Decisions of the United States
Court of International Trade

Slip Op. 04–59

ALLEGHENY BRADFORD CORPORATION, d/b/a TOP LINE PROCESS EQUIPMENT COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00073

[Antidumping duty order scope determination reversed.]

Dated: June 4, 2004

Womble Carlyle Sandridge & Rice PLLC (*James K. Kearney*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, *James H. Holl, III*, and *Paul D. Kovac*), *Philip J. Curtin*, Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, *Christopher Chen*, Senior Attorney, Office of Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

OPINION

RESTANI, Chief Judge:

INTRODUCTION

Plaintiff Allegheny Bradford Corporation, d/b/a Top Line Process Equipment Company ("Top Line") moves for judgment on the agency record that its stainless steel butt-weld tube fittings from Taiwan were improperly ruled to be within the scope of an antidumping duty order by the U.S. Department of Commerce ("Commerce" or "Department"). *Final Scope Ruling on the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Allegheny Bradford Corporation d/b/a Top Line Process Equipment* (Dep't Commerce Dec. 10, 2001), P.R. 29:13:33, Pl.'s App., Doc. 1, *notice published at* 66 Fed. Reg. 65,899 (Dep't Commerce Dec. 21, 2001) [hereinafter *Final Affirmative Scope Ruling*]. The underlying antidumping duty order imposed duties on stainless steel butt-weld pipe fittings from Taiwan. *Amended Final Determination and Antidump-*

ing Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 58 Fed. Reg. 33,250 (Dep't Commerce June 16, 1993) [hereinafter *Antidumping Duty Order* or *Order*]. Because its tube fittings are unambiguously outside the scope of the *Antidumping Duty Order*, Top Line's motion is granted.

BACKGROUND

I. THE ANTIDUMPING DUTY INVESTIGATION

The *Antidumping Duty Order* was the culmination of an investigation initiated by the petition of the Flowline Division of Markovitz Enterprises. *Petition* (May 20, 1992), P.R. 1:3:14-18,[1] Pl.'s App., Doc. 3, Ex. 4 [hereinafter *Petition*]. The petition alleged unfair imports of stainless steel butt-weld pipe fittings with an inside diameter of under fourteen (14) inches from Taiwan and the Republic of Korea. *Petition*, at 1, P.R. 1:3:14, Pl.'s App., Doc. 3, Ex. 4 at 1. Over the course of several pages, the petition describes the subject merchandise as follows:

- classifiable under heading 7307.23 of the Harmonized Tariff Schedule;
- designated under heading A403/A403M–1991 of the standards developing organization, ASTM;
- having American National Standards Institute ("ANSI") dimensional specifications B16.9–1986 and B16.28–1986;
- including finished or unfinished fittings capable of meeting these specifications
- excluding "threaded, grooved, and bolted fittings;"
- "used to connect pipe sections in piping systems where conditions require welded connections, as distinguished from fittings designed for other fastening methods (e.g., threaded, grooved, or bolted fitting);"
- "used where one or more of the following conditions is a factor in designing the piping system: (1) corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures (in excess of 300° F) are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system;"

---

[1] "P.R. ___ : ___ : ___ " refers to the public record document number, micro-fiche slide number, and micro-fiche frame number.

- "used in so-called 'process' piping systems such as chemical plants, foot processing facilities, breweries, cryogenic plants (including basic oxygen steel processing), waste treatment facilities, pulp and paper production facilities, gas processing (gas separation) facilities, and commercial nuclear power plants and nuclear navy applications (in reactor lines and water lines);"
- coming in "several basic shapes: 'elbows', 'tees', 'reducers', 'stub ends' and caps';"
- having edges that, for finished fittings, "are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe"

Id. at 1–4, Pl.'s App., Doc. 3, Ex. 4 at 1–4.

Working from Flowline's product description, Commerce formulated the antidumping investigation's scope in its notice of initiation:

> The products subject to these investigations are stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Stainless steel butt-weld pipe fittings are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Stainless steel butt-weld pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The stainless steel butt-weld pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).

Initiation of Antidumping Duty Investigations: Certain Stainless Steel Butt-Weld Pipe Fittings from the Republic of Korea and Taiwan, 57 Fed. Reg. 26,645 (Dep't Commerce June 15, 1992) [hereinafter *Notice of Initiation of Investigation*]. When Commerce issued its preliminary determination roughly six months later, the scope lan-

guage underwent minor changes, which consisted primarily of the addition of the word "certain" in its reference to the pipe fittings:

> The products subject to *this* investigation are *certain* stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> *Certain* stainless steel butt-weld pipe fittings (*pipe fittings*) are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system:
>
> (1) Corrosion of the piping system will occur if material other than stainless steel is used;
>
> (2) Contamination of the material in the system by the system itself must be prevented;
>
> (3) High temperatures are present;
>
> (4) Extreme low temperatures are present;
>
> (5) High pressures are contained within the system.
>
> ["*Stainless steel butt-weld*" deleted] Pipe fittings come in a variety of shapes, with the following five shapes being the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Preliminary Determination of Sales at Less Than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 57 Fed. Reg. 61,047 (Dep't Commerce Dec. 23, 1992) [hereinafter *Preliminary Determination*] (emphasis added to show changes from *Notice of Initiation of Investigation*).

The *Final Determination* nearly duplicated the scope language of the *Preliminary Determination*, with the addition, however, of two paragraphs regarding A774 fittings:

> The products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain *welded* stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where

> conditions requir*ed* welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.
>
> *After it withdrew from this investigation, [Tachia Yung Ho Machine Co., Ltd.] inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation, and therefore, subject to any antidumping duty order.*
>
> *Based on the information on the record, we determine that A774 is covered by the scope of this investigation because it meets the requirements outlined in our scope. Our scope states that fittings must be under 14 seconds in inside diameter and can be either finished or unfinished. Our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings. Therefore, we determine that A774 fittings are included in the scope of this investigation. (See "Concurrence Memorandum", dated May 7, 1993 for further discussion).*

Final Determination of Sales at Less than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 58 Fed. Reg. at 28,556 (Dep't Commerce May 14, 1993) [hereinafter *Final Determination*] (emphasis added to show changes from *Preliminary Determination*). The additional section regarding A774 fittings refers to the *Concurrence Memorandum*, which explains how the non-beveled A774 fittings could be included within the investigation's scope: "The scope does state the edges of finished fittings are beveled; however, this is not a requirement nor is this stated with respect to unfinished fittings. Finally, our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum* to *Final Determina-*

tion (Dep't Commerce May 7, 1993) at issue 3, P.R. 1: 4:66–67, Pl.'s App., Doc. 3, Ex. 11 at 4 [hereinafter *Concurrence Memorandum*].

II. THE COMMISSION'S INJURY INVESTIGATION

Concurrent with Commerce's dumping investigation, the International Trade Commission ("ITC" or "Commission") instituted its injury investigation on December 17, 1992. In providing notice of the initiation of its injury investigation, the ITC gave only a brief description of the subject merchandise as "certain stainless steel butt-weld pipe fittings, provided for in subheading 7303.23.00 of the [HTSUS]." *Certain Stainless Steel Butt-Weld Pipe Fittings from Korea and Taiwan: Institution and Scheduling of Preliminary Antidumping Investigations*, 57 Fed. Reg. 22,486 (Int'l Trade Comm'n May 28, 1992). Later, on June 3, 1993, the ITC transmitted to Commerce its final affirmative determination that a U.S. industry was materially injured by less than fair value imports of stainless steel butt-weld pipe fittings from Taiwan. *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, USITC Pub. 2641, Inv. No. 731-TA-564 (final) (June 1993) at *1 [hereinafter *Final Injury Determination*]. The *Final Injury Determination* defined the scope of the investigation by incorporating the Commission's product discussion in *Certain Stainless Steel Butt-Weld Pipe Fittings from Korea*, USITC Pub. 2601, Inv. No. 731-TA-563 (final) (Feb. 1993) [hereinafter *Korea Final Injury Determination*]. The product description in the *Korea Final Injury Determination* begins as follows:

> Stainless steel butt-weld pipe fittings are used to connect pipe sections where conditions require permanent, welded connections and resistance to corrosion or oxidation and extreme temperatures as well as the ability to withstand pressure. The beveled edges of butt-weld fittings distinguish them from other types of pipe fittings, such as threaded, grooved, or bolted fittings, which rely on different fastening methods. When placed against the end of a beveled pipe or another fitting, the beveled edges form a shallow channel that accommodates the "bead" of the weld that fastens the two adjoining pieces.

Id. at *27–*28.

III. THE ANTIDUMPING ORDER

After the ITC made its affirmative injury determination and Commerce issued the *Final Determination*, the Department issued the definitive scope language in the *Final Antidumping Order*. The *Order* altered the final paragraph of the *Final Determination* to couch the A774 ruling in the past tense and removed the reference to the Department's *Concurrence Memorandum*:

> The products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain welded stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where conditions *require* welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.
>
> After it withdrew from this investigation, Tachia Yung Ho Machine Industry Co., Ltd. (TYH) inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation, and therefore, subject to any antidumping duty order.
>
> Based on the information on the record, we determin*ed in our final determination* that A774 is covered by the scope of this investigation because it meets the requirements outlined in our scope. Our scope states that fittings must be under 14″ ["*seconds*" deleted] in inside diameter and can be either finished or unfinished. Our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings. Therefore, we determined that A774 fittings are included in the scope of this investigation. ["(*See 'Concurrence memorandum', dated May 7, 1993 for further discussion*)." deleted]

Antidumping Duty Order, 58 Fed. Reg. at 33,250 (emphasis added to show changes from *Final Determination*).

IV. TOP LINE'S FIRST REQUEST FOR A SCOPE DETERMINATION

Top Line did not participate in the pre-antidumping order investigations by Commerce and the ITC, and did not participate in Commerce's administration of the *Final Antidumping Order*. Top Line did, however, approach Commerce on December 14, 1994, requesting a scope ruling as to whether its various stainless steel tube fittings with non-welded ends are covered by the *Final Antidumping Order*. *Letter from Reed Smith to Secretary of Commerce* (Dec. 14, 1994), P.R. 4:5:44, Pl.'s App., Doc. 4, Ex. 14 [hereinafter *First Scope Request*]. Commerce ruled for Top Line after an initial investigation, concluding that "no formal inquiry is warranted to determine whether bevel seat fittings, clamp fittings, valves, hangers, and flanges are outside the scope of [the *Final Antidumping Order*]." *Final Scope Ruling: Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan- Request of Top Line Process Equipment Corporation*, (Dep't Commerce Aug. 8, 1994), at 2, P.R. 1:4:76, Pl.'s Appx., Doc. 3, Ex. 12 at 2, *notice published at* 60 Fed. Reg. 54,213 (Dep't Commerce Oct. 20, 1995) [hereinafter *First Scope Ruling*].

V. TOP LINE'S SECOND SCOPE REQUEST

Several years after the *First Scope Ruling*, Top Line received from Customs a *Notice of Action*, dated March 8, 2001, informing the company that an entry of its "stainless steel butt weld pipe fittings" was subject to antidumping duties and requesting a cash deposit on the entry within 30 days. *Notice of Action* (Mar. 8, 2001), P.R. 1:3:11, Pl.'s App., Doc. 3, Ex. 3. Top Line responded the following month by filing with Commerce a second scope request, which sought a ruling as to whether the *Antidumping Duty Order* covers its sanitary/hygienic stainless steel butt-weld tube fittings imported from King Lai International Co., Ltd. ("King Lai") of Taiwan. *Letter from Reed Smith to Secretary of Commerce* (Apr. 12, 2001), at 1, P.R. 1:2:1, Pl.'s App., Doc. 3 [hereinafter *Second Scope Request*].[2]

In the *Second Scope Request*, Top Line alleged that its sanitary/hygienic stainless steel butt-weld tube fittings should be excluded from the *Final Antidumping Order* because: (1) while stainless steel pipe, the subject of the *Final Antidumping Order*, is always designated by inside diameter, stainless steel tubing, King Lai's product, is always designated by outside diameter; (2) King Lai's sanitary/hygienic stainless steel butt-weld tube fittings do not meet the specific and objective criteria for stainless steel butt-weld pipe fittings,

---

[2] On July 31, 2000, Commerce, pursuant to 19 U.S.C. § 1675, initiated an administrative review of the *Final Antidumping Order*, covering the period from June 1, 1999 to May 31, 2000. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 Fed. Reg. 46,687, 46,688 (Dep't Commerce July 31, 2000).

as set forth in the *Petition*; (3) King Lai's tube fittings are manufactured and used in different ways than the pipe fittings described in the *Final Antidumping Order*; and (4) King Lai's sanitary/hygienic stainless steel butt-weld tube fittings are square cut, not beveled. *Second Scope Request*, at 5–6, Pl.'s App., Doc. 3 at 5–6.

