether Customs received notice of the removal of suspension of liquidation so as to trigger the six-month deemed liquidation period. The liquidation instructions of March 23, 1998, clearly state that they "constitute the

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[6] The 1984 amendment, effective as to post November 14, 1984 entries, Pub. L. No. 98–573, § 195(a), 98 Stat 2948, 2974 (1984), did not alter the basic scheme. Ad Hoc argues that somehow the effective date language of the 1984 amendments indicates that the pre-1993 version continued to apply post-1993. The court rejects this argument.

immediate lifting of suspension." The notice, however, was not a public notice and, in fact, suspension had not yet been lifted.

Fujitsu General America, Inc. v. United States states that suspension does not end until the period for seeking writ of certiorari has expired. 283 F.3d 1364, 1379 (Fed. Cir. 2002) ("*Fujitsu*"). The Judgment of the Federal Circuit herein was entered on January 8, 1998, and the parties had ninety days under 28 U.S.C. § 2101(c), or until April 8, 1998, to file for a writ of certiorari. Because the time for appeal had not yet expired, suspension of liquidation had not been lifted when Customs issued the March 23, 1998 instructions. Further, both *Fujitsu* and *International Trading* endorse the concept that the notice should be both unambiguous and public. Of course, in those cases there were public Federal Register notices. Here, no such notice was posted. The court has recently held in *NEC* that an unambiguous public notice other than the Federal Register notice will suffice to trigger deemed liquidation under the 1993 amendment. Here, the March 23, 1998 notice was not public, and it cannot be said to be unambiguous where the suspension had not yet been lifted. Some other event might suffice to cure this notice so as to trigger the six-month period, but the parties have not brought it to the court's attention. The court does not decide whether, post-suspension removal, specific and clear suspension removal notice via liquidation instructions will suffice, even if the instructions are not made public, but alone the March 23, 1998 notice does not qualify.[7]

As proper deemed liquidation has not been established for any of the entries, the court turns to the issue of just what remedies may be available to Ad Hoc. As indicated, 19 U.S.C. § 1504(d) was meant to benefit importers. Therefore, it fits neatly into the Customs protest of liquidation scheme. If a deemed liquidation or any liquidation is adverse to an importer, it has its protest remedies under 19 U.S.C. § 1514 and access to judicial review under 28 U.S.C. § 1581(a). Domestic parties have no specific avenue of relief for improper liquidation.[8] The Byrd Amendment might have been accompanied with a new administrative remedy provision for domestic parties, but it was not. As to the Nogales entries, which were liquidated in 2001, 19 U.S.C. § 1514(a) bars Ad Hoc's claim because the liquidation became final as to "all persons" after 90 days passed. 19 U.S.C. § 1514(a).

19 U.S.C. § 1514 developed piecemeal, but the finality provision of 19 U.S.C. § 1514(a) is not obviated by the provisions of 19 U.S.C. § 1514(b), which suspend finality of liquidation if actions are filed challenging antidumping duty determinations. Section 1514(b) was enacted pursuant to the Trade Agreements Act of 1979, Pub. L. No.

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[7] The court is aware that deemed liquidation defeats the direction of 19 U.S.C. § 1516a(e) (requiring liquidation in accordance with the final court decision), but that is the effect of the deemed liquidation provision. This is not the reason for the court's finding of no deemed liquidation.

[8] Domestic parties have been given certain rights to challenge classification and rate of duty decisions, but the remedies are prospective. *See* 19 U.S.C. § 1516.

96–39, 93 Stat. 144 (1979), which was before the court had equitable power to enjoin liquidation; today it seems somewhat redundant. There is no legislative history to guide the court. Section 1514(b) does seem, however, to assist the statutory goal of not requiring parties to proceed on multiple fronts. Rather, they are to challenge substantive antidumping duty determinations before Commerce or the International Trade Commission, as appropriate, with judicial review rights as to adverse determinations. *See Sandvik Steel Company v. United States*, 164 F.3d 596, 600–02 (Fed. Cir. 1998). Here, there are no pending proceedings and nothing in § 1514(b) indicates it prevents finality as to Customs' determinations after court proceedings are conclusively terminated. Otherwise, there would never be finality, which is clearly contrary to legislative intent.

