Slip Op. 08–125

CELANESE CHEMICALS LTD., *Plaintiff*, v. UNITED STATES, *Defendant*, and E.I. DUPONT DE NEMOURS & CO. and CHANG CHUN PETROCHEMICAL CO., LTD., *Defendant-Intervenors*.

Court No. 04-00594
PUBLIC

[International Trade Commission's Affirmative Preliminary Determination on remand sustained.]

Dated: November 19, 2008

Gibson, Dunn & Crutcher LLP (*Daniel J. Plaine*, *Gracia M. Berg*, and *Oleh Vretsona*), for Plaintiff.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel for Litigation, U.S. International Trade Commission (*Mary Jane Alves*); for Defendant.

Crowell & Moring LLP (*Jeffrey L. Snyder*, *Matthew P. Jaffe*, *Alexander H. Schaefer*, and *Christopher E. Gagne*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

This matter is before the Court following remand to the United States International Trade Commission.

In *Celanese I*, the Court sustained in part and remanded in part the Commission's negative preliminary injury determination in the antidumping investigation of polyvinyl alcohol ("PVA") imports from Taiwan. *See* Polyvinyl Alcohol from Taiwan, Inv. No. 731–TA–1088 (Preliminary), USITC Pub. 3732 (10/04) ("Preliminary Determination") (negative preliminary injury determination); *Celanese Chemicals Ltd. v. United States*, 31 CIT ___ , 2007 WL 735024 (2007) ("*Celanese I*"). On remand, the Commission reconsidered various issues in light of the instructions in *Celanese I*, and reached an affirmative preliminary injury determination. *See* Polyvinyl Alcohol from Taiwan, Inv. No. 731–TA–1088 (Preliminary) (Remand), USITC Pub. 3920 (4/07) ("Remand Determination").

The Commission, joined by Celanese, urges that the agency's remand determination be sustained in its entirety. *See generally* Commission's Rebuttal Comments on Remand Determination at 1, 15 ("Commission Comments"); Comments of Celanese Chemicals Ltd. Regarding the U.S. International Trade Commission's Remand Determination at 3, 15–16 ("Pl.'s Comments"). In contrast, Defendant-Intervenors E.I. DuPont de Nemours & Co. and Chang Chun Petrochemical Co., Ltd. (collectively "DuPont") assert that the remand was improper *ab initio*, and that the Commission's original preliminary injury determination – the negative preliminary injury determination – should therefore be reinstated. *See generally* Defendant-Intervenors' Comments on the U.S. International Trade Commission's Remand Determination ("Def.-Ints.' Comments") at 1–11, 27. In the alternative, DuPont contends that the Commission failed to comply with the Court's instructions in *Celanese I*, and that the agency's findings on remand "lack any rational connection to the facts." On those theories, DuPont requests that this matter be remanded to the Commission yet again, for further explanation and analysis. *See generally* Def.-Ints.' Comments at 1, 11–27.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000). For the reasons outlined below, the Commission's affirmative preliminary injury determination on remand must be sustained.

I. *Background*

This action arises out of an antidumping petition against polyvinyl alcohol ("PVA") imports from Taiwan, filed by Celanese. In its preliminary injury investigation, the Commission found – by a three-to-two vote, with one Commissioner not participating[1] – that there was no reasonable indication that an industry in the United States was being materially injured or was threatened with material injury by reason of PVA from Taiwan. *See* Polyvinyl Alcohol from Taiwan, Inv. No. 731–TA–1088 (Preliminary), USITC Pub. 3732 (10/04) (negative preliminary injury determination). As a result, the investigation was terminated, in accordance with the statute. 19 U.S.C. § 1673b(a)(1).

Celanese responded by commencing this action contesting the Commission's negative preliminary determination. In *Celanese I*, the Court granted Celanese's Motion for Judgment Upon the Agency Record in part, and remanded the action to the Commission for further action. *See Celanese Chemicals Ltd. v. United States*, 31 CIT ___ , 2007 WL 735024 (2007) ("*Celanese I*").[2]

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[1] The Commission's majority opinion in the original investigation reflected the views of Vice Chairman Deanna Tanner Okun, as well as Commissioners Daniel R. Pearson and Charlotte R. Lane. Chairman Stephen Koplan and Commissioner Marcia E. Miller reached an affirmative determination. Commissioner Jennifer A. Hillman did not participate in the investigation.

[2] Specifically, the Commission was directed to: (1) explain why it relied on importer ques-

After considering the parties' comments on the issues remanded to the agency in *Celanese I*, and based on the information available at the time of the original preliminary determination, the Commission issued its remand determination. *See* Polyvinyl Alcohol From Taiwan, Inv. No. 731–TA–1088 (Preliminary) (Remand), USITC Pub. 3920 (4/07) ("Remand Determination").

On remand, the new Commission majority – consisting of three new Commissioners – reached an affirmative preliminary determination on injury, finding a reasonable indication that a domestic industry was being materially injured by imports of PVA from Taiwan allegedly being sold in the United States at less than fair value.[3] As required by the statute in situations where the Commission's composition has changed, the new Commissioners addressed the determination *de novo* and applied the proper statutory test to the record. *See Trent Tube Div. v. United States*, 14 CIT 780, 789, 752 F. Supp. 468, 476 (1990), *aff'd*, 975 F.2d 807 (Fed. Cir. 1992); *Mitsubishi Materials Corp. v. United States*, 20 CIT 328, 330, 918 F. Supp. 422, 425 (1996). The other three participating Commissioners (who constituted the majority in the original investigation) issued separate and dissenting remand views, again reaching a negative preliminary determination.

Where – as here – the Commission is "evenly divided," the statute specifies that "the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11). Thus, it is the affirmative preliminary determination on injury reached on remand which is now before the Court.

II. *Standard of Review*

As all parties correctly emphasize, judicial review of preliminary determinations issued by the Commission is strictly limited. *See* Def.-Ints.' Comments at 2; Pl.'s Comments at 3–6; Commission Comments at 2–3. Indeed, *affirmative* preliminary determinations on injury are not independently appealable. Instead, upon receiving notice of an affirmative preliminary injury determination by the Commission, the U.S. Department of Commerce proceeds with its preliminary investigation into the existence of the alleged unfair

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tionnaire responses, rather than import statistics collected by the U.S. Census Bureau, to measure the volume of subject imports; (2) explain why it relied on unadjusted import statistics collected by Census to measure non-subject imports; (3) explain its finding of "attenuated competition" in the context of its underselling analysis; (4) reconsider its finding on price depression; (5) reconsider its finding on price suppression; (6) reconsider its finding on impact; and (7) reconsider its threat determination. *Celanese I*, 31 CIT at ____ , ____ , ____ , ____ , ____ , ____ , ____ , ____ , 2007 WL 735024 at * 7–10, 10–11, 12–18, 19, 19–20, 20–23, 23–25; in particular, *see* Confidential Celanese Slip–Op 07–16 at 20–21, 24, 36–38, 41–42, 43–44, 49–50, 50–55.

[3] The three new Commissioners who constituted the majority were Vice Chairman Shara L. Aranoff, and Commissioners Irving A. Williamson and Dean A. Pinkert.

trade practice (*i.e.*, dumping or subsidies). *See* 19 U.S.C. §§ 1671b(a), (b), & (f), 1673(a), (b), & (f). The Commission's affirmative injury determination is judicially reviewable only at some later date.

Moreover, although *negative* preliminary injury determinations may be appealed, Congress has prescribed a highly deferential standard for judicial review. Specifically, the statute requires that the Commission's determination be sustained, save where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A).

In a case such as this, the court's jurisdiction to review an affirmative preliminary injury determination reached on remand is "derived from the proper exercise of its jurisdiction" to review an appeal from a negative preliminary injury determination. *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1308–09 (Fed. Cir. 2004). Again, though, the scope of judicial review is quite narrow. As the Court of Appeals has underscored, the Commission's preliminary determination "must be upheld unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* at 1309. On the other hand, the court is not a "potted plant."[4] *See* section III.A, *infra*.

III. *Analysis*

As a threshold matter, DuPont contends that "the . . . entire remand was inappropriate," and that "the Court therefore should reinstate the initial preliminary negative determination." Def.-Ints.' Comments at 11; *see generally id.* at 1–11, 27. In the alternative, DuPont charges that, even assuming that the remand was appropriate, the Commission failed to comply with the Court's instructions in *Celanese I*. DuPont therefore seeks to have this matter remanded to the Commission for a second time. *See generally* Def.-Ints.' Comments at 1, 11–14, 17. A second remand is also warranted, according to DuPont, because the remand determination at issue here is assertedly "irrational, arbitrary and capricious." *See generally* Def.-Ints.' Comments at 1, 14–27.

As discussed in greater detail below, however, all three of DuPont's arguments must fail.