Responding to the *Second Scope Request*, a group of manufacturers—including Flowline, Gerlin, Inc., Shaw Alloy Piping Products, Inc., and Taylor Forge Stainless, Inc. ("Petitioners")—urged Commerce to find Top Line's tube fittings to be covered by the *Order*. *Letter from Collier Shannon Scott to the Secretary of Commerce* (May 4, 2001), at 1–2, P.R. 2:5:1, Def.'s App. at 71–72 [Hereinafter *Collier Shannon Letter* (May 4, 2001)]. Petitioners argued that Top Line's *Second Scope Request* failed to distinguish its tube fittings from the subject butt-weld pipe fittings. *Id*. at 2, Def.'s App. at 72. Petitioners also emphasized a purported admission by Top Line in its first scope proceeding that its butt-weld fittings were covered by the *Order*. *Id*. at 3–4, Def.'s App. at 73–74.[3]

In response to a supplemental questionnaire from Commerce, Top Line specified the parameters of its scope request and discussed the points raised by Petitioners. *See Letter from Reed Smith to Secretary of Commerce* (May 11, 2001), P.R. 4:5:35, Pl.'s App., Doc. 4. This letter reemphasized the purported physical differences between tube and pipe. *Id*. at 2–4, Pl.'s App., Doc. 4 at 2–4. Shortly thereafter, Top Line submitted samples of two types of sanitary/hygienic stainless steel butt-weld tube fittings for review by Commerce. *Letter from Reed Smith to Secretary of Commerce* (May 18, 2001), P.R. 5:5:66, Pl.'s App., Doc. 5.

Commerce found the parties' submissions and the existing agency work to be an insufficient basis for decision and, consequently, determined that a formal scope inquiry was required under C.F.R. §§ 351.225(d) and (k)(1). *Letter from Edward C. Yang to All Interested Parties*, (Dep't Commerce May 24, 2001), at 1–2, P.R. 9:5:78, Def.'s Appx. at 86–87 [hereinafter *Formal Scope Initiation Letter*]. In commencing the formal scope inquiry, Commerce requested that interested parties submit comments regarding their products that ad-

---

[3] In a footnote to the *First Scope Ruling*, Commerce observed that "Top Line acknowledges that it does market a line of butt-weld tube fittings, such as elbows, tees, and reducers that do fall under the scope of the order. However, Top Line states that it does not import these products into the United States." *First Scope Ruling*, at 5 n.1, Pl.'s App., Doc. 3, Ex. 12 at 5. The footnote does not provide a citation for the alleged acknowledgment. Top Line argues that this purported acknowledgment was actually a mischaracterization of a statement that only admitted that the company marketed a line of butt-weld tube fittings, not that those tube fittings fell within the scope of the *Order*. Pl.'s Reply Br. at 3 (citing *See Letter from Reed Smith* (May 11, 2001), at 2–3, P.R. 4:5:35, Pl.'s App., Doc. 4, at 2–3). In any event, Commerce refined its interpretation of this purported admission, and used it "as support only for its conclusion that the information on the record prior to the initiation of the formal scope inquiry did not offer a clear distinction between pipe and tube butt-weld fittings." *Final Affirmative Scope Ruling*, at 4–5, P.R. 29:13:33, Pl.'s App., Doc. 1, at 4–5.

dress the five criteria originally set forth in *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983), and incorporated into regulation by 19 C.F.R. § 351.225 (k)(2) (2003): (1) the physical characteristics of the product; (2) the ultimate use of the product; (3) the expectations of the ultimate purchaser; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. *Id.* at 2, Def.'s Appx. at 87.

In response to the *Formal Scope Initiation Letter*, Top Line and Petitioners submitted comments discussing the *Diversified Products Criteria* on June 12, 2001. *Letter from Reed Smith to Secretary of Commerce*, (June 12, 2001), P.R. 11:7:1, Pl.'s App., Doc. 7 [hereinafter *Top Line Scope Comments*]; *Letter from Collier Shannon to Secretary of Commerce* (June 12, 2001), P.R. 10:6:1, Def.'s App. at 101.[4]

In discussing the first criteria—physical characteristics—Top Line argued that " 'pipe' and 'tube or tubing' are precise terms describing different products." *Top Line Scope Comments*, at 2, Pl.'s App., Doc. 7, at 2. In support of this claim, Top Line alleged that, in contrast to pipe fittings, tube fittings have square cut (i.e. non-beveled) ends; are designated by its outside diameter rather than its inside diameter; and have their wall thickness identified by the term "gauge" as opposed to the term "schedule," which is used for pipe fittings. *Id.* at 7, Pl.'s App., Doc. 7, at 7.

Second, regarding the ultimate use of the product, Top Line claimed that tube fittings are to be used in applications involving sanitary processing of consumable products, or manufacturing of products requiring extreme purity. *Id.* at 8, Pl.'s App., Doc. 7, at 8. Top Line contrasted these applications with those of pipe fittings, which it described as almost exclusively industrial applications that do not require sanitary or hygienic conditions. *Id.* at 8-9, Pl.'s App., Doc. 7, at 8–9. Top Line also asserted that "pipe is generally intended for high temperature and high pressure applications [while] tube fittings are not used when either extremely high or low temperatures are present, nor are they used in 'high pressure' applications." *Id.* at 9, Pl.'s App., Doc. 7, at 9.

As for the third criteria—the expectations of the ultimate purchaser—Top Line argued that because its tube fittings are not used in the same applications as pipe fittings, the expectations of the ultimate purchaser of sanitary/hygienic stainless steel butt-weld tube fittings are different from that of the ultimate purchaser of pipe fittings. *Id.*

Top Line then discussed the fourth criteria, channels of trade, stating that, "to the best of [its] knowledge and belief," King Lai is

---

[4] On June 22, 2001, Top Line and Petitioners submitted rebuttal comments. *Letter from Reed Smith to Secretary of Commerce* (June 22, 2001), P.R. 13:9:1, Pl.'s App., Doc. 8; *Letter from Collier Shannon to Secretary of Commerce* (June 22, 2001), P.R. 12:8:44.

not a supplier of pipe fittings. *Id.* at 9–10, Pl.'s App., Doc. 7, at 9–10. Top Line also indicated that the *Petition* did not identify Top Line as a U.S. distributer of pipe fittings, nor was Top Line's proposed port of import, Pittsburgh, listed by Petitioners as a port of import for pipe fittings. *Id.* at 10, Pl.'s App., Doc. 7, at 10.

Regarding the fifth criteria, the manner of advertising and display, Top Line argued that it is a member of certain industry associations that "define the potential end-users of stainless steel butt-weld tube fittings useable in sanitary and hygienic applications." *Id.* at 11, Pl.'s App., Doc. 7, at 11. Top Line also noted that it advertises in particular trade journals, such as *Pharmaceutical Processing* and *Food Manufacturing*, whereas Petitioners and other domestic producers of stainless steel butt-weld pipe fittings do not. *Id.*

At the conclusion of the comment period, Commerce made a preliminary determination that Top Line's sanitary/hygienic stainless steel butt-weld tube fittings are within the scope of the *Final Antidumping Order*. *Memorandum from Edward C. Yang to Joseph A. Spetrini: Preliminary Scope Ruling on the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings: Allegheny Bradford Corporation d/b/a Top Line Process Equipment* (Dep't Commerce Nov. 15, 2001), P.R. 22:12:65, Pl.'s App., Doc. 2, at 2 [hereinafter *Preliminary Scope Ruling*]. In the *Preliminary Scope Ruling*, Commerce addressed the regulatory factors to be applied in the case of ambiguous orders. The Department then gave Top Line and Petitioners an opportunity to comment. Top Line and Petitioners responded by filing comment briefs, followed by rebuttal briefs. *Letter from Reed Smith to Secretary of Commerce*, (Nov. 21, 2001), P.R. 25:13:4, Pl.'s App., Doc. 11; *Letter from Collier Shannon Scott to Secretary of Commerce*, (Nov. 21, 2001), P.R. 26:13:17., Def.'s App. at 169; *Letter from Reed Smith to Secretary of Commerce*, (Nov. 26, 2001), P.R. 28:13:30, Def.'s App. at 171; *Letter from Collier Shannon Scott to Secretary of Commerce*, (Nov. 26, 2001), P.R. 27:13:21, Def.'s App. at 173.

On December 10, 2001, Commerce issued the *Final Affirmative Scope Ruling*, which found Top Line's tube fittings to be within the scope of the *Final Antidumping Order*. *Final Affirmative Scope Ruling*, Pl.'s App., Doc. 1. The *Final Affirmative Scope Ruling* reiterated that the scope could not be determined through informal inquiry and then applied each of the *Diversified Products* criteria.

First, regarding the physical characteristics of pipes and tubes, Commerce reaffirmed its preliminary determination that "the interchangeability of [the terms "pipe" and "tube"] precludes a finding of a distinction, based on terms alone." *Final Affirmative Scope Ruling*, at 9, Pl.'s App., Doc. 1, at 9.[5] Commerce then sought to clarify certain

---

[5] Petitioners argued to Commerce that certain fittings—unfinished fittings, A774 fittings and those with Schedule 5S wall thickness—were clearly covered by the *Order* even though they had square-cut, non-beveled edges like Top Line's fittings. *Letter from Collier Shannon*

points from industry publications, which it had considered when analyzing Top Line's product in the *Preliminary Scope Ruling*. For instance, Commerce pointed out that statements contained in an article from *Fabricator*, a trade journal, rebutted Top Line's arguments regarding differences in the diameter, thickness, technical composition, and mechanical properties of stainless steel pipe fittings versus stainless steel tube fittings. *Final Affirmative Scope Ruling*, at 10-11, Pl.'s App., Doc. 1, at 10–11.

Regarding the ultimate use of the product, Commerce defended the validity of determining ultimate uses in part by the ultimate users of the product. *Id.* at 13, Pl.'s App., Doc. 1, at 13. Commerce then rejected Top Line's contention that a sanitary/hygienic tube fitting—as opposed to a pipe fitting—is always used for conveying food, beverage, and pharmaceutical products. *Id.* at 13, Pl.'s App., Doc. 1, at 13. The Department supported this position by citing Top Line's admission that pipe fittings may be used for "dirty" applications in any kind of manufacturing facility, including those in the dairy, food, beverage, and pharmaceutical process industries. *Id.* at 13, Pl.'s App., Doc. 1, at 13 (citing *Letter from Reed Smith* (May 11, 2001), at 3, Pl.'s App., Doc. 4, at 3). On this basis, Commerce concluded that the uses for tube and pipe fittings overlap. *Id.* Commerce explained the significance of this overlap by referring to its 1993 ruling on A774 pipe fittings. According to Commerce, the A774 ruling demonstrated that "meeting one or more of several factors [listed in the scope section of the *Order*] will cause a product to fall within the scope of the [*Order*]." *Final Affirmative Scope Ruling*, at 13–14, Pl.'s App., Doc. 1, at 13–14.

In terms of the expectations of the ultimate purchaser, Commerce reasoned that, because Top Line and Petitioners share common distributers, the record indicates "that pipe and tube fittings are being sold to the same ultimate customer." *Id.* at 16, Pl.'s App., Doc. 1, at 16. According to Commerce, the expectations of the ultimate purchasers of tube fittings are similar to the expectations of the ultimate purchasers of pipe fittings because the products have similar uses, applications, channels of trade, and manners of advertising and display. *Id.*

Regarding channels of trade, Commerce observed that Top Line did not contest the fact that it shares common distributors with Petitioners, who sell stainless steel butt-weld pipe fittings. *Id.* at 17, Pl.'s App., Doc. 1, at 17. Commerce used this commonality to support its determination that Top Line's tube fittings are within the scope of the *Order*. *Final Affirmative Scope Ruling*, at 17, Pl.'s App., Doc. 1, at 17.

(June 12, 2001), at 4, Def.'s App. at 104. Commerce, however, did not specifically discuss edging in stating its final position on physical characteristics. *Final Affirmative Scope Ruling*, at 9–11, Pl.'s App., Doc. 1, at 9–11.

Commerce analyzed the manner of advertising and display as the last step in its inquiry. The Department agreed with Top Line that its tube fittings were sold on separate product lists, in separate sections of catalogues, and on separate segments of websites, but discounted these considerations on the ground that Top Line's marketing choices are not probative of industry-wide marketing practices. *Id.* at 19, Pl.'s App., Doc. 1, at 19. Commerce then determined that Top Line's tube fittings are not distinguished from the subject merchandise by their method of advertising and display because Top Line uses different terminology than does King Lai, its Taiwanese producer, to describe the same fittings. *Id.*

Top Line filed suit with the court in January 2002. On June 17, 2002, the Company moved for a judgment on the agency record on the grounds that the *Final Affirmative Scope Ruling* is "unsupported by substantial evidence on the record and otherwise not in accordance with law." Pl.'s Op. Br. at 1. Oral argument on the motion was held on April 6, 2004. The court has jurisdiction over this motion pursuant to 28 U.S.C. § 1581(c) (2000).