Unlike the automatic liquidations in *L.G. Electronic U.S.A., Inc. v. United States*, 21 CIT 1421, 1431, 991 F. Supp. 668, 677 (1997), which were barred by a court injunction and which the court declined to recognize, here there was no longer a court injunction in effect and the posted liquidations were purposeful. *See also Yancheng Baolong Biochemical Company, Ltd. v. United States*, No. 01–00338, slip op. 03–84 at 12 (Ct. Int'l Trade July 16, 2003) (no protest required of liquidations in violation of court order.). Customs made a decision to recognize deemed liquidations and to post them. It is Customs' decision to declare deemed liquidation, not that of any other agency, which is at issue. Assuming Ad Hoc had any rights to prevent finality, under these circumstances it would have had to act within 90 days of the posting of notice of liquidation to avoid the effects of 19 U.S.C. § 1514(a).

Further, by waiting beyond the 2001 collection year Ad Hoc seeks to disrupt the Byrd Amendment distribution scheme. Was the lone 2001 claimant entitled to a different distribution? Is Ad Hoc entitled to complain about funds it wants collected in 2003 when the funds should have been collected in 1998 or, at the latest, 2001? Even if 19 U.S.C. § 1514(a) does not bar Ad Hoc, it waited too long as to the Nogales entries.[9] Parties to unfair trade litigation should not have to police the Commerce Department, but without having filed a Byrd Amendment claim to 2001 collections, Ad Hoc is not in a position to complain about an erroneous liquidation in that year. For purposes of the Byrd Amendment, it was not harmed by incorrect 2001 deemed liquidations. Even if it technically is harmed by the liquidations because it lost the ordinary competitive advantages resulting from the antidumping proceedings, those advantages were temporary and tangential. Ad Hoc should have pursued whatever remedies it had to enforce the judgment here promptly. Enforcement at this

[9] Because Ad Hoc has no remedies as to the Nogales entries, the court need not allow further attempts by Cemex or the United States to establish deemed liquidation as to those entries.

date would prejudice other parties by disrupting finality and the Byrd Amendment distribution scheme.

The court has not determined what relief, if any, is available as to the one El Paso entry for which liquidation was posted within the 90 days prior to this action, or for the Los Angeles entry which remains unliquidated. The parties are to consult. If the parties agree as to reliquidation, or if reliquidation as to these entries is not to be pursued, the court will enter an order denying Ad Hoc's motion so that it may pursue its appellate rights, if it chooses.[10] If the dispute is to continue, Cemex and the United States have eleven (11) days to explain these positions as to those entries, applying this decision. Ad Hoc has seven (7) days to respond.

(Slip Op. 03–103)

LIBAS, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 95–00014

[Upon remand, Plaintiff is awarded attorneys' fees and costs under the Equal Access to Justice Act.]

(Dated: August 13, 2003)

Law Offices of Elon A. Pollack (Elon A. Pollack and *Eugene P. Sands)* for plaintiff.
Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, *Bruce N. Stratvert*, Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Edward Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant.

OPINION

This case concerns Plaintiff Libas, Ltd.'s ("Libas") claim for attorneys' fees and costs from Defendant United States pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act ("EAJA"). Libas brought the original action to challenge a United States Customs Service[1] ("Customs") classification of fabric imported by Libas from India. Familiarity with the history of the original case is presumed. *See Libas, Ltd. v. United States*, 24 CIT 893, 118 F. Supp. 2d 1233 (2000), *Libas, Ltd. v. United States*, 193 F.3d 1361 (Fed. Cir. 1999),

[10] The parties are also to advise if Cemex' motion to strike the Rule 26(f) report is now moot.

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

[2] Libas's petition for attorneys' fees and costs was unopposed because the Court refused to accept Customs' untimely submission of its brief in opposition to Libas's motion.