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[4] In the course of congressional hearings on the Iran-Contra affair, chairman Daniel Inouye wearied of famed trial counsel Brendan Sullivan's objections to questions that were put to Mr. Sullivan's client, Oliver North. Exasperated, Chairman Inouye suggested that Mr. North should speak for himself. Mr. Sullivan famously responded: "Well, sir, I am not a potted plant. I am here as the lawyer. That's my job."

A. *The Propriety of the Remand in Celanese I*

DuPont first mounts a broadbrush attack on the propriety of the remand in *Celanese I*. According to DuPont, "the . . . entire remand was inappropriate." Def.-Ints.' Comments at 11. DuPont contends that, in remanding the matter to the Commission, "the Court substituted its judgment for that of the ITC and thus strayed beyond the limits of its narrow review authority." *Id.* at 2. According to DuPont, "the Commission's initial determination featured a rational nexus between the facts on the record and the Commission's conclusions," and therefore should have been sustained. *Id.* at 11. DuPont concludes that "the Court . . . should reinstate the initial preliminary negative determination." *Id.* at 11; *see generally id.* at 1–11, 27.

DuPont's argument is ill-conceived, both as a matter of fact and as a matter of law. In *Celanese I*, the Court remanded issues in the Commission's determination that it found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Celanese I*, 31 CIT at ___ , ___ , ___ , ___ , ___ , ___ , ___ , 2007 WL 735024 at * 5, 10, 11, 17–18, 19, 20, 22–23, 23–25. DuPont seems to fundamentally misconstrue that standard.

Like DuPont, the Commission too originally argued that the initial preliminary determination on injury (which was negative) should be sustained – a view which was rejected, in part, in *Celanese I*. It is telling that the Commission does not now join in DuPont's claim that the Court's remand to the agency in that decision reflected an incorrect application of the standard of review, and was improper.

DuPont's interpretation of the scope of judicial review would reduce the Court of International Trade to little more than a rubber stamp for agency decisionmaking. To the contrary, the court is entitled to require that the agency articulate the bases for its determinations in sufficient detail. The court is not obligated to defer to determinations where the agency's rationale cannot reasonably be discerned on review.

An arbitrary and capricious determination has been defined by the Supreme Court as a determination having no satisfactory explanation or rational connection between the facts found and choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). As a reading of *Celanese I* makes plain, there were a number of issues in the Commission's original preliminary determination lacking the requisite satisfactory explanation or rational connection between the facts found and the choices made. Under the "arbitrary and capricious" standard mandated by Congress for judicial review of negative preliminary determinations, the Court was thus well within its rights to order a remand to the Commission on the specified issues, as illustrated generally in the discussion in section III.C, below.

B. *The Commission's Compliance With the Remand Instructions*

DuPont further asserts that "[e]ven assuming *arguendo* that the Court's remand was appropriate, . . . the remand determination is unresponsive to the specific factual questions that the Court raised" in *Celanese I*. Def.-Ints.' Comments at 11. DuPont therefore argues, in the alternative, that the remand determination cannot be sustained, and that this matter should be sent back to the agency yet again. *See id.* at 1, 11–14 (and, more generally, 11–27). This claim too is lacking in merit.

As the Commission's Comments succinctly point out, "the [new] Commission majority was not required to explain findings it never made." Commission Comments at 3; *see generally* Commission Comments at 3–6; Pl.'s Comments at 8–9. And this is no *post hoc* rationalization. In reaching their remand determination, the majority Commissioners themselves explained:

> [T]he Court's instructions on remand are primarily directed to the substance of the Commission majority's Original Views in support of a preliminary negative determination. As a result of our affirmative preliminary remand determination, we do not need to address a number of the Court's remand instructions.

Commission Comments at 4 (*quoting* Remand Determination at 6; Remand Determination (Confidential Version) at 7). In sum, to the extent that the remand instructions in *Celanese I* required further explanation or analysis specific to the Commission's original negative preliminary determination on injury, the affirmative preliminary injury determination on remand rendered those instructions moot. *See Mitsubishi Materials*, 20 CIT at 330, 918 F. Supp. at 425 (holding that, because certain Commissioners made a threat of injury determination, remand instructions pertaining only to Commission's material injury finding did not apply to their determination).

Because the Commissioners who made up the new majority on remand were not involved in the original investigation, DuPont errs in asserting that they should have explained what DuPont terms the "reversal" of the Commission's earlier determination. Indeed, not only were they not involved in the original investigation, they were not even Commissioners at that time. Thus, they had no "position" from which to "change." Instead, in accordance with the law, they appropriately made their remand determination *de novo*, by weighing the evidence and reaching their own independent conclusions. *See Mitsubishi Materials*, 20 CIT at 330, 918 F. Supp. at 425 (observing that those who "were not members of the Commission at the time of the original determination . . . properly reviewed the case on remand *de novo*").

In a remand proceeding, Commissioners may adopt findings made in the original determination, as they deem appropriate, and make them their own. *USX Corp. v. United States*, 12 CIT 844, 844–45 &

n.3, 698 F. Supp. 234, 235–37 & n.3 (1988). The Commissioners comprising the new majority in fact did adopt some findings from the original determination (*i.e.*, domestic like product, domestic industry, and negligibility). However, they were not obligated to adopt or to defer to the methodologies employed in – much less the findings reached in – the original determination. *See Trent Tube*, 14 CIT at 789, 752 F. Supp. at 476 (in cases involving this "continuing institution, regardless of changes in [ ] membership," those newly participating in a remand proceeding comply with a remand order simply by "employ[ing] the proper statutory test to the record"); *cf. Nippon Steel Corp. v. United States*, 30 CIT 1229, 1238–40, 433 F. Supp. 2d 1336, 1344–46 (2006), *rev'd on other grounds*, 494 F.3d 1371 (Fed. Cir. 2007) (stating that the fact that a portion of the final determination on a previous remand was supported by substantial evidence "does not prevent the Commission from lawfully reaching a different conclusion on the same issue in a subsequent remand proceeding").

Contrary to DuPont's implication, the members of the Commission majority did not "reverse" their position on remand. Nor was there any requirement that they "reconcile" their analysis with, or adopt the methodology of or the findings from, the original negative preliminary determination at issue in *Celanese I*. Having properly reviewed the record *de novo* and having reached an affirmative preliminary injury determination based thereon, the majority Commissioners were under no obligation to respond to remand instructions that pertained solely to a negative preliminary determination.

C. *The Adequacy of the Commission's Remand Determination*

DuPont maintains that, "[e]ven assuming that (1) the Court's remand was appropriate and (2) the Commission addressed the issues the Court identified, any review of the record evidence demonstrates that the Commission's remand determination is irrational, arbitrary and capricious." Def.-Ints.' Comments at 14. Thus, the final issue is whether the new Commission majority's analysis of (1) the volume of subject imports, (2) the price effects of subject imports, and (3) the impact of subject imports on the domestic industry was arbitrary and capricious, as DuPont contends. *See generally* Def.-Ints.' Comments at 1, 14–27.[5]

As summarized below, a review of the record confirms that there was a rational nexus between the facts found and the choices made

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[5] The Commission is directed to determine, "based on the information available to it at the time of the determination, whether there is a reasonable indication that – (A) an industry in the United States – (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of the subject merchandise." 19 U.S.C. § 1673b(a)(1). Here, because the new Commission majority found present injury, there was no need for it to reach the issue of the threat of injury, and it did not do so.

by the majority on remand. DuPont has failed to make its case to the contrary. The new Commission majority adopted certain undisputed findings from the original preliminary determination, as noted above. DuPont does not challenge their analysis of the relevant conditions of competition. After explaining their choice of data sets to measure the volume of subject and non-subject imports (also undisputed – *see* section III.C.1, below), the new Commission majority concluded that the volume and the increase in volume of the subject imports from Taiwan was significant. As they explained, the volume of subject imports increased both absolutely and relative to apparent U.S. consumption over the period of investigation, most notably as imports previously found to be injurious began to leave the market from 2002 to 2003 and into 2004. DuPont's disagreement with the new majority's volume analysis is limited to its argument that they did not draw the conclusions that it would have preferred concerning the price effects and impact of subject imports, discussed in sections III.C.2 and III.C.3 below.

DuPont's remaining arguments reflect little more than its disagreement with the new Commission majority's weighing of the evidence, and its contention that the record did contain clear and convincing evidence of no material injury or threat thereof by subject imports under *American Lamb*. *See generally* Commission Comments at 7 (*citing American Lamb Co. v. United States*, 785 F.2d 994, 1003–04 (Fed. Cir. 1986)). However, that DuPont would have preferred that the new Commission majority weigh the evidence differently so as to reach a negative determination – as the Separate and Dissenting Commissioners did – does not detract from the validity of the affirmative preliminary determination on injury that the new majority reached on remand. That determination must therefore be sustained.