DISCUSSION

The issue in this case is whether Commerce may construe an antidumping order to cover products which bear a characteristic that cannot be reconciled with the language of the order. The *Antidumping Duty Order*, in language very similar or identical to the *Petition*, *Preliminary Determination*, and *Final Determination* before it, stipulates that "[t]he edges of finished pipe fittings are beveled." *Antidumping Duty Order*, 58 Fed. Reg. at 33,250. Top Line's tube fittings, whether finished or unfinished, are *not* beveled. *Second Scope Request*, at 6, Pl.'s App., Doc. 3, at 6.

I. STANDARD OF REVIEW

The court must sustain Commerce's scope determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2000); *see also Novosteel SA v. United States*, 128 F. Supp. 2d 720, 724–725 (Ct. Int'l Trade 2001). The court gives significant deference to Commerce's interpretation of its own orders, but a scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002) (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

II. APPLICABLE LAW

In determining whether a product is within the scope of an antidumping duty order, Commerce is governed by a two-step process set forth in 19 C.F.R. § 351.225(k) (2003). First, § 351.225(k)(1) re-

quires that Commerce make its determination by taking into account "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If those criteria are not dispositive, Commerce then evaluates the product according to the *Diversified Products* factors; namely "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

The introductory paragraph of § 351.225 explains that the interpretive rules for scope determinations are necessary to resolve issues that arise because "the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." *See* 19 C.F.R. § 351.225(a). Indeed, a common issue in scope cases is whether Commerce acted properly in determining that a particular product is covered by an order's general terminology. *See, e.g., Novosteel SA v. United States*, 284 F.3d 1261, 1264 (Fed. Cir. 2002) (rejecting plaintiff's argument that the antidumping and countervailing duty orders required more specific language); *Wirth Ltd. v. United States*, 22 CIT 285, 294, 5 F. Supp. 2d 968, 976 (1998) (noting that "[the] absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order").

It is important to distinguish such cases from circumstances in which an order's relevant terms are unambiguous. The language of an order is the "cornerstone" of a court's analysis of an order's scope. See Duferco, 296 F.3d at 1097–98 (citing Eckstrom, 254 F.3d at 1073). Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language, see Novosteel, 284 F.3d at 1272, but it is not justifiable to identify an ambiguity where none exists. As noted above, Commerce cannot make a scope determination that conflicts with an order's terms, nor can it interpret an order in a way that changes the order's scope. *Duferco*, 296 F.3d at 1087, 1094–95 (quoting *Ericsson GE Mobile Communications v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)).[6] Here, Commerce "interpreted" the *Order* in a manner contrary to its terms. Commerce maintains that beveled edges are not necessary for inclusion in the Order, despite what the Order says.

---

[6] Even if a potential interpretation is not clearly precluded by an order's terms, the interpretation must nevertheless constitute a reasonable construction of those terms: "Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089; *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990) (holding that Commerce cannot construe its scope orders to include products that are outside those orders).

III. THE ANTIDUMPING DUTY ORDER

The *Antidumping Duty Order's* scope description begins by providing that "[t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter." 58 Fed. Reg. at 33,250. The remainder of the scope section specifies primarily the potential applications and shapes of the subject merchandise. This language makes it clear that the *Order* does not apply to *all* stainless steel butt-weld pipe fittings with an inside diameter under 14 inches, but rather a subset of such fittings. *See Eckstrom*, 254 F.3d at 1073 (rejecting a construction of the *Antidumping Duty Order* which would cover any stainless steel butt-weld pipe fittings under the 14 inch diameter limit). Among the sentences describing the subset of fittings covered by the *Order* is the following: "The edges of finished pipe fittings are beveled." 58 Fed. Reg. at 33,250.

Although the *Order's* beveling language is not subject to interpretation in this context—i.e., because a given fitting either does or does not have beveled edges—a review of the *Petition* and the investigation documents confirms that the beveling language is not an aberration that inadvertently found its way into the *Order*.[7] Indeed, the beveling requirement has been a consistent feature of the investigation's scope since it appeared in the *Petition*:

> A characteristic of all stainless steel butt-weld pipe fittings is that the edges of finished fittings are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe.

Petition, at 4, Pl.'s App., Doc. 3, Ex. 4, at 4.[8] After its appearance in the *Petition*, the beveling requirement appeared in each of Commerce's pronouncements as it proceeded with the investigation. With Commerce's notice that it was initiating an investigation—its first opportunity to publicize the scope—it stated in the scope section that "[t]he edges of finished fittings are beveled." *Notice of Initiation of Investigation*, 57 Fed. Reg. at 26,645. The same exact sentence appears in the scope section of the *Preliminary Determination*. 57 Fed. Reg. at 61,047. After the interested parties commented on the *Preliminary Determination*, Commerce made two pertinent changes to the scope language with the issuance of the *Final Determination*.

---

[7] A review of the petition and investigation may assist the interpretation of an order, but "they cannot substitute for language in the order itself . . . a predicate for the interpretive process is language in the order that is subject to interpretation." *Duferco*, 296 F.3d at 1097.

[8] The court can only assume that this language was included as part of the requirements for a petition. "Petitions must contain (among other things) a 'detailed description of the subject merchandise that defines the requested scope of the investigation.' " *Novosteel*, 284 F.3d at 1271 (quoting 19 C.F.R. 351.202(b)(5)).

First, the beveling sentence was changed to refer to "pipe fittings" instead of simply "fittings." *Final Determination*, 58 Fed. Reg. at 28,556. Second, the scope section of the *Final Determination* contained two additional paragraphs setting forth Commerce's determination that pipe fittings conforming to specification A774 are covered by the scope. *Id.* While the *Final Determination* does not state that A774 fittings do not have beveled edges, it makes parenthetical reference to the *Concurrence Memorandum*, which does so. *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. Despite the reference to A774 fittings, the *Final Determination* retained the scope language describing the subject merchandise as having beveled edges. The beveled edge stipulation was again repeated in the *Order*, which removed the parenthetical reference to the *Concurrence Memorandum*. 58 Fed. Reg. at 33,250.

The ITC also characterized the subject merchandise as having beveled edges.[9] The *Final Injury Determination* incorporated by reference the product description set forth in the *Korea Final Injury Determination*. *Final Injury Determination*, USITC Pub. 2641 at *1. The second and third sentences of that product description discuss beveling as a distinguishing feature of the subject merchandise:

> The beveled edges of butt-weld fittings distinguish them from other types of pipe fittings, such as threaded, grooved, or bolted fittings, which rely on different fastening methods. When placed against the end of a beveled pipe or another fitting, the beveled edges form a shallow channel that accommodates the "bead" of the weld that fastens the two adjoining pieces.

Korea Final Injury Determination, USITC Pub. 2601 at *27–*28.

Despite the consistent use of beveled edges to help define the scope in the *Order* and other relevant documents, Commerce applied the § 351.225(k) criteria in the instant proceeding as if the *Order's* scope consisted of general terms that required significant interpretation. Such efforts were unnecessary. Any potential ambiguities in this case—for example, the distinction between pipe and tube fittings—are rendered moot by the irreconcilability of the *Order's* beveling sentence with the edging characteristics of Top Line's fittings. There is nothing more to interpret: the plain language of the *Order* does not encompass Top Line's non-beveled fittings.

This conclusion results from the *Order's* use of unequivocal language to describe the edges of the subject merchandise. The *Order* does not provide that the edges of finished pipe fittings "may be" or "are generally" beveled; either the edges are beveled or the fitting is not covered. This either/or proposition must be addressed before

---

[9] As an antidumping order cannot be issued without affirmative determinations of both the ITC and Commerce, it is important that the same type of merchandise be investigated by both agencies.

reaching the second stage of the interpretive process. While application of the Diversified Products criteria is appropriate in a case such as Novosteel, where the plaintiff could not identify "any language in any of the sources (the petitions and the initial determinations by Commerce and the ITC) used to initially construe those Orders that would exclude its . . . product," 284 F.3d at 1270, the opposite is true here. In the *Petition*, the *Notice of Initiation of Investigation*, and the *Preliminary Determination*, and as well as in the *Final Determination* and the *Order*, the scope description includes a sentence requiring beveled edges, a sentence that cannot logically be construed to describe Top Line's fittings.

Beveling is not the only characteristic which can be ascertained without extensive inquiry and which the *Order*, by the logic of its language, requires for inclusion within its scope. For example, the scope section begins by describing the subject merchandise as certain fittings which are "under 14 inches inside diameter." *Antidumping Duty Order*, 58 Fed. Reg. at 33,250. It is elementary to determine which fittings have an inside diameter under 14 inches and which do not. There is also no doubt that the *Order* does not cover fittings with inside diameters of greater than 14 inches. This conclusion is inescapable, even though the *Order* does not affirmatively and explicitly exclude such fittings.

In contrast to characteristics that can be clearly ascertained and which the *Order* requires of subject merchandise in unequivocal language, other aspects of the scope description leave room for interpretation. The second paragraph of the *Order's* scope section provides that "[t]he subject merchandise is used where one or more of the following conditions is a factor in designing the piping system," and then lists five conditions, such as the presence of high temperatures. *Id.*, 58 Fed. Reg. at 33,250. Through the use of the phrase "one or more," the *Order* gives Commerce a certain amount of room to interpret whether a product may be included within the scope, based on the number and type of conditions the product fulfills. *See Eckstrom*, 254 F.3d at 1072–73 (discussing the significance of the *Order's* specification that subject merchandise meet "one or more" of the five conditions of use).

The *Order* also describes the possible shapes of the subject fittings in general terms: "Pipe fittings come in a variety of shapes with the following five shapes the most basic: 'elbows', 'tees', 'reducers', 'stub ends', and 'caps'." 58 Fed. Reg. at 33,250. The *Order* does not require that the subject merchandise conform to a particular shape or group of shapes. Again, this terminology allows Commerce room to interpret whether a given product bears a shape that is covered by the scope.

The contrast between these general terms and the beveled edge language is clear. While the *Order's* language allows for Commerce to make an affirmative scope determination on a fitting that is not

used where high temperatures are a factor in designing the piping system and where the fitting does not bear an "elbow" shape, it does not permit Commerce to include fittings that do not have beveled edges. Commerce is bound by "the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders." *See Duferco*, 296 F.3d at 1098. An order cannot be interpreted broadly when a broad construction is "belied by the terms of the Order itself." *Id.* (quoting *Eckstrom*, 254 F.3d at 1073). The only exception to this rule occurs in certain situations where Congress, out of concern that orders might be circumvented, provided Commerce with discretion to make clarifications that would otherwise conflict with an order's literal scope. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (discussing 19 U.S.C. § 1677j(d)). A circumvention determination is not at issue here. In the remaining areas of scope determinations, "Congress intended the language of the orders to govern." *Duferco*, 296 F.3d at 1098.[10]

IV. COMMERCE'S PRIOR INCLUSION OF NON-BEVELED A774 FITTINGS

Perhaps because it cannot otherwise avoid the *Order's* beveling language, the Government relies entirely on the fact that Commerce included non-beveled A774 fittings in the *Final Determination*: "Commerce's ruling upon A774 fittings shows that beveling is not an absolute requirement for a product to fall within the scope of the order." Def.'s Br. at 26. This argument presumes that the *Concurrence Memorandum's* A774 ruling carries the weight of precedential authority. The ruling does not deserve such treatment in this case: it was made at a late stage in the investigation and in irregular fashion; was reached without a thorough inquiry; and was based on unpersuasive reasoning.[11]

---

[10] The force of an order's plain language is so great that, where the order's language is clearly inapplicable to a plaintiff's product, the imposition of duties on such a product constitutes a mere ministerial error that may be protested to Customs instead of Commerce. *See Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) (finding plaintiff's belts to be clearly outside the scope of an order pertaining to belts used for power transmission because they were not used for power transmission and were not constructed with the materials listed in the order).

[11] In this case, some tension exists between Commerce's duty to abide by the language of its orders and the inclusion of non-beveled A774 fittings in the *Final Determination*, which references the *Concurrence Memorandum*. "Commerce must either act in accord with its prior, similar scope determinations or else provide 'rational reasons for deviating' from them." *Novosteel*, 284 F.3d at 1271 (discussing this Court's holding in *Springwater Cookie & Confections, Inc. v. United States*, 20 CIT 1192, 1196 (1996)). Commerce suggests that one brief, ill-reasoned section of the *Concurrence Memorandum* should prevail over its duty to abide by the clear language of its order. To demonstrate the error of this approach, it is necessary to examine the flaws of the A774 ruling, even though it is not before the court.

A. The Lateness and Irregularity of the A774 Ruling

By including a product that cannot be reconciled with the omnipresent beveling language, the A774 ruling purports to amend the investigation's scope concurrent with the issuance of the *Final Determination*, a very late stage in the investigation. "Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Mitsubishi Heavy Indus., Ltd. v. United States*, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1433 (1997) (quoting *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)); *but see Royal Bus. Mach., Inc. v. United States*, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980) (discussing the constraints of prior administrative action: "Each stage of the statutory proceeding maintains the scope passed on from the previous stage"). There is no clear point during the course of an antidumping investigation at which Commerce loses the ability to adjust the scope, but Commerce's discretion to define and clarify the scope of an investigation is limited in part by concerns for the finality of administrative action, which caution against including a product that was understood to be excluded at the time the investigation began. *Mitsubishi*, 21 CIT at 1231-32, 986 F. Supp. at 1433.