Libas, Ltd. v. United States, 20 CIT 1215 (1996). This Court previously denied Libas's petition for attorneys' fees and other expenses. *Order Denying Plaintiff's Application for Attorneys' Fees and Other Expenses under the Equal Access to Justice Act* (May 16, 2001). On January 7, 2003, the Court of Appeals for the Federal Circuit vacated the denial and remanded to this Court for further proceedings. *Libas, Ltd. v. United States*, 314 F.3d 1362, 1366 (Fed. Cir. 2003).[2] Upon remand, the Court holds that the United States was not substantially justified in the classification determination. Further, Libas is entitled to attorneys' fees, and can recover those fees in excess of the $75 per hour base provided by the EAJA. However, not all fees and expenses sought by Libas are recoverable.

I. Customs was not substantially justified in its classification of the fabric

28 U.S.C. § 2412(d)(1)(A) reads, in part: "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (2000) (emphasis added). The Supreme Court has defined substantial justification as "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). This has been interpreted as requiring the United States to "show that it was *clearly* reasonable in asserting its position * * * in view of the law and the facts." *Gavette v. Office of Personal Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original). Therefore, the burden of proving either substantial justification or special circumstances lies with the United States. *Traveler Trading Co. v. Untied States*, 13 CIT 380, 381, 713 F. Supp. 409, 411 (1989) ("Should the government be unable to bear this burden, the court must award fees and expenses."). In addition, the United States' position must be substantially justified not only in litigation, but at the administrative level as well. *Gavette*, 808 F.2d at 1467.

To be substantially justified, the United States' position is not required to be correct, as long as it is reasonably based. *Pierce*, 487 U.S. at 566, *Consolidated Int'l Automotive, Inc., v. United States*, 16 CIT 692, 696, 797 F. Supp. 1007, 1011 (1992). In *Consolidated*, for example, incorrect calculations of the foreign market value for chrome-plated lug nuts from the People's Republic of China were deemed substantially justified because Commerce was adopting a novel methodology for determining the market value of goods in a non-market economy. 16 CIT at 697, 797 F. Supp. at 1012. However, when the United States offers " 'no plausible defense, explanation, or substantiation for its action,' " its position is not reasonably based. *Consolidated*, 16 CIT at 696, 797 F. Supp. at 1011 (quoting *Griffin &*

Dickenson v. United States, 21 Cl.Ct. 1, 6–7 (1990)), *see also Beta Systems, Inc. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989) (when "[n]o authority for [its] position is offered by the government * * * ", its position is not substantially justified) (quoting *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1182 (Fed. Cir. 1988)).

The only authority cited by Customs in the previous *Libas* case was its own test to distinguish between hand-loomed and power-loomed fabric. Because of severe deficiencies in Customs' fabric test for distinguishing between hand-loomed and power-loomed fabric, and the flawed procedure it used to arrive at that fabric test, Customs' incorrect categorization of Libas's fabric as power-loomed was not substantially justified. The test was so scientifically unsupportable that it was tantamount to offering no authority at all. In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court set forth certain factors to consider when determining the reliability of a scientific test: (1) whether the technique in question has been tested; (2) whether the test has been published or otherwise evaluated by peers; (3) the tests' known or potential rate of error; and (4) whether the test has been generally accepted. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993). The previous *Libas* opinion delivered by the Court detailed how Customs' testing method failed to meet any of the *Daubert* factors. *Libas*, 188 F. Supp. 2d. at 1235–1237.

Customs' failure to meet the first *Daubert* factor, whether the test itself has been scrutinized, is the most relevant hindrance to its claim of substantial justification. In *Consolidated*, although no *Daubert*-like analysis was employed, the court was sympathetic to the United States' "erroneous" conclusions because Commerce was dealing with complex, "previously unaddressed issues." *Consolidated*, 16 CIT at 697. Although there is testimony which indicates that distinguishing between hand and power-loomed fabric is also troublesome, such testing is clearly distinguishable from *Consolidated*. In *Consolidated*, Commerce was trying to determine an inherently intricate and imprecise figure: the foreign market value of goods in a non-market economy. Commerce was aware that a degree of error was to be expected; their test was one in a series of attempts by the United States to foster more accurate valuations.