1. *The Volume of Imports*

Under the statutory scheme, in evaluating the volume of imports of subject merchandise, the Commission must determine "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

In its original preliminary determination, although the Commission found the actual volume of subject imports and the increase in that volume over the period of investigation ("POI") to be significant, it nevertheless found that volume did not have a significant impact on the domestic market. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 7. The Commission further determined that non-subject imports, *i.e.*, imports from countries other than Taiwan, had a negligible impact on the domestic PVA industry. *See generally id.*, 31 CIT at ____, 2007 WL 735024 at * 10.

a. *The Basis for the Remand in Celanese I*

Celanese disputed the data on which the Commission relied to calculate the volume of subject and non-subject imports and their respective market shares, as well as the domestic industry's market share performance, asserting that the Commission both understated the volume of subject imports and overstated the volume of non-subject imports. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 10.

To determine the volume of subject imports, the Commission relied on importer questionnaire data, rather than U.S. Census statistics, citing inaccuracies in the Census statistics. *See Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 7–8. However, Celanese maintained that corrected Census statistics were available and more reliable, and that the importer questionnaire data were incomplete. *See id.*, 31 CIT at ___ , 2007 WL 735024 at * 7–9.

Celanese I acknowledged that the Commission's calculation of the volume of subject imports using importer questionnaire data (as opposed to other data sources) is generally within the agency's discretion. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 7–8 (and authority cited there). However, the Commission failed to provide any response to allegations that the questionnaire data were incorrect, or to provide a rational explanation for the use of those data, except to say that relevant U.S. Census statistics were not correct. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 9. The Commission was therefore instructed, on remand, to "explain why the questionnaire responses remained the best information available in light of the apparent corrections to the errors which were cited as reasons for not using Census data in the first instance." *Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 10.

Celanese also objected to the Commission's use of certain unadjusted Census data to calculate the volume of non-subject imports. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 10. Those data covered PVA of all hydrolysis levels, while the scope of the investigation at issue includes only PVA with an hydrolysis level of 80% or higher. *Id.*, 31 CIT at ___ , 2007 WL 735024 at * 10. Celanese contrasted the Commission's practice in the case at bar with the agency's practice in the parallel investigations of PVA from China, Japan, and Korea, where the Commission adjusted the Census data to exclude non-subject PVA. *See generally id.*, 31 CIT at ___ , 2007 WL 735024 at * 10. Celanese argued that "by using data that included out-ofscope products[,] the Commission overstated the volume of non-subject imports which contributed to understating the impact on the domestic market of subject imports from Taiwan." *Id.*, 31 CIT at ___ , 2007 WL 735024 at * 10.

The Commission's original preliminary determination characterized the out-of-scope imports as a "relatively small share"; but it provided no justification for the inclusion of such imports in the non-

subject import data, and failed to explain why the Commission had not adjusted the data in this case as it had in the parallel investigations. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 10–11. The Commission was therefore instructed, on remand, to explain the basis for the difference in its practices in parallel investigations, and to provide support for its conclusion that the volume of out-of-scope, non-subject imports included in Census data used in its calculations would not affect the outcome of the agency's determination. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 11 .

b. *The Remand Determination*

On remand, the Commission – including both the new Commission majority and the dissenting Commissioners – explained that the agency in fact did not have final, corrected Census data available for use in determining the volume of subject imports. Contrary to Celanese's representations, the Census Bureau had not provided the agency with revised data. The Commission noted that, although DuPont provided information correcting its own import data to the Commission and to Census, there was no indication on the record "when or even if Census concurred with DuPont's revision." The Commission chose not to rely on data that had not been verified by Census, and concluded that the importer questionnaire data were the best information available to the agency under the circumstances. *See generally* Remand Determination at 10; Remand Determination (Confidential Version) at 12–13; *see also* Pl.'s Comments at 6–7; Commission Comments at 6–7; Def.-Ints.' Comments at 11.

On remand, the Commission also addressed the issue of the use of unadjusted Census data in determining the volume of non-subject imports. The Commission – including both the new Commission majority and the dissenting Commissioners – explained that the agency had lacked sufficient time to adjust the data to exclude out-of-scope non-subject imports in reaching its original preliminary injury determination, and that it had made such adjustments only in the final phases of the parallel investigations of PVA from China, Japan, and Korea. With the benefit of the additional time on remand, the Commission made the appropriate adjustments, as reflected in the Remand Determination. *See generally* Remand Determination at 9–11; Remand Determination (Confidential Version) at 12–13; *see also* Pl.'s Comments at 7–8; Def.-Ints.' Comments at 11.

No party, including DuPont, contests the new majority's treatment of the volumes of subject and non-subject imports in the Remand Determination – or, for that matter, any other specific aspect of the new majority's volume analysis. The new Commission majority found that the volume of subject imports increased both absolutely and relatively over the period of investigation, and that the increases were "sharpest from 2002 to 2003 and into 2004," when PVA imports

from China, Japan, and Korea – the countries subject to antidumping orders entered in 2003 – began to leave the U.S. market. *See* Remand Determination at 18, 19; Remand Determination (Confidential Version) at 24, 26. The new majority concluded that these increases were significant. Remand Determination at 19; Remand Determination (Confidential Version) at 26. Given the record facts, that is a rational conclusion. *See generally* Pl.'s Comments at 9–10.

2. *The Price Effects of Subject Imports*

The statute further requires that the Commission evaluate the price effects of the subject imports. Specifically, the Commission must consider whether there is significant price underselling, and whether the subject imports have otherwise depressed prices significantly or prevented price increases to a significant degree. 19 U.S.C. § 1677(7)(C)(ii).

a. *Underselling and Attenuated Competition*

In its original preliminary determination, the Commission found attenuated competition between domestic and imported PVA. The Commission further concluded that any underselling by subject imports was not significant. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 12–13.

(1) *The Bases for the Remand in Celanese I*

Celanese challenged the Commission's finding of attenuated competition, as well as its conclusion that any underselling of subject imports was insignificant. Celanese asserted the Commission had changed methodologies from the 2003 investigation, giving decisive weight to the alleged lack of competition overlap in the current investigation, and dismissing allegations of lost sales and revenues (which were cited as dispositive bases for finding significant underselling in another investigation).

Celanese further alleged that the Commission downplayed the underselling observed with a particular product (product 4) by stating the volume of that product was [ ]. Celanese argued that the data showed that the volume [ ]. Celanese also asserted that the Commission erred in minimizing a significant instance of a confirmed lost sale, challenging the agency's statement that the lost sale occurred during a period of decreasing imports. In addition, Celanese objected to the weight accorded by the Commission to factors other than price in the agency's analysis of lost sales and lost revenues. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 16–17.

In *Celanese I*, the Court acknowledged that the scope of judicial review for a preliminary injury determination is narrow, and that the Commission is entitled to utilize any number of methodologies to

perform its duties. The Court further noted the right of the agency to weigh the evidence before it, and to give dispositive weight to certain facts over others. However, the agency must explain the reasons behind its determination. *Bowman Transp., Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285–86 (1974); *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. Further, there is a general rule that an "agency must either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) (*citing Sec'y of Agric. v. United States*, 347 U.S. 645 (1954)). *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 16.

Celanese I directed the Commission to further explain its finding of attenuated competition, as well as its determination that any underselling was insignificant. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 18.

(2) *The Remand Determination*

On remand, the Commissioners examined the price effects of the subject imports by evaluating the same five product lines as in the original preliminary determination. However, the new Commission majority reached a conclusion very different from that in the original preliminary determination. Specifically, the new majority concluded that there was significant underselling. As the Commission properly noted, the remand instructions in *Celanese I* were "primarily directed to the substance of the Commission majority's Original Views in support of a preliminary negative determination." The new Commission majority therefore "did not need to address a number of the Court's remand instructions," including those related to the earlier determination's findings on attenuated competition and underselling. *See generally* Remand Determination at 6; Remand Determination (Confidential Version) at 7.

In analyzing underselling, the new Commission majority examined pricing data that all parties agreed were representative of the quarterly selling prices of domestic products and subject imports. They found that prices fluctuated during the period of review, but trended downward overall. As the new majority explained, they placed greater weight on the pricing data for the most recent portion of the period of review, which is when the volume of non-subject imports was declining and the volume of subject imports from Taiwan was increasing. In that period, subject imports from Taiwan undersold the domestic like product in 13 out of 30 instances, with a significant range in the margin of underselling. Accordingly, the new Commission majority found significant underselling by subject imports from Taiwan. *See* Remand Determination at 21; Remand Determination (Confidential Version) at 29; *see generally* Commission Comments at 8; Pl.'s Comments at 11.

DuPont asserts that the new Commission majority failed to examine the pricing data by period, instead looking "only" at changes from the beginning to the end of the period of investigation. *See* Def.-Ints.' Comments at 16. Although the new majority did examine price changes from the beginning to the end of the period of review, they emphasized that the pricing data for the most recent periods (when the volume of non-subject imports was receding, and the volume of subject imports from Taiwan was increasing) weighed more heavily in their analysis. In particular, for product 4, subject imports undersold the domestic like product for five of the six most recent quarters, with a significant range in the margin of underselling. Subject imports undersold for product 2 for the second quarter of 2004, and for product 3 for the fourth quarter of 2003 as well as the second quarter of 2004. Subject imports undersold for product 5 for five of six recent quarters, at disparate underselling margins. *See* Remand Determination at 21 n.136; Remand Determination (Confidential Version) at 29 n.136; *see generally* Commission Comments at 8–9. And, as DuPont itself acknowledges, the Commission has broad discretion in determining the weight to be accorded data in its analysis. *See* Def.-Ints.' Comments at 3.