The inclusion of A774 fittings raises concerns for the finality and regularity of administrative action because it occurred late in the investigation; i.e., after completion of the ITC investigation and concurrent with the issuance of the *Final Scope Determination*. In *Mitsubishi*, the Court affirmed Commerce's scope determination in part because the clarification occurred early in the process (upon the issuance of the notice of investigation), thereby alleviating concerns of administrative finality and regularity. The ruling in *Mitsubishi* also demonstrated that, at some point, Commerce may, if it sees fit, delete some language from the petition's description of the subject merchandise in order to "further clarify" the scope of the investigation.[12] *Id.*, 21 CIT at 1232, 986 F. Supp. at 1430.

Because Commerce in the instant case ruled on non-beveled A774 fittings at a much later stage than the change in *Mitsubishi*—i.e., concurrent with the issuance of the *Final Determination*—it could not have removed the beveling sentence from the scope language without compromising the integrity of the investigation's prior stages. If, however, Commerce felt that it was too late to "clarify" the scope by deleting the beveling language, it should have declined to

---

[12] At issue in that case was the definition of "unassembled components," and Commerce's clarification of that term was upheld in part because Commerce had not consistently interpreted "unassembled" and "incomplete" as two mutually exclusive terms. *Id.*, 21 CIT at 1232, 986 F. Supp. at 1434. The Court refrained from deciding whether Commerce may contract the scope of an investigation, however. *Id.*, 21 CIT at 1230 n.6, 986 F. Supp. at 1432 n.6.

include the A774 fittings, which were outside the plain language of the *Order*. Instead of pursuing an approach that would ensure the integrity and coherence of the scope language, Commerce included A774 fittings without removing the sentence requiring beveled edges. Commerce now proposes that the collateral effect of the A774 ruling is to nullify the beveling language, even while the language remains in the *Order*. Commerce cites no statute or regulation authorizing it to clarify or amend an investigation's scope by collateral nullification. Such an irregular maneuver does not merit judicial endorsement as a valid administrative precedent, especially considering the serious finality concerns it raises.

B. The Lack of a Thorough Inquiry

The precedential value of the A774 ruling is undermined not only by its timing and irregularity, but also by the consideration that the ruling was not the outcome of a standard, thorough scope determination process. Commerce's general obligation to follow "prior, similar scope determinations," *Novosteel*, 284 F.3d at 1271, is premised in part on the fact that the prior decisions are indeed determinations, with formal procedures to ensure reliable results. *See Springwater Cookie*, 20 CIT at 1195 (requiring Commerce to abide by prior final scope determinations or provide rational reasons for deviating from them). Unlike the extensive procedures that governed Commerce's response to Top Line's scope requests, the A774 ruling came in response to an inquiry that was submitted during the comment period that followed the *Preliminary Determination. See Antidumping Duty Order*, 58 Fed. Reg. at 33,250 ("After it withdrew from this investigation, [TYH] inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation"). Commerce did not issue a preliminary affirmative scope ruling and thus did not have the benefit of the commentary that might have followed. It did not issue a final affirmative scope ruling that provided a thorough explanation for its decision. Instead, A774 fittings were included within the scope of the *Order* on the basis of a two-paragraph team recommendation in the *Concurrence Memorandum*, which was not included or referenced in the *Order*. Accordingly, the rationale for following the A774 ruling as a "prior, similar scope determination" fails.

C. Unpersuasive Reasoning

The precedential value of the A774 ruling is undermined not only by its procedural flaws and superficial level of inquiry, but also by the limitations of its substantive claims. While the ruling's brief discussion admits that "[t]he scope does state that the edges of finished fittings are beveled," it counters with nothing more than unpersuasive assertions: (1) that the statement pertaining to beveled edges "is not a requirement;" (2) that the statement is not made

"with respect to unfinished fittings;" and (3) that the scope language "only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. These cursory statements provide no rational basis for nullifying the plain language of the *Order* as it pertains to Top Line's tube fittings.

The first assertion—that beveling is not a requirement—is made without providing any basis in statute or regulation for distinguishing between "requirements" and other allegedly superfluous language. In its brief to the court, the Government promotes this distinction as if it needs no explanation: "previous scope rulings have consistently held that beveling is not an essential physical characteristic for a product to fall within the scope of this order."[13] Def.'s Br. at 35. What is essential, according to the Government, is that the components of the fittings are butt-welded. Def.'s Br. at 35 (describing butt-welding as the "most important aspect" of the *Order*). The implication is that other specifications in the *Order* may be ignored when they impede the *Order's* application to a given butt-welded product. *See id.* If Commerce is correct on this point, the beveling characteristic may be ignored as surplusage. Recourse to the § 351.225(k)(2) *Diversified Products* criteria might then be appropriate. There is, however, little, if any, support for the proposition that some portions of the physical description of the subject merchandise are essential while others are superfluous.

The Federal Circuit rejected a previous attempt by Commerce to interpret the *Antidumping Duty Order* as "covering any stainless steel butt-weld pipe fittings in diameter," because such a broad construction would render some of the scope language as "mere surplus-

---

[13] Which prior scope rulings these are is not clear, as the Government provides no citations after making this claim and refers only to the A774 ruling in other sections of its brief. Top Line, in contrast, cites two previous scope determinations—interpreting a different order on butt-weld fittings—in which Commerce found beveling to be critical in placing the products outside the scope of the order. *See Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan*, 60 Fed. Reg. 54,213 (Dep't Commerce Oct. 20, 1995) (Notice of Scope Rulings) ("A characteristic of all stainless steel butt-weld pipe fittings is that the edges of finished fittings are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe"); *Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan*, 61 Fed. Reg. 40,194 (Dep't Commerce Aug. 1, 1996) (Notice of Scope Rulings) ("[W]e conclude that [the merchandise] whose ends are square-cut, not beveled, and thus, not designed to be butt-welded, are not the same merchandise as that covered by the scope order"). These two scope determinations turned on the issue of beveling alone.

Commerce contends that, because its determinations must be based upon the record established in the case before it, the scope established in one investigation should have no bearing upon the determination of the scope in another investigation. Def.'s Br. at 24. The determinations themselves, however, are public records and may be considered with respect to Commerce's past practices. Commerce's past practices in *Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan* are particularly relevant because the petition in that case used language identical to that of the instant *Petition* to characterize the subject merchandise as having beveled edges.

age." *Eckstrom*, 254 F.3d at 1073. Even though the *Eckstrom* plaintiff's pipe fittings were intended for butt-weld connections, this was an insufficient basis for inclusion within the order. *Id*. Commerce is not at liberty to ignore the plain terms of an order on the theory that a broad interpretation of the order will best promote the intent of the petitioners. To allow for unsubstantiated distinctions between a scope's "requirements" and other, supposedly non-essential language is to invite arbitrariness and uncertainty into the process by which Commerce administers antidumping duty orders.

Commerce's approach also constitutes an improper heightening of the standard faced by a plaintiff seeking to exclude its product. Commerce cannot abandon an order's scope standard in favor of "a different, more exacting one" that a plaintiff must meet in order to have its product excluded from the scope. *See Ericsson GE Mobile Communications v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995) (rejecting Commerce's imposition of a "rigid requirement[ ] of proof of commercial availability" where the order was much less specific in terms of exclusionary end uses). A different, more exacting exclusionary standard is created where Commerce uses a selective reading to nullify portions of an order's scope language which would otherwise exclude a plaintiff's product. Commerce imposed such a standard on Top Line when it adopted the reasoning of the A774 ruling. In so doing, Commerce "strayed beyond the limits of interpretation and into the realm of amendment." *See id*. at 782.

In the second of its unpersuasive assertions, the *Concurrence Memorandum* observes that the beveling language does not pertain to unfinished fittings. *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. The relevance of this observation to A774 fittings is unclear, as the *Concurrence Memorandum* gives no indication that they are imported in an unfinished state. *See id*. In any case, the observation is clearly irrelevant with regard to the products at issue here. Top Line's fittings do not have beveled edges, regardless of whether they are finished or unfinished. There is no record evidence to suggest that unfinished versions of Top Line's fittings would be beveled after entry into the United States.

_____ As for the *Order's* failure to exclude non-beveled fittings explicitly, *Duferco* extinguished the theory that a product could be covered by an order merely because the order does not explicitly exclude it. 296 F.3d at 1096. Here, the beveling sentence immediately precedes the explicit exclusion sentence, and there is no indication that one sentence helps to define the scope while the other does not. Accordingly, Commerce proved little, if anything, by observing that "our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum*, at 4, Pl.'s App., Doc. 3, Ex. 11 at 4.

CONCLUSION

Because Commerce cannot interpret an antidumping order in a manner contrary to the clear terms that were a consistent part of the investigation, Top Line's fittings are outside the scope of the *Antidumping Duty Order*. No recourse to the § 351.225(k)(2) *Diversified Products* criteria is warranted. Commerce's ruling to the contrary was therefore not in accordance with the law. Accordingly, the motion for judgment on the agency record is granted, judgment shall be entered for Top Line, and Commerce must exclude Top Line's stainless steel butt-weld tube fittings from the scope of the *Antidumping Duty Order*.

SLIP OP. 04–60

BEFORE: RICHARD K. EATON, JUDGE

MICHAEL J. KENNY, PLAINTIFF, v. JOHN W. SNOW, SECRETARY OF THE TREASURY, U.S. DEPARTMENT OF THE TREASURY UNITED STATES OF AMERICA, DEFENDANT.

COURT NO. 03–00011

[Plaintiff's motion for judgment upon an agency record denied; Defendant's motion for judgment upon an agency record granted.]

Dated: June 7, 2004

Michael J. Kenny, Pro Se, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *Barbara S. Williams*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Harry A. Valetk*), for Defendant United States.

MEMORANDUM OPINION

EATON, *Judge*: Before the court is plaintiff Michael J. Kenny's ("Plaintiff") motion for judgment on the pleadings.[1] By his motion, Plaintiff challenges the United States Secretary of the Treasury's ("Secretary") affirmance of the United States Customs Service's

[1] Citing both USCIT Rules 12(c) and 56.1, Plaintiff styles his motion as one for "judgment on the pleadings." *See* Pl.'s Br. Supp. Mot. J. Pleadings ("Pl.'s Mem.") at 3. However, as this action was brought pursuant to 19 U.S.C. § 1641(e)(1), and since review of the issues raised herein is based upon an agency record, the court will treat Plaintiff's motion as one made solely pursuant to Rule 56.1.

("Customs")[2] decision to deny Plaintiff credit[3] for one question on the October 2001 customs broker's license examination.[4] Defendant United States ("Defendant") opposes Plaintiff's motion and cross-moves for judgment upon an agency record, pursuant to USCIT Rule 56.1(a). The court has exclusive jurisdiction to review the denial of a customs broker's license under 28 U.S.C. § 1581(g)(1) (2000) and 19 U.S.C. § 1641(e)(1) (2000).[5] For the reasons discussed below, the court denies Plaintiff's motion and grants Defendant's cross-motion.

BACKGROUND

In October 2001, Plaintiff sat for the customs broker license examination in New York City. On November 2, 2001, Customs informed Plaintiff by letter that he had received a score of 73.75%, 1.25 percentage points below the passing score of 75%. *See* Letter from Customs to Michael J. Kenny of 11/2/01; 19 C.F.R. § 111.11(a)(4) (2001). Plaintiff timely appealed his score to Customs, seeking full credit for the answers he provided for Questions 19 and 32. *See* Letters from Michael J. Kenny to Customs of 11/12/01, Admin. R. Docs. XI (Question 19) & XII (Question 32); 19 C.F.R. § 111.13(f). Customs denied Plaintiff's appeal with respect to both questions. *See* Letter from Customs to Michael J. Kenny of 2/8/02.

On February 20, 2002, Plaintiff appealed Customs's decision to the Secretary, but only as to Question 32. *See* Letter from Michael J. Kenny to Deputy Director, Office of Trade and Tariff Affairs of 2/20/02; 19 C.F.R. § 111.17(b) ("Upon the decision of the Assistant Commissioner affirming the denial of an application for a license, the applicant may file with the [Secretary], in writing, a request for any additional review that the Secretary deems appropriate."). On De-

---

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

[3] While in his complaint, Plaintiff "respectfully requests he be given credit for Question No. 32," Compl. ¶14, Plaintiff actually seeks review of the Secretary's decision to deny him a customs broker's license. *See* 19 U.S.C. § 1641(b)(1) ("No person may conduct customs business . . . unless that person holds a valid customs broker's license issued by the Secretary. . . .").

[4] An applicant for a customs broker's license is required to pass a written examination, which is "designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." *See* 19 C.F.R. § 111.13(a) (2001).