On the other hand, in the instant case, the fabric test can be effectively scrutinized. Either the fabric was hand or machine-woven; the goal is not estimation or approximation as in *Consolidated*. Therefore, although it may not be more reasonable to expect a more exact testing method than in *Consolidated*, it is reasonable to expect an understanding by Customs of the accuracy of its fabric test. This could have been achieved through double-blind testing: evaluating whether examiners, not previously informed of a sample's composition, could reliably distinguish hand and machine woven fabric by using Customs' fabric test. Instead, Customs' evaluation involved ex-

aminers who already knew of the material's composition, obviously an inappropriate testing method. *Libas*, 24 CIT at 896, 118 F. Supp. 2d at 1236. Reliance on such a fabric test was unreasonable at the administrative level. Customs failed to recognize the scientific unreliability of using the fabric test without any type of testing to validate the fabric test. It was also unreasonable in litigation because Customs should have been aware of the *Daubert* analysis to which any scientific test would be subjected.

In light of the fact that Customs' fabric test is not in accordance with *Daubert*, yet another roadblock to Customs' substantially justified argument is Customs' evident failure to appropriately consider the testimony of S. Ponnuswamy and Mary Jane Leland. Ponnuswamy, partner of JLC International of Madras, India, previously testified that JLC purchased the fabric at issue from hand-weavers in Kovur, India, and that he observed similar fabric being handwoven. *Libas*, 24 CIT at 898, 118 F. Supp. 2d at 1237. Leland, a Professor Emeritus at California State University at Long Beach, testified that the fabric is "typical of fabric produced on a hand-powered fly shuttle loom in the Madras area of India." *Id.* The Court of Appeals for the Eighth Circuit has held, "the government's position [cannot] be deemed reasonable in fact when it relied on an isolated part of the evidence and ignored other overwhelming evidence * * *." *Cornelia v. Schweiker*, 728 F.2d 978, 984 (8th Cir. 1984), *see also John Doe v. United States*, 16 Cl.Ct. 412, 420 (1989) ("Absence of thorough familiarity with the facts and the implications of those facts * * * is unreasonable."). Ponnuswamy and Leland's testimony may not have been "overwhelming" in the face of a validated, accurate Customs' fabric test. However, their testimony, along with the inherent weakness of Customs' test, lends itself to the conclusion that Customs was not substantially justified.

II. Amount of Attorneys' Fees to be Awarded Per Hour

28 U.S.C. § 2412 (d)(1)(D)(2)(A)(ii) (2000) provides that: "attorney fees shall not be awarded in excess of $125 per hour, unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The $125 base, however, was the result of a 1996 amendment to the EAJA; for cases initiated before March 29, 1996, the base award is $75. *See* Contract with America Advancement Act of 1996, Pub.L. 104–121. Since the original *Libas* suit was initiated in January of 1996, the lower figure applies to the instant case.

The Supreme Court in *Pierce* held that " * * * the exception for 'limited availability of qualified attorneys for the proceedings involved' must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than just their legal competence. We think it refers to attorneys having some distinctive knowledge or special-

ized skill needful for the litigation in question * * * " *Pierce*, 487 U.S. at 572. In this case, it is apparent that elevated attorneys' fees are appropriate. Although cases involving customs law are not automatically worthy of elevated attorneys' fees, in this case specialized skills in customs law were necessary for the instant case, and Libas produced affidavits that there was a shortage of lawyers in the Los Angeles area capable of handling like cases.

Theoretically, any legal practice area can be labeled as a "specialized skill" within the *Pierce* definition. However, such an expansive view, "would serve to emasculate the effectiveness of the $75 cap * * * " *Esprit Corp., Inc. v. United States*, 15 Cl.Ct. 491, 494 (1988). Instead, courts have read *Pierce* as attempting to curtail a broad interpretation. *Cox Construction Co. v. United States*, 17 Cl.Ct 29, 36 (1989) (" * * * Pierce's choice of 'patent law' as an example of a specialty probably indicates an intent to be more restrictive in its interpretation of 'limited availability of qualified attorneys."). As such, needing general expertise in a specific field, by itself, is insufficient for an award of attorneys' fees above the $75 base. *See Lozon v. Commissioner of Internal Revenue*, 1997 Tax Ct. Memo LEXIS 622, at 16. Therefore, in the case at hand, although Libas's credentials and expertise are undisputed, that alone will not affect the amount of attorneys' fees.