DuPont also mistakenly argues that the new Commission majority failed to examine pricing data on a firm-specific basis by period on remand. *See* Def.-Ints.' Comments at 16. The Commission is not obligated to examine pricing data on a disaggregated basis, because the statute requires it to analyze injury on an industry-wide basis. *See* 19 U.S.C. § 1673b(a); *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1215–17, 431 F. Supp. 2d 1302, 1311–12 (2006). In any event, the new Commission majority in fact also examined the pricing data on a firm-specific basis. In particular, the new majority indicated that, in any final phase investigation, they would more closely examine certain relevant data. They also stated their intent to examine the price effects associated with a recent surge of imports. *See* Remand Determination at 21 & n.135; Remand Determination (Confidential Version) at 27–29 & n.135; *see generally* Commission Comments at 9. Contrary to DuPont's suggestion, the fact that the new Commission majority chose not to give dispositive weight to certain data does not in any way establish that its analysis was "arbitrary or capricious."

DuPont further asserts that the new Commission majority should have examined the pricing data by market segment by period. *See* Def.-Ints.' Comments at 16, 17–19. DuPont's argument fails to recognize that the new majority's analysis of quarterly pricing data was consistent with the Commission's normal methodology, and thus presumptively reasonable and entitled to deference. *See Hynix*, 30 CIT at 1215–16, 431 F. Supp. 2d at 1311; *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357–58, 1361–62 (Fed. Cir. 1996) (explaining

that the Commission's analytical and methodological choices need only be reasonable ones); *see generally* Commission Comments at 9 10.

In addition, DuPont faults the new Commission majority for failing to find "attenuated competition" between the subject imports and the domestic like product based on a market segment analysis and an examination of "top ten customers" and because DuPont disagrees with how the new majority weighed evidence of lost sales and revenues. *See* Def.-Ints.' Comments at 17–19. But it appears that the new Commission majority simply was not comfortable making an assessment that competition was "attenuated" based on the record at this relatively early stage of the investigation. Indeed, the members of the new Commission majority expressed their intent to collect data in any final phase investigation about the extent of competition between subject imports and the domestic like product, as well as the extent to which various types of PVA are interchangeable. *See* Remand Determination at 23 n.147; Remand Determination (Confidential Version) at 32 n.147. Similarly, the new Commission majority noted that "Staff received no responses to many of the [lost sales and revenue] allegations" and would continue efforts to verify them in any final phase investigation. *See* Remand Determination at 22 n.142; Remand Determination (Confidential Version) at 30 n.142. The new majority also noted plans to explore the role of non-price factors, including – in addition to the fungibility of various types of PVA – "why purchasers may have shifted to subject imports from the domestic like product and whether purchasers seek multiple supply sources." *See* Remand Determination at 23 n.147; Remand Determination (Confidential Version) at 32 n.147; *see generally* Commission Comments at 10.

It is the statutory role of the Commission to determine whether the evidence is inadequate to show a reasonable indication of material injury or threat of injury to the domestic industry by reason of subject imports, and whether the evidence that the domestic industry is not harmed by imports is clear and convincing. 19 U.S.C. § 1673b(a)(1); *American Lamb*, 785 F.2d at 1004. DuPont's criticisms of the new Commission majority's finding of significant underselling are no more than an improper request that the Court reweigh the evidence and make its own *American Lamb* assessment. The new majority's finding of significant underselling is both rational and supported by ample evidence in the record.

b. *Price Depression*

In determining the price effects of subject imports, the Commission is charged under the statute with ascertaining whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). In its original preliminary determination, the Commission found no price depression

attributable to subject imports from Taiwan. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 19.

(1) *The Bases for the Remand in Celanese I*

In its original preliminary determination, the Commission stated that – while PVA prices did decline in the U.S. market – those declines occurred largely in the early portion of the period of investigation, when subject imports from Taiwan were declining. The Commission further stated that "[g]enerally prices began to increase or stabilized during the latter part of the period of investigation, notwithstanding an increase in the volume of subject imports between 2002 and 2003." *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 19.

Celanese took strong exception to the Commission's characterization of the data. Indeed, as *Celanese I* noted, the "evidence seems to indicate that [the prices] were flat or even decreasing" during the end of the period of investigation. *See Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 19. Citing specific prices by product, the Court remanded the determination to the Commission with instructions to explain any apparent contradictions and inconsistencies between the evidence and its finding that prices were not declining at the end of the period of investigation. *See Celanese I*, 31 CIT at ___n.19, 2007 WL 735024 at * 19 n.19.

(2) *The Remand Determination*

On remand, the new Commission majority agreed with the Court's observations in *Celanese I*, and found significant price depression during the period of investigation. *See generally* Remand Determination at 21; Remand Determination (Confidential Version) at 29. The new majority noted that prices for all U.S. products, except product 5, were lower at the end of the period than at the beginning, while prices for all Taiwan products, including product 5, were lower at the end of the period than at the beginning. The new majority acknowledged that from 2001 to mid–2003, "the downward pressure on U.S. prices was caused in part by dumped imports from China, Japan, and Korea" and that subject imports from Taiwan "often oversold the domestic like product." *See* Remand Determination at 22; Remand Determination (Confidential Version) at 30. At the same time, the new majority pointed to the continued increase in subject imports from Taiwan after orders were imposed on China, Japan, and Korea, and the fact that "U.S. prices did not recover." *See id.*; *see generally* Commission Comments at 11; Pl.'s Comments at 12–13.

In assessing the record evidence, the new Commission majority emphasized that there were "multiple examples that directly link[ed] the pricing of subject imports to the observed downward price pressure in the U.S. market," including confirmed lost sales

and lost revenue allegations, as well as evidence that seven of 17 purchasers shifted purchases of PVA from U.S. sources to Taiwan (four for price reasons). The new majority also pointed to statements from 10 of 17 purchasers that indicated that their U.S. source had reduced its prices to compete with subject imports from Taiwan. *See* Remand Determination at 22; Remand Determination (Confidential Version) at 30; *see generally* Commission Comments at 11–12; Pl.'s Comments at 12–13.

The new Commission majority found the record inconclusive as to the effect, if any, of Celanese's allegedly flawed pricing strategy, and indicated that, in the future, they would seek additional data concerning domestic producers' business practices. They found that domestic producers lowered prices to retain market share, in response to pricing pressure from subject imports; and they concluded that subject imports depressed U.S. prices, particularly after the nonsubject imports left the U.S. market. *See* Remand Determination at 21–23; Remand Determination (Confidential Version) at 29–32; *see generally* Commission Comments at 12; Pl.'s Comments at 12–13.

DuPont mistakenly claims that the new Commission majority did not examine trends in the pricing data by pricing product, requests (in effect) that the Court re-weigh the evidence, asserts that the new Commission majority should have applied DuPont's preferred market-segment methodology, and insists that the new Commission majority should have found "attenuated competition" between domestic and subject products. *See* Def.-Ints.' Comments at 20–24. DuPont's challenges to the new Commission majority's price depression analysis thus echo many of the same arguments it advanced in its challenge to the Commission's finding on underselling, and fail for the same reasons. *See generally* Commission Comments at 12.

DuPont further insists that the new Commission majority "paid no regard to the fact that most of the declines in PVA prices in the U.S. occurred during the first two years of the POI." *See* Def.-Ints.' Comments at 21. However, the new majority clearly rejects that view, noting that the volume of subject imports continued to increase after imports from China, Korea, and Japan became subject to order, and that "U.S. prices did not recover" as a result of subject imports. *See* Remand Determination at 22; Remand Determination (Confidential Version) at 30. In addition, DuPont alleges that the new Commission majority failed to analyze demand factors in making its determination. *See* Def.-Ints.' Comments at 23. On the contrary, the new majority expressed their view that additional information was needed to evaluate "factors other than imports that may have affected U.S. producers' ability to raise prices and recover costs." *See* Remand Determination at 14, 22, 23 n.147; Remand Determination (Confidential Version) at 17–18, 30, 32 n.147. And the Commission has the prerogative under *American Lamb* to conclude that it is necessary to

conduct a final investigation to fully analyze these issues. *See generally* Commission Comments at 12–13.

c. *Price Supression*

In determining the price effects of subject imports, the statute further requires that the Commission analyze whether "the effect of imports of such merchandise . . . prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). In its original preliminary determination, the Commission found there was no price suppression by subject imports from Taiwan. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 19.