[5] Title 19 U.S.C. § 1641(e)(1) states:

> A customs broker, applicant, or other person directly affected may appeal any decision of the Secretary denying or revoking a license . . . by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part.

Id.

cember 11, 2002, the Secretary affirmed Customs's decision to deny Plaintiff's appeal. *See* Letter from Deputy Assistant Sec'y Skud to Michael J. Kenny of 12/11/02.[6] Thereafter, on January 10, 2003, Plaintiff timely commenced this action pursuant to 19 U.S.C. § 1641(e)(1) and 19 C.F.R. § 111.17(c).[7]

Plaintiff seeks review of the Secretary's decision to uphold the denial of his request for credit with respect to Question 32, and seeks a reversal of the Secretary's decision, thus giving him credit for one additional answer and a passing grade on the Exam. *See* Compl. ¶14. Defendant contends that the Secretary's denial of Plaintiff's application for a customs broker's license, based on his test score, was "reasonable" and "supported by substantial evidence," and thus should be sustained. *See* Def.'s Mem. Supp. Mot. J. Admin. R. and Opp'n Pl.'s Mot. J. Pleadings ("Def.'s Mem.") at 8.

STANDARD OF REVIEW

Title 19 U.S.C. § 1641(e)(3) states that, with respect to an appeal to this Court of the Secretary's decision to deny a broker's license, "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* Substantial evidence is "more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It "is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co.*, 305 U.S. at 229). "In applying this [substantial evidence] standard, the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998); *see also Slater Steels Corp. v. United States*, 27 CIT ___ , ___ , 297 F. Supp. 2d 1351, 1356 (2003) (where "Commerce's determination . . . was reasonable [it was] thus supported by substantial evidence and in accordance with law.").

---

[6] Deputy Assistant Secretary Timothy E. Skud reviewed Plaintiff's appeal under the authority delegated to him by the Secretary. *See* Aff. of Timothy E. Skud, Deputy Assistant Secretary ¶D; *O'Quinn v. United States*, 24 CIT 324, 324 n.1, 100 F. Supp. 2d 1136, 1137 n.1 (2000) (internal citations omitted).

[7] Title 19 C.F.R. § 111.17(c) states:

> Upon a decision of the Secretary of the Treasury affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within 60 calendar days after the date of entry of the Secretary's decision.

Id.

DISCUSSION

Question 32 required the examinee to classify a beverage under the correct subheading of the Harmonized Tariff Schedule of the United States (2001) ("HTSUS"). The question asked:

> Water Street Fishhouses is importing a beer from Mexico to sell at their eating establishments in Texas. The beer is made from malt with an alcoholic strength by volume of 0.4 percent. It is shipped in 1 liter glass bottles. What is the correct classification of the beer?

Oct. 2001 Exam., Question 32. The choices available to answer this question were:

> A) HTSUS 2202.90.9010, which provided for "Waters . . . and other nonalcoholic beverages . . . Other, Other, Nonalcoholic beer,"
>
> B) HTSUS 2203.00.0060, which provided for "Beer made from malt [i]n containers each holding not over 4 liters: Other,"
>
> C) HTSUS 2203.00.0030, which provided for "Beer made from malt [i]n containers each holding not over 4 liters: [i]n glass containters,"
>
> D) HTSUS 2203.00.0090, which provided for "Beer made from malt [i]n containers each holding over 4 liters,"
>
> E) HTSUS 2202.90.9090, which provided for "Waters . . . and other nonalcoholic beverages . . . Other, Other, Other."

See id.; HTSUS subheadings 2202, 2203.

Plaintiff chose (C) as the correct answer; however, the official answer was (A). In the explanation sheet issued to Plaintiff, Customs explained its reasons for finding (A) to be the correct answer:

> Chapter 22 Note 3 states: for the purposes of heading 2202 the term "nonalcoholic beverages" means beverages of an alcoholic strength by volume not exceeding 0.5 percent vol. Alcoholic beverages are classified in headings 2203 to 2206 or heading 2208 as appropriate.
>
> Chapter 22 Note 2 states: for the purposes of this chapter and of chapters 20 and 21, the "alcoholic strength by volume" shall be determined at a temperature of 20 degrees [Celsius]. The question does not contain a statement that the alcoholic strength by volume was determined at a temperature other than 20 degrees [Celsius].
>
> Therefore, the beer described in question #32 does not meet the terms of subheadings 2203.00.0030, 2203.0060 [sic], or 2203.00.0090 (answers C, B, and D, respectively). Answer E is

> incorrect because nonalcoholic beer is provided for under subheading 2202.90.9010.

Explanatory Comments to Question 32 (emphasis in original). Thus, Plaintiff was denied credit for Question 32.

Plaintiff contends that answer (C) is the best answer to Question 32 because the question did not state the temperature at which the beverage's alcoholic strength by volume was calculated. *See* Pl.'s Mem. 4–5. In Plaintiff's view, "[t]he absence of any indication at what temperature the beverage was measured can be the difference between an alcoholic and a non-alcoholic beverage." *Id.* at 5. Plaintiff further states that

> Question No. 32 indicated the alcohol strength of the malt beer was 0.4%, ostensibly making it non-alcoholic, but without knowing at what temperature it was measured that 0.4% is meaningless[.] [I]t may have been measured at 30 degrees Celsius thereby reducing its strength in order to qualify as a non-alcoholic import.

Id. at 6 (citation omitted). Plaintiff claims that the specificity of choice (C), which deals with "Beer made from malt [i]n containers each holding not over 4 liters: [i]n glass containers," makes it the best of the available choices. *Id.* at 7.

Defendant argues that "the administrative record reasonably supports Customs' decision to deny [Plaintiff's] application based on his failure to achieve a passing score of 75 on his broker's examination." Def.'s Mem. at 5. As to Plaintiff's argument that Question 32 lacked information necessary to answer the question, i.e., the temperature of the beverage being classified, Defendant reiterates the Secretary's view that Question 32 "stipulates the alcohol strength by volume, making it unnecessary to provide additional information about the temperature at the time of measurement." *Id.* at 7; *see also* Mem. from Anne Shere Wallwork to Deputy Assistant Sec'y Skud of 12/11/02 at 2 ("Note 3 defines nonalcoholic beverages as having an alcoholic strength by volume of not greater than 0.5%, so that the beer specified in the question qualifies as nonalcoholic beer.").

This Court has considered similar cases brought by customs broker's license examinees seeking review of specific exam questions. In *DiIorio v. United States*, 14 CIT 746 (1990), Mr. DiIorio sought review of five questions from the October 1989 exam after failing to achieve a passing grade of 75%. With respect to Question 38, he claimed that selecting the official answer required an examinee to rely on assumptions. The question asked what course of action a Customs District Director would take after a customs broker's client had written to dispute certain matters with respect to merchandise detained for possible copyright violations. Mr. DiIorio contended that choosing the answer that Customs insisted was correct required the examinees to assume three things: "that whatever his client 'wrote'

to the director was actually received; that such letter was received within thirty days after the denial; and that such letter was an acceptable denial." *DiIorio*, 14 CIT at 748. Mr. DiIorio argued that "requiring the examinee to leap through these assumptions in arriving at the correct answer placed an unreasonable burden on [the] test-taker." *Id.* The court, however, upheld the Secretary's denial of the appeal, finding that the Secretary's decision to deny Mr. DiIorio credit for his answers to the exam questions was a reasonable decision. *Id.* at 752. The court stated that Question 38, "[w]hile not perfect" was adequate, despite its "ambiguities." *Id.* at 748. The court specified that judicial review of agency decisionmaking as to "the formulation and grading of standardized examination questions should be limited in scope." *Id.* at 747 (noting the court "[would] not substitute its own judgment on the merits of the Customs examination, but [would] examine decisions made in connection therewith on a reasonableness standard.").

This case presents facts similar to the those in *DiIorio*. There, Mr. DiIorio argued that it was unreasonable for examinees to answer "ambiguous" questions by relying on assumptions. In the present case, Plaintiff similarly alleges that Question 32 was ambiguous. *See, e.g.*, Letter from Michael J. Kenny to Deputy Assistant Sec'y Skud of 2/20/02 ("The absence of any indication at what temperature the imported malt beer's alcoholic strength by volume was measured can easily be interpreted [in multiple ways]. . . ."). Plaintiff claims that credit should be granted for his answer as the question did not specify the temperature at which the alcoholic strength by volume was calculated, and thus to reach the official answer he would have to assume that the alcoholic strength of the beer was measured at twenty degrees Celsius. *See* Pl.'s Mem. at 5.

In another case the court found the Secretary's denial of an examinee's appeal to be unreasonable. In *O'Quinn v. United States*, 24 CIT 324, 100 F. Supp. 2d 1136 (2000), Plaintiff challenged one question, alleging that it contained insufficient information to answer correctly.[8] The court found that the question required examinees to

---

[8] The question asked:

The terms of sale stated on the invoice are Freight on Board (FOB). Which of the following deductions are allowed when determining the entered value?

A) The freight costs are deductible.
B) The insurance costs are deductible.
C) The freight and insurance costs are both deductible.
D) The inland freight costs are deductible.
E) No deductions are allowed.

O'Quinn, 24 CIT at 326, 100 F. Supp. 2d at 1138. The official answer to the question was (E). Mr. O'Quinn selected (C) as his answer. *Id.*

be familiar with the term "FOB."[9] Moreover, Plaintiff contended, and the court agreed, that since "FOB can refer to both port of embarkation and port of delivery," the question could not be answered as it did not specify which port was involved. *Id.* at 327, 100 F. Supp. 2d at 1139. The court found that all consulted "lexicographic authorities require a named point to follow the 'FOB' term; otherwise, the term in and of itself is ambiguous."[10] *Id.* at 328, 100 F. Supp. 2d at 1140. The court held that "[g]iven the question's incorrect use of the delivery term 'FOB,' it was unreasonable for the Assistant Secretary to affirm Customs' denial of Plaintiff's appeal of this question." *Id.* The court remanded the case to the Secretary, instructing that "Plaintiff's answer . . . must either be deemed correct or the question must be voided." *Id.* at 332, 100 F. Supp. 2d at 1143.

Unlike *O'Quinn*, Plaintiff's disputed exam question was not drafted ambiguously, nor did it require the examinee to rely on assumptions. Plaintiff insists that he chose answer (C) because the stated alcoholic strength of the beverage as 0.4% was "meaningless" unless it was known at what temperature the measurement was made; thus, "answer C was chosen . . . as the best possible answer considering all facts in the question and Chapter Notes." Pl.'s Mem. at 4. However, all the information that Plaintiff needed to answer Question 32 was available. First, the alcoholic strength of the beverage was supplied as part of the question. Second, Chapter 22 Note 3 states that " '*nonalcoholic beverages*' means beverages of an alcoholic strength by volume not exceeding 0.5 percent vol." HTSUS Chapter 22, Note 3 (emphasis in original). Thus, Plaintiff chose to ignore the stated facts of the question and now labors to find a justification for doing so. Indeed, Plaintiff's choice of (C) is all the more remarkable because, rather than relying on the given fact that the "beer . . . [had] an alcoholic strength by volume of 0.4 percent," he chose to invent a fact by assuming that the beer had an alcoholic strength by volume in excess of 0.5%. Therefore, the court agrees with the Secretary that since "the question [itself] stipulate[d] the alcohol strength by volume . . . [it was] unnecessary to provide additional information about the temperature at time of measurement." Mem. from Anne Shere Wallwork to Deputy Assistant Sec'y Skud of 12/11/02 at 2.

CONCLUSION

For the foregoing reasons, the findings of the Secretary, and the subsequent decision not to grant a customs broker's license to Plain-

---

[9] The Secretary conceded that FOB was not an industry term. *See O'Quinn*, 24 CIT at 327, 100 F. Supp. 2d at 1139.

[10] For instance, Black's Law Dictionary defined FOB as "Free on board some location (for example, FOB shipping point; FOB destination)." BLACK'S LAW DICTIONARY 642 (6th ed. 1990).

tiff, is "supported by substantial evidence." 19 U.S.C. § 1641(e)(3). Accordingly, the court denies Plaintiff's motion for judgment upon an agency record and grants Defendant's cross-motion. Judgment shall be entered accordingly.

Slip Op. 04–61

BEFORE: GREGORY W. CARMAN

XL SPECIALTY INSURANCE CO. (Surety for Cosmos Electronics Co.), Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 01–00900

[Defendant's Motion to Dismiss for lack of subject matter jurisdiction is granted. Plaintiff's Motion for Leave to Amend[ ] or Supplement Complaint is denied.]