Beyond simply possessing expertise, "the test seems to be whether the specialized skills are required to competently litigate the case." *Esprit*, 15 Cl.Ct. at 494. If that is the case, attorneys' fees above $75 may be awarded. *Nakamura v. Heinrich*, 17 CIT 119, 121 (1993) (attorney's knowledge of customs law, applied in a broker license case, led to additional fees being awarded). In this case, as in *Nakamura*, the attorney's knowledge of customs law was necessary to litigate this case. Therefore, the Court will award fees above the statutory $75 minimum.

Of interest to courts in determining whether to consider higher lawyer's fees is the availability of regional lawyers who can litigate the case at hand. *Nakamura v. Heinrich*, 17 CIT at 121. ("The Court takes judicial notice of the relatively small Customs bar that practices before this Court * * * "). Libas submitted affidavits of attorneys from the Los Angeles area who stated that the customs bar was very small in that area. Therefore, the Court will award Libas fees of $125 per hour. The Court declines to award the excessive fees claimed by Libas, up to $260 an hour, because those were calculated based on the $125 statutory minimum which does not apply in this case.

III. Totals Attorneys' Fees and Expenses Awarded

Before proceeding, it is important to note that the burden is on the party seeking fees to detail with a degree of specificity the hours sought, and the activities conducted during those hours. As stated in

Esprit, "[a] party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the title expended, the nature and the need for the service, and the reasonable fee to be allowed." *Esprit Corp.*, 15 Cl.Ct. at 494. Failure to meet these minimal standards of specificity may result in a forfeiture of the claim for additional fees. *See Lozon*, 1997 Tax Ct., at *22 (fees not awarded for hours which there was "no detailed explanation of the services provided * * * "), *Bonanza Trucking Corp. v. United States*, 11 CIT 436, 443, 664 F. Supp. 1453, 1458 ("When fees are sought at the expense of a losing party in court, no amount of work, or money claimed therefore, is too small to obviate explanation.").

A. Attorneys' fees

Section 2412 applies only to "civil actions." 28 U.S.C. § 2412(a)(1). It is well grounded that attorneys' fees apply only to the proceedings surrounding the action at hand, *Gavette*, 808 F.2d at 1461, *Cox Construction*, 17 Cl.Ct at 36. Thus, fees and expenses that predate the summons and complaint, including those amassed at the administrative level, are not recoverable. *Traveler Trading Co.*, 13 CIT at 385. Hence, any hours billed before December 30, 1994, the date Libas's administrative protest was denied, shall be excluded from the total award.

Libas lists two employees, "JS" and "TP," in the invoices regarding billable hours.[3] Yet the amount of money sought for both is considerably lower that of the other attorneys listed. Furthermore, TP was given research assignments similar to those given to a summer associate or other non-attorneys. Since the Court has no detailed description is provided for either JS or TP, the Court is left to assume that they are law clerks, summer associates, or some sort of consultants. Since we have no information that establishes any of these employees as members of the bar, they do not fall within the parameters of the $75 minimum. *Bonanza*, 11 CIT at 444. Courts have come up with several different solutions for dealing with like situations, ranging from (1) awarding the amount paid to the employee by the law firm, (2) awarding the amount that the client was billed, or (3) awarding no payment at all. *Id.* The situation presented in this case is analogous to *Esprit*, where fees sought for a consultant were decreased by two thirds, centrally because no description of the consultant's importance to the trial was provided. Therefore, as in *Esprit*, we grant Libas one third of the requested for fees from TP's services. *Esprit*, 15 Cl.Ct. at 494.

Three invoices from the Law Offices of Elon A. Pollack to its client, Libas, were presented to the Court to substantiate Libas's claims for attorneys' fees. Invoice #5932 covered attorneys' fees from December

[3] Although the rates for JS and TP are quoted for the Court's benefit, only the hourly rate for TP is relevant. JS accumulated no hours preparing for litigation.

8, 1994, to June 24, 1996. The total hours claimed in Invoice #5932 are 688.29, for a total of $148,767.90 in attorneys' fees. The Court has modified those totals. First, 28.5 hours of pre-litigation work (prior to December 30, 1994) were subtracted from the total, resulting in a total of 659.79 hours. Second, instead of the claimed hourly rates varying from $175 to $250, the hourly rates were all adjusted to $125. Therefore, Libas is awarded $82,473.75 for attorneys' fees under Invoice #5932.