(1) *The Bases for the Remand in Celanese I*

In its original preliminary determination, the Commission stated that there was evidence that the domestic industry suffered a cost-price squeeze.[6] The Commission also found that cost of goods sold ("COGS") as a ratio to sales declined in the early portion of the POI, but increased between 2002 and 2003 as the increases in prices in the U.S. market were unable to fully keep pace with increasing costs. However, the Commission stated that there was no reasonable indication that subject imports from Taiwan were responsible for the cost-price squeeze. Instead, the Commission pointed to evidence that there was more overselling at the end of the period of investigation, when subject import volume was rising, and that cost factors other than subject imports were responsible for important adverse effects on prices during the period of review. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 20.

Celanese objected to the Commission's finding that certain individual cost factors were responsible for the cost-price squeeze and not the subject imports, on the ground that there was no rational explanation by the Commission for the connection between company cost factors and the Commission's finding of a lack of price suppression. The Court remanded the price suppression analysis to the agency, "to allow the Commission to further explain the connection between cost structure factors and its finding of no price suppression . . . [and to] reconsider its findings on price suppression . . . , in light of any new conclusions it may reach on volume." *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 20.

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[6] A cost-price squeeze occurs when the cost of goods sold ("COGS") exceeds price and the producer is unable to raise the price - that is, when the producer is unable to sell the good for more than it costs to produce it. *See generally Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1354 (Fed. Cir. 2006).

(2) *The Remand Determination*

One would ordinarily expect that prices would have risen as costs rose, with demand steady or rising, and as imports from China, Korea, and Japan became subject to the discipline of orders. However, based on their analysis of the available evidence, the new Commission majority found on remand that there was significant price suppression – that is, that PVA imports from Taiwan prevented price increases that otherwise would have occurred to a significant degree. *See generally* Remand Determination at 23; Remand Determination (Confidential Version) at 31–32. Specifically, the new majority concluded that "U.S. producers could not raise their prices sufficiently to recover increasing costs despite steady or rising demand." *See* Remand Determination at 23; Remand Determination (Confidential Version) at 32. The record amply supports that conclusion. *See generally* Commission Comments at 13; Pl.'s Comments at 13.

For example, the record evidence documents that the price of gas – a significant cost for the production of PVA in the U.S. – rose from a low of $3.58 per Mcf in the last quarter of 2003, to $6.30 per Mcf in the first half of 2004. *See* Remand Determination at 23 n.144; Remand Determination (Confidential Version) at 31 n.144. Other relevant supporting data include statistics on the rising unit costs of production throughout the period of review, and corresponding data on unit sales value, as well as the ratio of unit cost of goods sold to unit sales value. *See* Remand Determination at 23 n.146; Remand Determination (Confidential Version) at 32 n.146. Based on these and other record data, the new Commission majority's preliminary determination that there was significant price suppression must be upheld as rational. *See generally* Pl.'s Comments at 13–14.

DuPont recycles once again its erroneous claim that the new Commission majority "reversed" course, and insists that the new majority turned a blind eye to evidence of other factors that might explain away any price suppression. *See* Def.-Ints.' Comments at 24–25. Quite to the contrary, the new Commission majority expressly acknowledged the factors that DuPont asserts were ignored; and, indeed, the new majority indicated their desire to seek additional data on "factors other than imports that may have affected U.S. producers' ability to raise prices and recover costs." *See* Remand Determination at 23 n.147, 25; Remand Determination (Confidential Version) at 32 n.147, 34–35 (reflecting future plans of new Commission majority to "explore more fully . . . other factors such as sharply rising energy costs" and other obvious factors that may account for differences, "such as production methods and pricing strategies"). DuPont simply disagrees that more complete consideration of such issues can properly be deferred to a final phase investigation. *See generally* Commission Comments at 14.

3. *The Impact of Subject Imports*

In analyzing the impact of subject imports, the statute directs the Commission to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States." 19 U.S.C. § 1677(7)(C)(iii). Such factors include output, sales, market share, profits, productivity, return on investments, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital, and investment. 19 U.S.C. § 1677(7)(C)(iii). Further, the Commission is to consider all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

In its original preliminary determination, the Commission found no reasonable indication that subject imports had an adverse impact on the domestic industry. The Commission noted that the domestic industry's operating margin had declined between 2002 and 2003, and then stabilized from interim 2003 to interim 2004; and the Commission acknowledged that "subject imports from Taiwan may have contributed to [the decline]." However, the Commission declined to find that subject imports contributed materially to the decline in the domestic industry's operating margins or other performance factors. Instead, the Commission attributed the poor performance of the domestic PVA industry to cost structure differences and various other factors. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 20–22.

a. *The Bases for the Remand in Celanese I*

Celanese charged that the Commission's use of a cost structure comparison as part of the impact analysis was arbitrary, given that the Commission had not used such a methodology in the 2003 investigation. Although the Court rejected that argument, it agreed with Celanese that it was arbitrary for the Commission, without explanation, to point to other factors to support its finding on the absence of an adverse impact. *Celanese I* thus sustained the Commission's impact analysis to the extent that it was based on cost structure differences. But the Commission was instructed on remand to elaborate on the alleged negative profitability trend which was cited as a basis for the Commission's conclusions. *See generally Celanese I*, 31 CIT at ___ , 2007 WL 735024 at * 22–23.

b. *The Remand Determination*

In contrast to the Commission's original determination, the new Commission majority concluded on remand that, in fact, subject imports did have a "significant adverse impact" on the U.S. industry.

See Remand Determination at 24; Remand Determination (Confidential Version) at 33. The Commission's finding on remand thus obviated the need for the agency to respond to the instructions in *Celanese I*, which were directed toward the agency's original negative preliminary determination.

Specifically, the new majority found that the increasing volume of subject imports, at prices which undersold the domestic like product, depressed and suppressed domestic prices, and negatively impacted the financial performance of the weakened domestic industry. The majority found that subject imports from Taiwan "continued and even exacerbated the injury caused by the previous unfairly traded imports and prevented the [domestic] industry from raising its prices sufficiently to cover rising costs and expenses and [to] improve its performance." The majority further took note of the domestic industry's performance in 2001 and 2002 (when imports from China, Japan, and Korea were still in the U.S. market), as compared to the trend in 2003 and the first half of 2004, as imports from Taiwan increased in the market as other imports receded. *See generally* Remand Determination at 24–25; Remand Determination (Confidential Version) at 33–34; Commission Comments at 14; Pl.'s Comments at 14–15.

DuPont contends that the new Commission majority failed to account for certain differences between domestic producers, the fact that some of the industry's performance indicators improved at the end of the period of review, and the domestic industry's exporting activities. *See* Def.-Ints.' Comments at 25–27. But each of DuPont's arguments is belied by the factors cited by the new Commission majority in the Remand Determination, such as their review of differences between several of the domestic producers and the extent to which the domestic industry's performance factors fluctuated. *See* Remand Determination at 24–25; Remand Determination (Confidential Version) at 33–35; Commission Comments at 14–15.

The record facts catalogued by the new Commission majority include information such as operating profit/loss data for commercial shipments in 2001, 2002, and interim 2003 and 2004; the operating ratios for the same periods; and statistics documenting the diminishing employment of production workers for shipments in the commercial markets during the relevant periods. *See* Remand Determination at 24–25; Remand Determination (Confidential Version) at 33–35; Pl.'s Comments at 15. Facts such as these establish the requisite nexus between the record evidence and the conclusions drawn by the new Commission majority in the Remand Determination.

IV. *Conclusion*

For the reasons set forth above, the International Trade Commission's affirmative preliminary injury determination, reached on remand, must be sustained. *See* Polyvinyl Alcohol from Taiwan, Inv. No. 731–TA–1088 (Preliminary) (Remand), USITC Pub. 3920 (4/07). Judgment shall enter accordingly.

Slip Op. 09–3

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

OUTER CIRCLE PRODUCTS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No.: 05–00678

Held: Plaintiff's motion for summary judgment is denied. Summary judgment is granted in favor of the Defendant.

Dated: January 9, 2009

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Curtis W. Knauss*, *Robert B. Silverman*, *Robert F. Seely*, *Edward B. Ackerman*, and *Steven P. Florsheim*) for Outer Circle Products, Plaintiff.

Gregory G. Katsas, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office (*Aimee Lee* and *Marcella Powell*); *Alexander Vanderweide*, Civil Division, Commercial Litigation Branch, United States Department of Justice; Of counsel: *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, for the United States, Defendant.

OPINION

TSOUCALAS, Senior Judge: This matter is before the Court on cross-motions for summary judgment pursuant to USCIT R. 56. Plaintiff Outer Circle Products ("Plaintiff" or "Outer Circle") challenges the classification of its merchandise by the United States Bureau of Customs and Border Protection ("Customs") under the 1997 Harmonized Tariff Schedule of the United States ("HTSUS").[1] Plaintiff maintains that the merchandise is properly classified under subheading 3924.10.50, HTSUS, as "Tableware, Kitchenware . . . of plastics: Other." Customs cross-moves for summary judgment stat-

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See Homeland Security Act of 2002*, Pub. L. No. 107–296, § 403, 116 Stat. 2178 (2002); *Reorganization Plan for the Department of Homeland Security*, H.R. Doc. No. 108–32 (2003).

ing that the Court should sustain its classification under HTSUS subheading 4202.92.90 as "bottle cases . . . [w]ith outer surface of sheeting of plastic or of textile materials: Other."