Dated: June 8, 2004

Jeffrey S. Kranig, Schaumburg, Illinois, for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Michael W. Heydrich*, Attorney, Office of Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

CARMAN, Judge: Pursuant to USCIT Rule 12(b)(1), Defendant moves to dismiss this action for lack of subject matter jurisdiction. Plaintiff, XL Specialty Insurance Co. (Surety for Cosmos Electronics Co.) ("XL Speciality"), alleges jurisdiction under 28 U.S.C. § 1581(a) (2000). Defendant argues that XL Specialty failed to file a proper protest. Plaintiff opposes Defendant's motion and moves, pursuant to USCIT Rule 15(a), for leave to amend its complaint. This Court has jurisdiction to resolve this matter under 28 U.S.C. § 1581(a). As discussed below, this Court grants Defendant's Motion to Dismiss because Plaintiff's protest is not sufficient to satisfy the regulatory and statutory requirements for validity. Plaintiff's request for leave to amend its complaint is denied.

BACKGROUND

The subject entries of color television receivers manufactured in South Korea by Cosmos Electronics Co. Ltd. were entered in April

1987 and May 1987. (Compl. ¶¶5–6[1]; Def.'s Br. in Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Def.'s Reply") at 3.) At the time of entry, the subject merchandise was subject to an administrative antidumping duty review for the period April 1, 1987, through March 31, 1998. (Compl. ¶8; Def.'s Reply at 3.) Under that administrative review, the entries were subject to certain importer-specific antidumping duty rates. (Compl. ¶8.) On April 21, 2000, the United States Customs Service, now organized as the Bureau of Customs and Border Protection ("Customs"), liquidated the subject entries and assessed a supplemental antidumping duty rate of 4.51% *ad valorem*. (*Id.* ¶13.) On July 12, 2000, after the importer, Cosmos Electronics, refused to pay the supplemental duties, Customs mailed a demand for payment to XL Specialty as surety for Cosmos Electronics. (*Id.* ¶14; Def.'s Mot. to Dismiss ("Def.'s Mot.") at 2.)

On October 6, 2000, Plaintiff filed a timely[2] protest challenging Customs' demand for payment of the supplemental duties. (Protest No. 3001–00–100339 at 1.) XL Specialty attached three additional pages to its protest form. (*Id.* at 2–4.) In the additional pages, XL Specialty presented several "alternative arguments" against Customs' liquidation of the subject entries. (*Id.* at 2.) The relevant portion of the protest is below. The two passages central to the parties' arguments are underlined.

> **II. SURETY'S PROTEST:**
>
> | *Entry Numbers:* | *Entry Date* | *Liquidation/Bill Date* | *Port* |
> |---|---|---|---|
> | *11006442476* | *05/17/87* | *04/21/00* | *3001* |
> | *11006441338* | *04/30/87* | *04/21/00* | *3001* |
>
> **A. ALTERNATIVE ARGUMENTS — INCORRECT DECISIONS MADE BY THE IMPORT SPECIALIST DURING LIQUIDATION:**
>
> The surety files this protest of the liquidation decisions and supplemental duty bills that relate to the captioned entries upon the belief that there errors have made in the such decisions and bills [sic].
>
> The surety hereby files this protest against your decision to: reclassify and/or reappraise the subject entries: deny drawback; assess antidumping/countervailing duties or any calculation of double antidumping duties based upon presumption of reim-

---

[1] Plaintiff's complaint is mis-numbered. For the purposes of citation, this Court refers to paragraphs of the complaint as numbered from the first paragraph.

[2] "A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond." 19 U.S.C. § 1514(c)(3). The notice of demand for payment was mailed on July 12, 2000; thus, XL Specialty's protest, filed 86 days later on October 6, 2000, was timely under the statute.

> bursement, marking duties, or any other special duties, charges or exaction, including but not limited to interest.
>
> The surety additionally claims that the importer capped and extinguished of its liability [sic] for additional antidumping duties as allowed under 19 C.F.R. 351.212(d) and 19 U.S.C. 1673f(a)(1). To the best of the surety's knowledge, the importer may have paid the cash deposit at the applicable preliminary countervailing duty rate in effect between the date of the preliminary antidumping order and the final antidumping order.
>
> Surety also protests any clerical error or mistake of fact made that influenced the increase in the amounts of duty found due when the entries were liquidated.
>
> As this is a protest, surety claims: the merchandise is properly appraised at the invoice unit values and that the values that were used as the basis for the supplemental duties were excessively high, the classification and the duty rate submitted by the importer at time of entry are correct; the entry is not subject to antidumping/ countervailing duties, that even if the entries are subject to the antidumping or countervailing duties, the rate used at liquidation did not apply to entries in question [sic] and that there was no reimbursement of antidumping duties paid prior to or received by the importer of record, or any other special duties, charges or exaction, including but not limited to interest.
>
> Additionally, on information and belief, the surety claims that entries were liquidated after the 6 month or 90 day statutory deadline imposed by 19 U.S.C. 1504(d), that the entries were not within the scope of the antidumping/countervailing duty case that Customs relied upon to determine that supplemental duties are due, and that other errors were made in the determinations that supplemental duties are due for the captioned entries.
>
> Surety is presently gathering the information and evidence necessary to establish our claims. Upon receipt of the documents and information, we will supplement the claims made in this protest with additional information as appropriate.

(*Id*. at 2–3 (emphasis added).)

On February 8, 2001, as a "supplement" to its protest, Plaintiff filed a letter which stated that the subject entries, imported by Cosmos Electronics, were incorrectly assessed the supplemental antidumping duty rate that applied to *Cosmos Communications*, an unaffiliated Florida corporation. (Letter from Jeffrey S. Kranig, Counsel to XL Specialty Insurance Company to Customs of 02/08/01 ("February Letter") at 1.)

Customs denied Plaintiff's protest on April 19, 2001. (Protest 3001–00–100339 at 1.) As explanation for the denial, a Customs officer wrote: "Denied: Entry Liquidated timely & correctly." (*Id*.)

On October 15, 2001, Plaintiff filed a summons in this Court challenging Customs' denial of its protest based on "the Customs Officer's mistake regarding applicable antidumping duty rate to be assessed to Cosmos Electronics Co. entries," and "the Customs Officer's mistake regarding the deemed liquidation status of the entries under [19 U.S.C. §] 1504(d).[3]" (Summons at 2.) On April 29, 2003, Plaintiff filed its complaint alleging that the subject entries were incorrectly assessed the supplemental antidumping duty rate that applied to Cosmos Communications, an unaffiliated Florida corporation. (Compl. ¶¶7, 13.) Plaintiff's complaint did not allege that the subject entries were deemed liquidated under § 1504(d). After two extensions of time in which to answer were granted, Defendant filed its Motion to Dismiss on October 30, 2003. (*See* Def.'s Mot. at 8.)

As detailed in Plaintiff's contentions below, the bulk of Plaintiff's opposition to Defendant's Motion to Dismiss rests on Plaintiff's assertion that its protest was valid because it contained a sufficient deemed liquidation claim. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 1–6.) After reviewing the parties' submissions, this Court asked for further briefing on the issue of whether Plaintiff's contention that its protest was sufficient based on its deemed liquidation claim was effected by the fact that Plaintiff did not allege deemed liquidation in its complaint. (*See* Letter to Counsel from the chambers of Judge Carman of 03/30/04.) In response to that letter, Plaintiff filed a Motion for Leave to Amend[ ] or Supplement Complaint ("Pl.'s Mot. to Amend") asking to add a deemed liquidation claim. (Pl.'s Mot. to Amend at 1.) Defendant opposes Plaintiff's request to amend its complaint.

DISCUSSION

As the party seeking to invoke this Court's jurisdiction, XL Specialty bears the burden of establishing jurisdiction. *See Old Republic Ins. Co. v. United States*, 741 F. Supp. 1570, 1573 (Ct. Int'l Trade 1990) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). XL Specialty alleges jurisdiction under 28 U.S.C. § 1581(a). (Compl. ¶1.) Because Defendant's Motion to Dismiss chal-

---

[3] Deemed liquidation is provided for in 19 U.S.C. § 1504(d):

> when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended . . . within 6 months after receiving notice of the removal from the Department of Commerce. . . . Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d).

lenges the factual basis of XL Specialty's allegations of jurisdiction, the allegations in the complaint are not controlling and only the uncontroverted facts will be accepted as true. *See SSK Indus., Inc. v. United States*, 101 F. Supp. 2d 825, 829 (Ct. Int'l Trade 2000) (citing *Power-One, Inc. v. United States*, 83 F. Supp. 2d 1300, 1303 (Ct. Int'l Trade 1999) and *Cedars-Sinai Med. Cntr. v. Walters*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)). All other facts underlying jurisdiction "are subject to fact-finding by this Court." *Id.*

Under 28 U.S.C. § 1581(a), this Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). "Therefore a prerequisite to jurisdiction by the Court is the denial of a valid protest." *Volkswagen of Am., Inc. v. United States*, 277 F. Supp. 2d 1364, 1367 (Ct. Int'l Trade 2003) (citing *Washington Int'l Ins. Co. v. United States*, 16 Ct. Int'l Trade 599, 601 (1992)); *see also Koike Aronson, Inc. v. United Sates*, 165 F.3d 906, 908 (Fed. Cir. 1999) ("By its terms, section 1581(a) limits the jurisdiction of the Court of International Trade to appeals from denials of valid protests.").

In order for a protest to be valid, it must satisfy the statutory and regulatory requirements set forth in 19 U.S.C. § 1514(c) and 19 C.F.R. § 174.13(a). In addition to other formal requirements, § 1514(c)(1) states that "[a] protest must set forth distinctly and specifically . . . each decision . . . as to which protest is made; . . . the nature of each objection and the reasons therefor; and . . . any other matter required by the Secretary by regulation." 19 U.S.C. § 1514(c)(1). Regulation § 174.13 states that "[a] protest shall contain the following information . . . [t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a)(6).

PARTIES' CONTENTIONS

I. Defendant's Motion to Dismiss.

A. Defendant's Contentions.

Defendant contends that this Court lacks subject matter jurisdiction over this action because Plaintiff's protest does not meet the statutory and regulatory requirements for validity. (Def.'s Mot. at 5.) Specifically, Defendant contends that Plaintiff's protest failed to set forth distinctly and specifically, "the nature of each objection and the reasons therefor" as required by statute. (*Id.* (quoting 19 U.S.C. § 1514(c)(1)(C)).) Further, Defendant asserts that Plaintiff's protest failed to specify the "justification for each objection set forth distinctly and specifically," as required by Customs' regulations. (*Id.* (citing 19 C.F.R. § 174.13(a)(6)).) Defendant contends that XL Spe-

cialty's protest "failed to state any reason for the objections that would have allowed Customs to decide whether it had incorrectly liquidated the entries." (*Id.*)

Defendant characterizes Plaintiff's protest as a "blanket protest" that merely listed every possible objection to Customs' liquidation and did not include any reasons to support those objections. (Def.'s Mot. at 6.) Defendant contends that "[s]uch a blanket protest undermines the administrative remedy provided by Congress because it does not give Customs an opportunity to correct its mistakes." (*Id.* (citing *Davies v. Arthur*, 96 U.S. 148, 151 (1877)).) To highlight the protests' "all encompassing nature," Defendant contends that "[m]ost of the objections in the protest have nothing to do with Customs' liquidation of the entries in issue." (*Id.* at 6 n.2.) Defendant notes that Plaintiff protested Customs' decision to deny drawback and assess marking duties, yet "the importer never applied for drawback . . . and Customs did not assess marking duties on the entries." (*Id.* (citing Protest No. 3001–00–100339 at 2–3).) Defendant argues that the administrative "policy behind the protest procedure . . . will be undermined" if Plaintiff's protest is held to be valid in this case. (Def.'s Reply at 10.)

In its Reply Brief, Defendant addresses Plaintiff's two central contentions: 1) that its protest was valid because it contained a sufficient deemed liquidation claim; and 2) that its protest was valid because it contained a sufficient wrong assessment rate claim. (Def.'s Reply at 2–6 (referencing Pl.'s Opp'n at 3–6).) Defendant contends that these statements "are objections to Customs' decision, not reasons why Customs' decision to assess antidumping [duties] was incorrect." (*Id.* at 2.)

First, Defendant counters Plaintiff's contention that the protest was valid based on its objection to "Customs' decision . . . to assess antidumping/countervailing duties" because "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 2 (citing Pl.'s Br. at 3 (in turn citing Protest No. 3001–00–100339 at 2–3).) Defendant asserts that the quoted protest language is "merely a statement of [Plaintiff's] claim," and "offers no reason why the entries liquidated in accordance with § 1504(d)." (*Id.* at 4.) Defendant contends that Plaintiff's deemed liquidation claim cannot be a "reason" for protesting Customs' decision to assess antidumping duties because, even if the entries were deemed liquidated, antidumping duties would still be assessed by Customs at the rate entered. (Def.'s Reply at 3.)