Invoice #4264 covered attorneys' fees from July 8, 1996, to October 14, 1999, and claimed 521.04 hours for a total bill of $105,371.98. The Court subtracted from the total claimed hours 25.5 hours for work on drafting complaints for other cases before the Court of International Trade, and work on other protests before Customs. *See, e.g.*, Invoice #4264, on 4/3/97, "Edit complaint in case No. 95–10–01320" (claiming attorneys' fees for work on another case). Again, adjusting the attorneys' fees downward to $125, the Court awards Libas $61,942.50 for Invoice #4264.

Invoice #5934 covered attorneys' fees from December 8, 1999, to November 17, 2000, and also included $750.00 for an administrative charge to compile time records. The total bill was for 250.50 hours, or $60,591.25. The Court subtracted eight hours for work on other matters, such as "Review case files re Reserve Calendar" on December 17, 1999. The Court also subtracted seventeen hours by "tp". The result is 225.5 attorney hours, or $28,187.50 in attorneys' fees. After adding in the $481.67 for tp's work (17 hours × $85 per hour, reduced by twothirds), and the $750.00 for compiling the time records, the Court awards $29,419.17 in attorneys' fees for Invoice #5934.

B. Expenses

"The EAJA permits recovery of all reasonable and necessary expenses incurred or paid in preparation for trial of the specific case before court, which are customarily charged to the client." *Traveler Trading Co.*, 13 CIT at 386. However, several of the expenses sought by Libas are neither "reasonable" nor "necessary." First, plaintiff seeks reimbursement for numerous uses of "Federal Express" and messenger services without explaining why those services were necessary. As other courts have held, we find that costs for Federal Express and messenger services are not reimbursable, without an explanation as to why the United States Postal Service was inadequate. *Lozon*, 1997 Tax Ct., at *23. Second, plaintiff seeks awards for several vaguely described "meals." The Court does recognize Libas's need for sustenance, however we see no reason to allow remuneration for an expensive palate. Thus, meals at House of Shish Kabob for $115.00 on June 23, 2000, and Yang Chow Restaurant for $109.16 on June 4, 1996 shall not be remitted. Additionally, the meal claimed on July 26, 1996, at Brewski's for $33.78 is not permitted because no corresponding attorney hours or other expenses were

billed out that date. The Court cannot attribute that meal as necessary to perform any service for the client. Perhaps these meals were necessary group meetings; however, without any detail of the company or of the subject matter discussed, the expenses claimed fail Libas's burden of proof.

Third, plaintiff seeks payment for a stay at Doubletree Hotels on May 30, 1996. Claims for hotel costs, without explanation, have been denied in the past. *John Doe*, 16 Cl.Ct. at 422. Although this expense took place around the time of trial, we are given no explanation regarding its necessity. Failure to overcome Plaintiff's burden of proof, plus the Court's confusion as to why accommodations were necessary for a locally held trial, supports a denial for additional fees.

Fourth, plaintiff seeks payment for certain expenses incurred prior to December 30, 1994, the date when litigation began for purposes of calculating fees and expenses. Therefore, the Court subtracts $94.67 from the expense invoice. Finally, Libas submitted a supplemental declaration on December 22, 2000, claiming that additional fees for expert witness Mary Jane Leland had been omitted from the original claim for expenses. The amount claimed is $9,563. The Court will grant Libas's petition for the additional fees attributable to Leland. However, because it is not clear if the amount claimed on the supplemental declaration includes previous claims for Leland's services, and to avoid double-counting Leland's fees, the Court will subtract the $2308.35 claimed for Leland's services in the original invoice. Therefore, while all other expenses remain valid, the Court denies additional fees for charges of Federal Express and messenger services, the three discussed meals, the hotel stay, expenses incurred prior to December 30, 1994, and overlapping witness fees for Leland.

IV. CONCLUSION

Based on the previous evidence regarding attorneys' fees and expenses, the total awarded to Libas is $199,723.87.