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994), which provides the Court "shall have 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." Section 515 of the Tariff Act, 19 U.S.C. § 1515 (1994), details the process by which Customs modifies and performs administrative review of its decisions and "provides for the allowance or denial of protests filed pursuant to section 514 of the Tariff Act of 1930." *Lowa, Ltd. v. United States*, 5 CIT 81, 84, 561 F. Supp. 441, 444 (1983) (citations omitted).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is material if it might affect the outcome of the suit under the governing law. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

This dispute is ripe for summary judgment and the relevant facts are outlined below. At issue is the proper classification of the subject merchandise, which was imported through the Port of Chicago, Illinois in June 1997. Plaintiff purports the merchandise to be bottle and jug wraps "designed, manufactured and marketed for the primary purpose to contain beverages and keep them cool." Mem. Supp. Pl.'s Mot. for Summ. J. ("Pl.'s Brief") at 3. Each of the items was imported in finished condition without the bottles or jugs attached. *See* Pl.'s Statement of Material Facts Not in Issue ¶ 7. The containers were designed to accommodate either a one liter, half gallon, or two gallon plastic bottle or jug, and were fitted to the size and shape of the bottle or jug they were designed to carry. *See* Pl.'s Brief at 2. Zippers placed on either the side or top allowed for greater plasticity of

container to bottle or jug. *See* id. at 3. The subject merchandise was constructed of a foam portion measuring approximately three millimeters in thickness covered on both sides by a plastic sheeting, or in the alternate, covered on the inside by a plastic coated textile fabric and the outside by plastic sheeting. *See* Complaint ¶ 5; Def.'s Statement of Undisputed Material Facts ¶ 5. Sewn on to each container was a fabric strap designed to promote the product's portability. *See* Pl.'s Brief at 3. After importation but prior to resale, the appropriate plastic bottle or jug was inserted into each container. *See id.* at 3. The finished product was then marketed as possessing insulative properties, and sold to large retail franchises under the trademark label "Arctic Zone." *Id.* at 3,5.

Upon liquidation of the entries, the merchandise was classified by Customs under subheading 4202.92.90, HTSUS, and assessed the schedule duty rate of 19.3% *ad valorem*. The relevant portions of Heading 4202 are as follows:

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:	
	Other:	
4202.92	With outer surface of sheeting of plastic or of textile materials:	
4202.92.90	Other	19.3%

Outer Circle protested Customs' classification of the subject merchandise, asserting that Customs should have classified the imports under subheading 3924.10.50, HTSUS with a dutiable rate of 3.4% *ad valorem*. The pertinent parts of Heading 3924 are as follows:

3924	Tableware, kitchenware, other household articles and toilet articles, of plastics:	
3924.10	Tableware and kitchenware:	
3924.10.50	Other	3.4%

Customs denied Plaintiff's protest and a timely summons was filed with this Court. All liquidated duties, charges and exactions for the subject entries were paid prior to the commencement of this action. Outer Circle seeks reliquidation of the subject imports and a full refund of duties paid together with interest, as provided by law. *See id.* at 11.

Defendant argues that the entries were properly classified under subheading 4202.92.90, HTSUS "because the merchandise is identified *eo nomine* under heading 4202, HTSUS." Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Brief") at 4. Customs further argues that the imported merchandise does not fall within the scope of Chapter 39, HTSUS as a container for food or beverages because "Outer Circle's bottle and jug cases clearly do not store food or beverages." *Id.* at 13.

II. Arguments of the Parties

A. Plaintiff's Arguments

Outer Circle maintains that Custom's wrongly liquidated the subject merchandise under subheading 4202.92.90 as other items similar to those described by name in Heading 4202, HTSUS rather than its appropriate classification as other household articles of plastics under Heading 3924, HTSUS. *See* Pl.'s Brief at 6. Plaintiff premises its argument on two prior decisions of this Court and the United States Court of Appeals for the Federal Circuit ("CAFC"). Outer Circle contends that because the subject imports are substantially similar to the products examined in *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997) and *Dolly, Inc. v. United States*, 27 CIT 1597, 293 F. Supp. 2d 1340 (2003), this Court is bound by these previous legal determinations. *See id.* at 2–4. In both cases, the Courts reviewed the scope of HTSUS Headings 4202 and 3924, and concluded that the correct classification for the merchandise at issue was HTSUS Heading 3924. Outer Circle maintains that because its merchandise was "designed to contain and transport beverages like the products in *SGI*, they should also be classified under Heading 3924, HTSUS." *Id.* at 3. Plaintiff also points to the rule of *ejusdem generis* which was employed by both the *SGI* and *Dolly* Courts to determine the scope of the two competing provisions.[2] Outer Circle argues that when applying the rule of *ejusdem generis* to "the products in this case, it is clear that the wraps also have the essential characteristics of the exemplars for Heading 3924, HTSUS – they preserve and store beverages." *Id.* at 4.

Plaintiff cites to the HTSUS General Rules of Interpretation ("GRI")[3] and the Harmonized Commodity Description and Coding

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[2] Under the rule of *ejusdem generis*, which means "of the same kind," where the enumeration of specific things is followed by a general word or phrase, the general word or phrase will be interpreted to include things of the same kind as those specified. *See Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994).

[3] Classification of goods under the HTSUS is governed by the General Rules of Interpretation and the Additional Rules of Interpretation ("ARI"). *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

System Explanatory Notes ("Explanatory Notes"),[4] as additional support for its position. More specifically, GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. *See id.* at 4–5. Outer Circle contends that the subject imports are correctly classified under HTSUS Heading 3924 because they are used for the storage and preservation of beverages as contemplated by such heading. *See id.* at 5. According to Plaintiff, the Explanatory Notes for Heading 3924 specifically provide for "food storage containers" which is "exactly the use for which the bottle and jug wraps were designed and manufactured."[5] *Id.* at 7. Moreover, Plaintiff suggests that the inclusion of the term "luncheon boxes" in the Explanatory Notes of Heading 3924 "reflects the likelihood that such boxes would be capable of keeping the contents warm or cool." *Id.* (citing *SGI*, 122 F.3d at 1473). Outer Circle posits that because the subject entries also maintain a desired temperature for beverages, they fall within the scope of Heading 3924. *See id.*

Next, Plaintiff argues that the subject imports are improperly classified under HTSUS Heading 4202 because they do not share any "common physical characteristics or a unifying purpose" with the articles identified *eo nomine* therein. *Id.* at 8. Namely, the exemplars listed under Heading 4202 do not contemplate the storage or preservation of food or beverages. *See id.* Plaintiff relies on the CAFC's holding in *SGI* which determined that the scope of Heading 4202 did not "include containers that organize, store, protect, or carry food or beverages." 122 F.3d at 1472. Outer Circle further notes that the term "insulated food or beverage bags" was not added to HTSUS Heading 4202 until several years after the subject merchandise was entered.[6] This, according to Plaintiff, is recognition of the fact that, prior to the change, such items were excluded from the scope of Heading 4202. *See* Pl.'s Brief at 9. Therefore, classification of the subject imports under Heading 4202 is inconsistent with the essential characteristics of the exemplars listed therein which is to organize, store, protect and carry various items. *See id.* at 8.

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[4] The Explanatory Notes constitute the official interpretation of the Harmonized Commodity Description and Coding System. While neither legally binding nor dispositive, they provide a commentary on the scope of each heading of the HTSUS and are generally indicative of its proper interpretation. *See Van Dale Indus. v. United States*, 18 CIT 247, 251 n.2 (1994).

[5] The Court notes that the term "food storage containers" was not included in the Harmonized Commodity Description and Coding System Explanatory Notes until January 2000, almost three years after the subject imports were entered.

[6] HTSUS Heading 4202 was expanded to include "insulated food or beverage bags" in December 2001. *See* Proclamation No. 7515, 66 Fed. Reg. 66549, 66,619 (Dec. 18, 2001).