Additionally, Defendant contends that the deemed liquidation statement in Plaintiff's protest cannot be the basis for validity because it failed to set forth any of the required elements for deemed liquidation as "reasons" for the deemed liquidation objection. (Def.'s Reply at 4.) Defendant contends that courts have held that "in order for a deemed liquidation to occur, (1) the suspension of liquidation

that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; (3) Customs must not liquidate the entry at issue within six months of receiving such notice." (*Id.* (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)).) Defendant contends that Plaintiff's protest failed "to state any fact that relates its claim under § 1504(d) to Customs' liquidation of the entries in issue." (*Id.* at 5.) Defendant contends that "[i]n the absence of such information, the plaintiff has not stated a reason why Customs' liquidation decision was incorrect, and does not give Customs the information necessary to correct [its decision] if warranted." (*Id.*)

Second, Defendant addresses Plaintiff's contention that its protest was valid based on a wrong assessment rate claim. (*Id.* at 5; Def.'s Reply at 6–7.) Defendant stresses that even if the statement that "the rate used at liquidation did not apply to entries in question" could be construed to state an objection, the protest is still invalid "because it does not state the reasons why the rate used by Customs did not apply to the entries in question." (Def.'s Mot. at 7 (quoting Protest No. 3001–00–100339 at 2).) Although Plaintiff argues that Customs had the opportunity to inquire further about this issue, Defendant asserts that "Customs had no better reason to investigate [the wrong assessment rate] objection than the dozen or so other objections raised in the protest." (Def.'s Reply at 7.) Defendant contends that "the failure of a protest to include the necessary reasons cannot be cured . . . by arguing that Customs could have conducted an investigation to obtain the missing information." (Def.'s Reply at 8–9.) Defendant contends that because Plaintiff failed to state a reason why "the rate used at liquidation did not apply to the entries in question," (Protest No. 3001–00–100339 at 2), the protest was invalid under the statute and regulation. (Def.'s Reply at 7–8.)

Next, Defendant addresses Plaintiff's February Letter which contained certain facts regarding the wrong assessment rate claim. (Def.'s Mot. at 5–6.) Defendant contends that Plaintiff attempted to amend its protest with the additional information contained in the February Letter. (*Id.* at 6 n.1) Defendant notes that a protest can be amended "to include objections . . . that were not the subject of the original protest," but asserts that these objections "must be made before expiration of the 90-day period in which the protest could have been filed." (*Id.* (citing 19 U.S.C. § 1514(c)(1)).) Defendant contends that the February Letter "cannot cure the defects in the protest" because the letter was not filed within 90 days of the demand for payment as required by statute. (*Id.* at 5.) Further, Defendant asserts that the February Letter cannot qualify as "new grounds in support of objections raised by a valid protest" because the protest was not valid when it was filed with Customs for the reasons given above. (*Id.* at 6 n.1 (quoting 19 U.S.C. § 1514(c)(1)).)

Defendant contends that the statement in the protest that Plaintiff "is presently gathering the information and evidence necessary to establish our claims," indicates that when the protest was filed, Plaintiff did not have a reason to support its objections and would inform Customs later of the reason. (*Id.* at 6.) Defendant asserts that Plaintiff did not afford Customs the opportunity to correct its mistakes because Plaintiff failed to submit the necessary "reasons" for its objections when it filed its protest. (*Id.*) Defendant contends that Plaintiff included "every conceivable ground for challenging [Customs'] decision with the hope or expectation that a reason eventually would be found." (Def.'s Reply at 7.)

B. Plaintiff's Contentions.

Plaintiff contends that its protest fulfilled all the statutory and regulatory requirements for validity. (Pl.'s Opp'n at 1.) Plaintiff asserts that its protest is sufficient because it objected to Customs' decision to assess antidumping duties based on two claims set forth in the protest: 1) a deemed liquidation claim; and 2) a wrong assessment rate claim. (*Id.* at 3, 6.)

First, Plaintiff draws the Court's attention to the statement in its protest that Plaintiff objected to Customs' "decision to . . . assess antidumping/countervailing duties" because "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 3 (quoting Protest No. 3001–00–100339 at 2–3).) Plaintiff contends that this statement is a sufficient "reason" for objecting to Customs' decision. (*Id.*) Plaintiff contends that this statement's "lack of details is not a fatal flaw." (*Id.* at 4.) Plaintiff acknowledges that this statement does not provide the underlying facts, but asserts that the statement is a sufficient reason for its objection. (*Id.* ("The fact that the statement does not provide either the in depth chronology of the six month liquidation period or of the gap between the expiration of that period and the liquidation date does not make the statement something other than a reason for the plaintiff's protest objection.").) Plaintiff contends that the court has rejected the contention that "the absence of precise facts" renders a protest invalid. (*Id.* at 4–5 (citing *Volkswagen*, 277 F. Supp. 2d at 1369).)

Plaintiff asserts that the sufficiency of the deemed liquidation claim "as a protest objection and reason therefor" is further bolstered by the fact that the Customs officer "respond[ed] to the claim in the protest decision." (*Id.* at 5.) Plaintiff contends that "the import special[ist] signed the protest denial decision in part because he believed that the entry was 'liquidated timely.' " (*Id.* (citing Protest No. 3001–00–100339 at 1).) Plaintiff asserts that the deemed liquidation claim was sufficient to "allow[ ] Customs the opportunity to review the documentation in the liquidated entry files to determine whether

the liquidation was timely" because Customs' records contained the "dates of entry, the antidumping case number, the importer and exporter names, and the date of liquidation." (*Id.* at 6.) Plaintiff contends that this information made it "relatively simple" for Customs to conduct an investigation "to determine the trigger date for the liquidation period provided by 19 U.S.C. § 1504(d), the date of expiration of that six month period, and the timeliness of the liquidation with respect to the expiration of the six month period." (*Id.*)

Second, Plaintiff asserts that the "main issue in this case is the claim that Customs used the wrong assessment rate to liquidate the entries." (*Id.*) Plaintiff contends that its protest is valid because this claim was also sufficiently set forth in the protest: "even if the entries are subject to antidumping or countervailing duties, the rate used at liquidation did not apply to the entries in question." (*Id.* (quoting Protest No. 3001–00–100339 at 3).) Plaintiff contends that "the protest's reference to the inapplicability of the antidumping rate . . . was sufficient to meet the protest validity requirements provided in 19 U.S.C. § 1514(c)(1)(C)." (*Id.* at 7.) Plaintiff contends that minimal additional investigation was necessary for Customs to determine if an incorrect duty rate had been applied because "Customs merely needed to . . . compar[e] the importer's name on the entry documents to the importer names on the liquidation instructions to ascertain that the rate used at liquidation pertained to Cosmos Communications, not Cosmos Electronics." (*Id.*) Plaintiff asserts that, based on the language in the protest and the information contained in the entry file, "Customs had the opportunity to perform the investigation of a specific question." (*Id.*) Plaintiff contends that "[i]t is irrelevant to the issue of protest validity that Customs['] discretion or administrative protocols or priorities may have required more information before Customs would ever have agreed to perform the inquiry and further investigate the applicability of the rate." (*Id.*)

Plaintiff claims that Defendant clouds the issue by drawing attention to Plaintiff's statement in the protest that the surety "is presently gathering the information and evidence necessary to establish our claims." (*Id.* at 9 (quoting Protest No. 3001–00–100339 at 3).) Plaintiff contends that "the protest reasons were concretely provided independent of the notice that the surety intended to provide additional information." (*Id.*) Plaintiff asserts that this statement in the protest was "not a notice that the protest lacked reasons for the objections to the protestable [Customs] decisions." (*Id.*) Plaintiff concludes that the "deemed liquidation claim and the incorrect assessment rate claim in this protest provided Customs with defined courses of inquiry to pursue to determine whether the claims had merit." (*Id.*)

Alternatively, Plaintiff contends that "[a]t a minimum," the protest raised a sufficient objection and the "specific facts" in the February

Letter "provided new grounds in support thereof in accordance with 19 U.S.C. [§] 1514(c) and the *Pagoda* and *Fujitsu* decisions." (*Id.*) Plaintiff states that the February Letter "was a timely filed supplement to the objection already raised in the protest here just like the protest and supplement in *Pagoda*." (*Id.*) Plaintiff cites *Pagoda Trading v. United States*, 804 F.2d 665 (Fed. Cir. 1986), to argue that under § 1514(c), this Court should find that the February Letter was a timely "new ground" in support of the wrong assessment rate objection already raised in the protest. (*Id.* at 3, 9.) Plaintiff contends the because the February Letter "did not challenge a different 'decision,' but merely raised a 'new ground' in support of the objections in the original protest," the letter "did not have to be filed within the 90-day period." (*Id.* at 3 (quoting *Pagoda*, 804 F.2d at 668).) Plaintiff concludes that because its protest was sufficient to satisfy the statutory and regulatory requirements for validity, Defendant's Motion to Dismiss should be denied. (*Id.* at 9–10.)

ANALYSIS

I. Defendant's Motion to Dismiss is Granted.

This Court holds that Plaintiff's protest failed to meet the statutory and regulatory requirements for sufficiency of protest. Therefore, this Court lacks jurisdiction over this case, and Defendant's motion to dismiss is granted. "[D]enial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly." *United States v. Parksmith Corp.*, 514 F.2d 1052, 1057 (C.C.P.A. 1975) (quoting *Eaton Mfg. Co. v. United States*, 469 F.2d 1098 (C.C.P.A. 1972)). "The court generally construes a protest in favor of finding it valid unless the protest 'gives no indication of the reasons why [Customs'] action is alleged to be erroneous.' " *Sony Elecs., Inc. v. United States*, No. 98–07–02438, 2002 Ct. Int'l Trade LEXIS 20, at *6 (Ct. Int'l Trade Feb. 26, 2002) (emphasis added) (citing *Koike Aronson*, 165 F.3d at 908) (in turn quoting *Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 602). Although protests are to be liberally construed, *Mattel, Inc. v. United States*, 377 F. Supp. 955, 960 (Cust. Ct. 1974), that "does not . . . mean that protests are akin to notice pleadings and merely have to set forth factual allegations without providing any underlying reasoning," *Computime, Inc. v. United States*, 772 F.2d 874, 879 (Fed. Cir. 1985) (emphasis added).

Section 1514(c)(1) states that among other requirements,

> A protest must set forth distinctly and specifically —
> (A) each decision . . . as to which protest is made;
> (B) each category of merchandise affected by each decision . . . ;
> (C) the nature of each objection and the reasons therefor; and
> (D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1). Customs' regulations require that a protest include "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each . . . decision." 19 C.F.R. § 174.13(a)(6). In applying the statutory and regulatory requirements, courts have held that "[a] protest must be sufficiently distinct and specific to enable the Customs Service to know what is in the mind of the protestant." *Parksmith Corp.*, 514 F.2d at 1057; *see also Eaton Mfg. Co.*, 469 F.2d at 1098. The Supreme Court has ruled that:

> Protests . . . must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies v. Arthur, 96 U.S. at 151; *see also, Mattel, Inc.*, 377 F. Supp. at 960 (A protest is sufficient "for purposes of [19 U.S.C. § 1514,] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought.").

Here, the parties agree that Plaintiff's protest stated the decision that was being protested: Customs' decision to assess supplemental antidumping duties. (Pl.'s Opp'n at 3, 6; Def.'s Reply at 2–3.) However, the parties disagree whether the two passages in the protest highlighted by Plaintiff merely stated "the nature of the objection," as Defendant claims, (Def.'s Mot. at 5–7), or whether the two passages sufficiently stated "the nature of the objection and the reasons therefor," as Plaintiff contends, (Pl.'s Opp'n at 8). *See* 19 U.S.C. § 1514(c)(1)(emphasis added). This Court holds that Plaintiff's protest merely stated the nature of its objections to Customs decision to assess duties. Therefore, this Court holds that Plaintiff's protest was not valid because it failed to state distinctly and specifically the reasons or justifications for its objections to Customs' decision as required under the statute and regulation. *See* 19 U.S.C. § 1514(c); 19 C.F.R. § 174.13(a)(6). This Court holds that it is not possible to determine the reasons or justifications for Plaintiff's objections from the text of the protest. *See Ammex Inc. v. United States*, 288 F. Supp. 2d 1375, 1382 (Ct. Int'l Trade 2003). This Court further holds that there is no possible construction of the language of the protest that would indicate that the protest gave the Customs official reviewing the protest sufficient information such that the official could correct any mistakes in liquidation.

1. Plaintiff's Protest is Not Valid Based on its Deemed Liquidation Claim.

Plaintiff's deemed liquidation claim is not sufficient under 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a)(6); thus, the deemed liquidation claim cannot be a basis for holding Plaintiff's protest valid. Applying the statutory requirements to Plaintiff's deemed liquidation claim, Plaintiff's protest stated the decision that was being protested: "[Customs'] decision to . . . assess antidumping/countervailing duties." (Protest No. 3001–00–100339 at 2.) The protest also stated the nature of the objection to that decision: "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 3.) However, Plaintiff's protest does not fulfill the requirement that a protest state the "reasons" and "justifications for the objection." *See* 19 U.S.C. § 1514(c)(1)(C); 19 C.F.R. § 174.13(a)(6).

Plaintiff's protest failed to provide "any underlying reasoning" for its deemed liquidation objection. *Computime*, 772 F.2d at 878. Plaintiff's protest failed to state why the entries were deemed liquidated. Plaintiff's protest did not indicate that there was a suspension of liquidation, when and if that suspension had been removed, or if Customs had received notice of the removal. *See Fujitsu Gen. Am. Inc.*, 283 F.3d at 1376. This Court is not persuaded by Plaintiff's argument that the underlying reasoning could have been determined by Customs with minimal investigation. (*See* Pl.'s Opp'n at 6.) Under the statute, Plaintiff clearly bears the burden of setting forth the reasons and justifications for its objections to Customs' decisions. *See* 19 U.S.C. § 1514(c)(1) ("[a] protest must set forth distinctly and specifically . . . the reasons therefor." (emphasis added)); *see also Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 604 (finding the plaintiff's protest invalid for failure to provide reasons for its objection to Customs' classification and stating that "[a]ny other ruling by this court would . . . effectively require Customs to scrutinize the entire administrative record of every entry in order to divine potential objections and supporting arguments which an importer meant to advance.").

This Court recognizes that liberal construction of the validity requirements is generally afforded to protests, but notes that courts have not hesitated to find protests invalid if the protest "gives no indication of the reasons why the collector's action is alleged to be erroneous." *Koike Aronson*, 165 F.3d at 908 (emphasis added) (quoting *Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 602); *see also Ammex*, 288 F. Supp. 2d at 1381–82 (finding that the plaintiff's protest "neither states the 'reasons' for the objection, 19 U.S.C. § 1514(c), nor does it elaborate on the 'justification for [the] objection set forth distinctly and specifically,' 19 C.F.R. § 174.13(a)(6)").

Further, this Court is not persuaded by Plaintiff's contentions that the protest "must have been sufficiently informative," because of the

written response of the Customs official on the protest form. (*See* Pl.'s Opp'n at 5.) In rejecting similar arguments, the court has held that "[t]he test for determining the validity and scope of a protest is objective and independent of a Customs official's subjective reaction to it." *Sony Elecs., Inc.*, No. 98–07–02438, 2002 Ct. Int'l Trade LEXIS 20, at *5 (citing *Power-One Inc.*, 83 F. Supp. 2d at 1305).

2. Plaintiff's Protest is Not Valid Based on its Wrong Assessment Rate Claim.

Plaintiff's protest states that: "even if the entries are subject to antidumping duties, the rate used at liquidation did not apply to the entries in question." (Protest No. 3001–00–100339 at 3.) This Court holds that this statement is insufficient to find Plaintiff's protest valid. The protest states the objection to Customs' decision to assess duties: the rate assessed did not apply to the subject entries. However, like the deemed liquidation claim, the protest failed to state the "reasons" for its objections. It is not possible to determine from Plaintiff's protest any reason why the rate assessed did not apply to the subject entries. Plaintiff's statement fails to set forth the "justification for the objection . . . distinctly and specifically." 19 C.F.R. § 174.13(a)(6).

Arguably, the February Letter contained the reasons and justifications for Plaintiff's objection that the assessed rate did not apply to the subject entries. However, under 19 U.S.C. § 1514(c), a protest may only be amended within the 90-day time period for protesting Customs' decision. 19 U.S.C. § 1514(c)(1) ("A protest may be amended . . . to set forth objections . . . which were not the subject of the original protest . . . any time prior to the expiration of the time in which such protest could have been filed."). The February Letter is dated February 8, 2001, almost seven months after Customs mailed its demand for payment to Plaintiffs and well after the 90-day time period for filing a protest had expired. Therefore, the February Letter cannot not cure the defects in Plaintiff's invalid protest. Further, this Court holds that the February Letter does not come "within a recognized exception to the 90-day deadline prescribed by section 1514(c)(3)." *Fujitsu Gen. Am.*, 283 F.3d at 1372. Contrary to Plaintiff's contentions, this Court cannot assert jurisdiction over Plaintiff's wrong assessment rate claim as "new grounds in support of objections raised by a valid protest." 19 U.S.C. § 1514(c)(1). The "new ground" exception requires an underlying valid protest, and, as detailed above, Plaintiff's protest was not valid because the protest failed to provide the reasons for its objections.

3. Policy Reasons Support the Conclusion Reached by this Court.

This Court agrees with Defendant's characterization of Plaintiff's protest as a "blanket protest." (*See* Def.'s Mot. at 6.) The language of

the protest seems to indicate that Plaintiff did not know the reasons or justifications for its protest at the time that the protest was filed. Such a blanket protest does not further the objectives of the administrative process. The court has already rejected the "blanket" method of protest that Plaintiff employed in this case. *See Washington Int'l*, 16 Ct. Int'l Trade at 605. In *Washington International*, the court rejected the plaintiff's argument that checking a box that stated that it challenged the classification of the merchandise was sufficient for a valid protest under 19 U.S.C. § 1514(c). *Id.* at 602–03. In rejecting the plaintiff's argument, the court stated that

> as a matter of policy plaintiff's argument cannot be countenanced. Under plaintiff's interpretation, an importer could simply check every available objection listed on the protest, and then submit at its leisure a 'supplemental' letter containing the reasons for the objections anytime prior to the resolution of the protest. Such a result would surely 'thwart the scheme of orderly claim assessment envisaged by § 1514.'

Id. at 605 (emphasis added) (quoting *CR Indus. v. United States*, 10 Ct. Int'l Trade 561, 565 (1986)). In effect, that is what Plaintiff has done here. Plaintiff listed "every available objection" to decision of the Customs official and then submitted a "supplemental" letter months later. *Id.* Such a protest is invalid under the statutory and regulatory requirements and does not further the "orderly claims assessment" mandated by Congress in 19 U.S.C. § 1514. *Id.*

II. Plaintiff's Motion to Amend its Complaint is Denied.

Having determined that this Court is without jurisdiction under 28 U.S.C. § 1581(a), granting Plaintiff leave to amend its pleadings in this case would be futile because any such amendment could not cure the deficiencies in Plaintiff's protest. Therefore, Plaintiff's Motion to Amend is denied.

CONCLUSION

This Court holds that Plaintiff's protest was not valid because the protest did not contain the reasons and justifications for Plaintiff's objections to Customs' decision. Thus, this Court lacks jurisdiction to hear Plaintiff's claims under 19 U.S.C. § 1581(a). Defendant's Motion to Dismiss for lack of subject matter jurisdiction is granted. Plaintiff's Motion to Amend is denied.

Slip Op. 04–62

NORSK HYDRO CANADA INC., Plaintiff, v. UNITED STATES, Defendant and US MAGNESIUM LLC, Defendant-Intervenor.

BEFORE: POGUE, JUDGE
Court No. 03–00828

ORDER

WHEREAS, in this matter, on January 27, 2004, this Court issued a preliminary injunction against liquidation of entries of pure magnesium and alloy magnesium from Canada "during the pendency of this litigation," and

WHEREAS Plaintiff has by Motion requested that this Court clarify its preliminary injunction to specify that said injunction remains in effect "during any appeals and/or remands," and

WHEREAS 19 U.S.C. § 1516a(c)(2) provides that this Court may enjoin said liquidation "upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances . . .", and

WHEREAS the parties agree that injunctive relief should be granted under the circumstances, and

WHEREAS Defendant's sole objection to the requested relief is to the duration of said relief, as continuing through any appeals and/or remands, and

WHEREAS 19 U.S.C. § 1516a(e)(2) provides that "entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final Court decision in the action" if the action is sustained, and

WHEREAS, Plaintiff has requested that this Court take note of subsequent authority issued after the January 27, 2004 preliminary injunction in this matter, specifically *Yancheng Baolong Biochemical Prods. Co. v. U.S.*, slip op. 04–42 (CIT April 28, 2004), and *SKF USA Inc. v. U.S.*, slip op. 04–14 (CIT Feb. 18, 2004), and

WHEREAS the relief requested by the Plaintiff will serve the interest of judicial economy and efficiency by maintaining the status quo pending the conclusion of this litigation without requiring further action by the Court, and

WHEREAS Defendant has neither alleged nor shown any prejudice resulting from the requested relief, NOW THEREFORE,

Upon consideration of the Notice of Subsequent Authority and Motion to Clarify the Preliminary Injunction filed by Norsk Hydro Canada Inc. ("NHCI"), it is hereby:

ORDERED that NHCI"s motion to clarify the preliminary injunction is GRANTED; and it is further

ORDERED that Defendant, the United States, together with the delegates, officers, agents, servants, and employees of the United

States Department of Commerce and the United States Bureau of Customs and Border Protection, shall be, and hereby are, ENJOINED, during the pendency of this litigation (including any appeals and/or remands) and until entry of final judgment by this Court in this litigation, from liquidating or causing or permitting liquidation of any unliquidated entries of pure magnesium and alloy magnesium from Canada that:

(1) were exported by NHCI;

(2) are covered by *Pure Magnesium and Alloy Magnesium from Canada: Final Results of Countervailing Duty Administrative Review*, 68 Fed. Reg. 53,962 (Dep't Commerce September 15, 2003) ("Final Results");

(3) were entered, or withdrawn from warehouse, for consumption, during the period January 1, 2001 through December 31, 2001; and

(4) remain unliquidated as of 5 o'clock p.m. on the fifth business day after the day upon which copies of the Order are personally served by Plaintiff upon the following individuals and received by them or by their delegates:

Ann Sebastian
Import Administration, International Trade Administration
U.S. Department of Commerce
14th Street and Pennsylvania Ave., NW
Washington, DC 20230;

Hon. Robert C. Bonner, Commissioner of Customs
Attn: Alfonso Robles, Esq. Chief Counsel
U.S. Bureau of Customs and Border Protection
1301 Constitution Ave., NW, Rm. 3305
Washington, DC 20004; and

Stephen C. Tosini, Esq.
Commercial Litigation Branch, Civil Division
United States Department of Justice
1100 L Street, NW, Suite 11064
Washington, DC 20530

and it is further

ORDERED that the entries subject to this injunction shall be liquidated in accordance with the final court decision in this action, as provided in 19 U.S.C. § 1516a(e).

Slip Op. 04–63

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

SLATER STEELS CORP., FORT WAYNE SPECIALITY ALLOYS DIVISION; CARPENTER TECHNOLOGY CORP., CRUCIBLE SPECIALTY METALS DIVISION, CRUCIBLE MATERIALS CORP.; ELECTRALLOY CORP.; UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC; ACCIAIERIE VALBRUNA S.P.A., Plaintiffs, v. UNITED STATES, Defendant, and TRAFILERIE BEDINI, SRL, Defendant-Intervenor.

Consolidated Court No. 02–00189

JUDGMENT ORDER

Upon consideration of the *Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order* ("*Redetermination Results*") filed by the Department of Commerce ("Commerce") pursuant to the Court's decision in *Slater Steels Corp. v. United States*, Slip Op. 03–162 (Dec. 16, 2003), and upon the parties' comments regarding the *Redetermination Results*; upon all other papers filed herein, and upon due deliberation; the Court finds that Commerce adequately distinguished the five administrative determinations cited in the Court's remand instructions. Accordingly, it is hereby

ORDERED that the *Redetermination Results* are sustained in all respects; and it is further

ORDERED that judgment is entered for defendant.

SO ORDERED.

Slip Op. 04–64

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., NTN-BOWER CORPORATION and NTN-BCA CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Court No. 00–09–00443

JUDGMENT

This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Remand Determination* pursuant to *NTN Corp. v.*

United States, 28 CIT ___ , 306 F. Supp. 2d 1319 (2004), and Commerce having complied with this Court's instructions contained therein, it is hereby

ORDERED that the *Final Remand Determination* is affirmed in its entirety, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/33 5/18/04 Ridgway, J.	Pomeroy Collection, Ltd.	01–01003	MX7013.39.60 4.8% MX7013.39.50 10% MX7013.99.50 20% MX7013.99.90 4.8%	MX7020.00.60 Free of duty MX9405.50.40 Free of duty	Agreed statement of facts	Laredo Replacement glass articles
C04/34 5/20/04 Aquilino, J.	Pomeroy Collection, Ltd.	03–00829	MX7013.99.90 3.3%	MX9405.50.40 Free of duty	Agreed statement of facts	Laredo "Stilton Wall Floral" articles
C04/35 5/24/04 Restani, C.J.	SSK Indus., Inc.	00–08–00389	8479.89.95/97 3.2% or 2.5% 9025.80.50 1.6%	9303.90.80 2% in 1996 Free of duty in 2000 and 2001	Agreed statement of facts	Cleveland Cybernetic parachute release systems
C04/36 5/25/04 Musgrave	Simon Mktg., Inc.	99–10–00621	7326.20.0050 4.3% 9503.90.0045 0%	7326.20.0070 3.9% 9503.90.0080 0%	Agreed statement of facts	Los Angeles Plastic toys
C04/37 6/2/04 Carman, J.	Benteler Indus., Inc.	96–05–01475	7304.59.80 6.8%	8708.90.80 At the dutiable rate in effect at the date of entry	Agreed statement of facts	Baltimore Detroit Tubular sections of BTR 150(Ni) or BTR 155