B. Defendant's Arguments

In response, Customs argues that the subject merchandise is properly classified under HTSUS Heading 4202 because "bottle cases" are specifically enumerated therein, and that goods classified as such *eo nomine* fall within the scope of such heading.[7] *See* Def.'s Brief at 9. Defendant also relies on GRI 1 and its general mandate that classification be determined according to the terms of the headings, section and chapter notes. *See id.* at 7. Because Note 2(ij) of Chapter 39 precludes "containers of heading 4202" from its coverage, Defendant claims that the subject imports are "specifically excluded from classification under heading 3924, HTSUS." *Id.* at 8. As evidence of the scope and meaning of the term "bottle cases," Defendant points to the language of the statute itself, and contends that the specific identification of the items enumerated in Heading 4202 is a clear indication that its coverage extends to "containers or cases which are designed to hold specific items which give them their names." *Id.* (quoting *DRI Indus., Inc. v. United States*, 11 CIT 97, 102, 657 F. Supp. 528, 533 (1987)). While acknowledging that none of the provisions of the HTSUS define the term "bottle cases," Defendant relies on established case law for the proposition that where a tariff term is not statutorily defined, such terms are construed in accordance with their common and popular meaning. *See id.* at 9–10. Therefore, Defendant looks to the term's dictionary meaning as "a covering or receptacle for holding bottles." *Id.* at 10.

Customs disputes Plaintiff's categorization of the subject imports as insulated food or storage containers, and asserts that "Outer Circle's entire argument hinges on the incorrect premise that its bottle and jug wraps preserve and store food or beverages." *Id.* at 13. Inasmuch as merchandise is classified according to its condition when imported, the subject containers were entered without the plastic bottles or jugs. Defendant claims that because the containers are incapable of storing food or beverages in the absence of the related bottles or jugs, Plaintiff's classification scheme is ill-conceived. *See id.* at 22. The imports are merely conduits for the encasement and transport of the associated bottles or jugs, which further contain the actual food or beverages. *See id.* at 13.

In addition, Customs performed its own tests of the insulative properties of the subject merchandise, and presents findings that call into question the efficacy of the goods' insulative capabilities. *See id.* According to Defendant, the results of these laboratory tests demonstrate that "Outer Circle's imported articles have no material

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[7] Absent contrary legislative intent, an *eo nomine* classification provision is one which describes a commodity by a specific name, usually one that is well known in the trade or to commerce. *See Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995); *Clarendon Marketing Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998).

insulative properties, and therefore cannot properly preserve or store food or beverages."[8] *See id.* at 16. Since they cannot be considered insulated food or beverage bags, any attempt at classification of the subject merchandise under HTSUS Heading 3924 is misplaced. *See id.* at 23.

In response to Outer Circle's argument that the term "insulated food or beverage bags" was not added to HTSUS Heading 4202 until years after its merchandise was imported, Defendant points out that while this may be true, the term "bottle cases" has always been an *eo nomine* provision in Heading 4202. *See id.* at 15. This fact notwithstanding, Customs maintains that the legislative history of Heading 4202 demonstrates that "insulated food or beverage bags" were always meant to fall within the heading's coverage. *See id.* In adopting the amendments to the text of Heading 4202, which included the addition of the term "insulated food or beverage bags," the Harmonized System Committee of the World Customs Organization stated that the "new texts involved no change in scope." *Id.*

Customs refutes Outer Circle's contention that judicial precedent is controlling with regard to this classification. Defendant maintains that the circumstances in the cases on which Plaintiff relies are distinguishable from those present here. *See id.* at 17. In particular, the CAFC's holding in *SGI* is predicated on the application of the subject merchandise as one for the storage of food or beverages. Moreover, the physical characteristics of Plaintiff's bottle and jug containers differ markedly from the merchandise at issue in *SGI*. *See id.* For example, whereas the imports in *SGI* were capable of storing both food and beverages, Plaintiff's merchandise is designed to store a single bottle or jug. *See id.* Defendant concludes, that because the Plaintiff has "failed to produce any competent evidence that its merchandise involves food or beverage storage," the holding of *SGI* is not controlling for purposes of this proceeding. *Id.* at 18.

Defendant further contests, as inapplicable to the underlying action, the CAFC's holding in *Dolly*. Customs alleges that, as was the

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[8] Customs tested the one liter and half liter cases by measuring the temperature of liquids within bottles placed into the cases against liquids within bottles placed into a brown paper bag and liquids within bottles not placed into any container, i.e. exposed to open air. At the end of a four hour period the difference in the temperature of a liquid insulated by the half liter container and that of a liquid insulated by the brown paper bag was 0.4° F. Likewise, the difference in the temperature of the liquid insulated by the one liter case and that of the brown paper bag over the same four hour period was 1.1° F. The differences recorded for the open air containers were similarly minimal. *See* Def.'s Brief, Exhibit A.

Plaintiff tested the subject merchandise on two separate occasions. The first test, performed in January 2008, compared the temperature of a liquid contained within a bottle left exposed to open air against a liquid within a bottle placed into one of the subject containers. The second test, conducted in August 2008, measured the temperature of a bottled beverage in three states: 1) wrapped in a subject wrap; 2) unwrapped; and 3) wrapped in a paper bag. Plaintiff argues that these tests demonstrate as incorrect, the conclusions drawn by Customs in its laboratory tests. *See* Pl.'s Brief, Exhibit 8; Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Resp."), Exhibit 1.

case in *SGI*, the physical composition of subject merchandise differs considerably from Outer Circle's bottle and jug containers.[9] *See id.* at 19. The merchandise at issue in *Dolly* was found to have a specific primary purpose of "transporting and storing infant and toddler food and beverages at a desired temperature over a period of time." *Id.* (quoting *Dolly*, 27 CIT at 1605, 293 F. Supp. 2d at 1346). Defendant claims that because the subject imports at issue here are "bottle cases," they are not adequately comparable to the articles examined in *Dolly*. *See id.* Furthermore, the Court in *Dolly* relied on the rule of *ejusdem generis* to determine the appropriate tariff classification, which was contingent upon an examination of dissimilar merchandise, namely food and beverage containers. *See id.* at 19–20. Therefore, the conclusions the Court reached in *Dolly* are not relevant to the proper classification of the items in the present action. *See id.* at 21.

Finally, Customs argues that the subject imports are not specifically described by the exemplars listed under HTSUS subheading 3924.10, nor are they similar in any material way. *See id.* at 22. More to the point, each of the exemplars in subheading 3924.10 are themselves used for the containment of food or beverages whereas Outer Circle's products merely secure bottles and jugs. *See id.* at 22–23.

III. Analysis

A. Motion for Summary Judgment

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Bausch & Lomb, Inc., v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. *See id.* Second, determine under which of the properly construed tariff terms the subject merchandise falls. *See id.* Interpreting the proper meaning of terms is a question of law, while determining whether the item fits within such meaning is a question of fact. *See Avenues In Leather, Inc. v. United States*, 423 F.3d 1326, 1330 (Fed. Cir. 2005) ("Avenues III"). While the second step, viewed as focusing on the particular merchandise and where it fits into the statutory scheme, is deemed a question of fact, a conceptual dilemma arises in its application. If the second step in the analysis is adjudged a question of fact, no party would ever stipulate to their adversary's classification as being factually correct, "since 'to do so would be to stipulate oneself out of court.' " *Bausch & Lomb*,

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[9] Customs observes that the insulative foam layer in the merchandise in both *SGI* and *Dolly* were significantly more dense than Plaintiff's imports. It is Defendant's contention that the degree to which these items differ make the articles in *SGI* and *Dolly* inappropriate for comparison to Outer Circle's bottle and jug containers. *See* Def.'s Brief at 19.

Inc., 148 F.3d at 1365 (quoting *Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 167, 957 F. Supp. 281, 282 (1997)). This quandary becomes especially acute in decisions on summary judgment. Because the inquiry on such motions is whether a "genuine issue as to any material fact" exists, USCIT R. 56(c), a court would be precluded from rendering summary judgment in such instances. Presently, the parties offer differing characterizations of the subject merchandise. Yet, they both agree that there are no material facts in dispute, and that the matter is ripe for summary judgment. Therefore, the question before the Court is whether the facts on which the parties disagree rise to the level of material facts so essential to a claim or defense embodied in the summary judgment motion. The Court finds that they do not.

In the event there is a real dispute as to the facts, it initially must be determined whether the facts at issue are material. A dispute as to an immaterial fact does not preclude summary judgment. *See Houston North Hosp. Properties v. Telco Leasing, Inc.*, 688 F.2d 408, 410 (5th Cir. 1982). While there is no established standard which governs the question of what constitutes a material fact, the courts have held that a fact is material "if it tends to resolve any of the issues that have been properly raised by the parties." *Allied Int'l v. United States*, 16 CIT 545, 548, 795 F. Supp. 449, 451 (1992) (quoting 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2725 at 93–95 (2d ed. 1983)). Summary judgment thus may be appropriate in a Customs classification case "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365. Whereas Outer Circle categorizes its imports as "insulated food or beverage containers," *see* Pl.'s Brief *passim*, Customs applies the designation "bottle cases" to those same items. *See* Def.'s Brief *passim*. The disagreement over the subject imports' proper nomenclature, however, is more a byproduct of the parties' preferred classification schemes. Both parties agree on the basic physical composition of the imported merchandise. *See* Pl.'s Statement of Material Facts Not in Issue ¶¶ 4–6; Pl.'s Resp. to Deft.'s Statement of Undisputed Material Facts ¶ 1; Def.'s Statement of Undisputed Material Facts ¶ 5; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Issue ¶¶ 4–6. What remains in dispute is the significance of the items' purported insulative capabilities. This, however, is not relevant to the Court's inquiry. In determining under what tariff provision the subject imports should properly fall, the Court's focus must be on "whether food or beverage is involved." *SGI*, 122 F.3d at 1472. While the insulative properties of the subject merchandise may be indicative of an ability to store beverages at a desired temperature, it is not legally dispositive of the products' ability to store or transport beverages in general. Thus, the insulative nature of the imports is not a fact that tends to resolve any of the issues properly raised by

the parties, i.e., whether food or beverages are being stored or transported. Therefore, the Court agrees with the parties, that there are no disputed material issues of fact to be resolved by trial in the instant matter and disposition by summary judgment is appropriate. *See* Pl.'s Brief at 7; Def.'s Brief at 4–5.

B. Presumption of Correctness

Relying on section 2639(a)(1) of title 28 of the United States Code, Customs argues that the agency's classification decision is presumed to be correct with the burden of overcoming this presumption resting with Plaintiff.[10] *See* Def.'s Brief at 5. Customs cites to a Court of Customs and Patent Appeals decision, *United States v. New York Merchandise Co., Inc.*, 58 CCPA 53, 435 F.2d 1315 (1970), for the proposition that this presumption extends to its decision as a whole, including purely legal portions of the determination. *See id.* at 6. The Court finds this argument unavailing. Although the presumption of correctness carries force on any factual components of a classification decision, the situation is quite different with respect to pure questions of law. *See Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). Questions of law, such as the proper interpretation of a particular tariff provision, "lie within the domain of the courts." *Id.* Moreover, Customs' understanding of section 2639(a)(1) is inconsistent with established judicial precedent. The statutory presumption of correctness is irrelevant where there is no factual dispute between the parties. *See Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997). Here, the parties filed cross-motions for summary judgment and agree that there are no disputed issues of material fact. As noted above, none of the pertinent characteristics of the merchandise are in dispute, and thus the sole issue is a matter of properly construing the relevant tariff provisions to determine whether the scope of those provisions are broad enough to encompass the subject imports. Therefore, the presumption of correctness does not apply.

C. *Stare Decisis*

Outer Circle urges this Court to find in its favor, in part, on the doctrine of *stare decisis*. Plaintiff points out that the same two provisions of the HTSUS at issue here were examined by the Federal Circuit in *SGI*. *See* Pl.'s Brief at 2. Specifically, the scope of Heading

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[10] The relevant portions of the statute read as follows:
Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision. 28 U.S.C. 2639(a)(1).

4202 was determined not to include the soft-sided cooler bags at issue in *SGI*, and that the proper classification for these products was under Heading 3924. The Court further held that the common characteristics or unifying purpose of the exemplars listed in Heading 3924, was their capacity to store food and beverages. *See SGI*, 122 F.3d at 1472. Thus, according to Plaintiff, if the Court agrees with the facts alleged by Outer Circle, i.e., that the subject wraps were designed to carry beverages, then it is bound by the holding in *SGI*. *See* Pl.'s Brief at 2 n. 1.

Stare decisis essentially "makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decision." *Avenues III*, 423 F.3d at 1331 (quoting *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993)). Plaintiff is correct in its assessment of the effects of this previous CAFC holding, as this determination relates to the scope of HTSUS Headings 3924 and 4202 – questions of law. Because the doctrine of *stare decisis* applies only to legal issues and not issues of fact, this Court is burdened by the previous holding in *SGI* only to the extent that such issues apply. The determination of whether the merchandise at issue comes within the description of either HTSUS Heading 3924 or 4202, however, is a question of fact. Therefore, the classification of soft-sided cooler bags in *SGI* is not *stare decisis* to the classification of the subject imports in this case.

D. HTSUS Classification

The parties' remaining arguments are directed to the issue of whether the properly interpreted scope of HTSUS Heading 4202 or 3924 encompasses Outer Circle's imported bottle containers.

As previously noted, the determination as to the proper classification of imported merchandise, is directed by the GRI and ARI of the HTSUS. *See Orlando Food Corp.*, 140 F.3d at 1439. The HTSUS is organized by headings, each of which has one or more subheadings. Whereas the headings set forth general categories of merchandise, the subheadings provide a more particularized taxonomy of the goods within each category. Under GRI 1, the HTSUS headings, as well as relative section or chapter notes, govern the classification of a product. *See* GRI 1. Only after a court determines that a product is classifiable under the heading should it look to the subheadings to find the correct classification for the merchandise. *See Orlando Food Corp.*, 140 F.3d at 1440. As Customs points out, Note 2(ij) to Chapter 39 provides that the chapter "does not cover . . . trunks, suitcases, handbags or other containers of heading 4202." Note 2(ij), Chapter 39, HTSUS (1997 ed.). Thus, the Court must first determine whether the containers are *prima facie* classifiable under Heading 4202. If the Court so concludes, the bags are precluded from classification under Heading 3924.

Heading 4202 is structured as a list of exemplars followed by the general term "similar containers." Customs argues that the subject imports are classifiable under Heading 4202 because they are encompassed by the listed exemplar "bottle cases." *See* Def.'s Brief at 9. The tariff term "bottle cases" is an *eo nomine* provision under Heading 4202, as it describes the merchandise by name. An *eo nomine* designation, without limitation or contrary legislative intent, is construed according to its common and commercial meanings, which are presumed to be the same. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). As the term "bottle cases" is not specifically defined in the HTSUS or in the relevant legislative history, it is necessary for the Court to determine, as a matter of law, the common and commercial meaning of the term to decide whether Outer Circle's merchandise can be classified as such. In so doing, the Court may rely upon its own understanding of the term, and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources. *See id.* (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337–1338 (Fed. Cir. 1999). A party who argues that a tariff term should not be given its common or dictionary meaning must prove that it has a different commercial meaning that is definite, uniform, and general throughout the trade. *See Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984).

It is well established that an *eo nomine* provision, such as 4202.92.90, HTSUS, includes all forms of the named article. *See National Advanced Systems v. United States*, 26 F.3d 1107, 1111 (Fed. Cir. 1994); *Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989); *Nootka Packing Co. v. United States*, 22 CCPA 464, 470 (1935); *Sabritas v. United States*, 22 CIT 59, 63, 998 F. Supp. 1123, 1127 (1998). By any measure, application of this principle to the term "bottle cases" would cast a wide net, and thus would appear to encompass Outer Circle's imports. However, the Court is not writing on a clean slate here. The CAFC has already determined that the scope of Heading 4202 does not include containers that organize, store, protect or carry food or beverages. *See SGI*, 122 F.3d at 1472. Therefore, the Court's focus is further limited to whether or not Outer Circle's products are designed to contain, organize store, protect or carry food or beverages.

While not specifically framed as such, Outer Circle presents an argument based upon the subject merchandise's "principal use." "Principal use" is defined as the use "which exceeds any other single use" of the article. *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (citation omitted). To the extent that a classification is controlled by use other than actual use, HTSUS ARI 1(a) provides that:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation of

> goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Plaintiff claims that "the primary purpose of the goods is to store and transport beverages." Pl.'s Resp. at 16. In support, Outer Circle submits an affidavit and deposition from its founder and former president of the company, Thomas Melk. *See* Pl.'s Brief, Exhibit 1 (Melk Affidavit), Exhibits 2, 3, 4, 6, 7 (Melk Deposition). Melk's affidavit and deposition testimony focus on the factors a court considers in determining the principal use of a subject import.[11] The Court finds it unnecessary to comment on the sufficiency of each individual factor except to note that each is predicated on the marriage of Outer Circle's containers to their respective bottles or jugs. For example, Melk states that the "primary purpose of the subject merchandise is to help retain the cool temperature of the water or other beverage contained within it (in the bottle or jug) for the period of hours expected." Pl.'s Brief, Exhibit 1 (Melk Affidavit ¶ 7). It is fundamental in Customs cases that merchandise subject to classification "must be evaluated for tariff purposes in its condition as imported." *Rollerblade, Inc.*, 112 F.3d at 487 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989). Thus, in order to produce uniformity in the imposition of duties, "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *KMW Johnson, Inc. v. United States*, 13 CIT 1079, 1082, 728 F. Supp 754, 755–56 (1989) (quoting *Worthington v. Robbins*, 139 U.S. 337, 341 (1891).

Presently, the subject containers are imported without the plastic bottles or jugs. Far from being mere *accoutrements*, the bottles and jugs are basic to the accomplishment of the articles' purported design and purpose, which is the maintenance and storage of beverages at a desired temperature. Thus, Plaintiff's argument that the subject imports are designed to contain and transport beverages is flawed. The bottle wraps, as imported, cannot make this claim. Their utility as insulated beverage containers arises only after the containers are mated to the requisite bottle or jug. Plaintiff claims that the wraps were designed to store and transport beverages and not the bottles which "merely act as vessels for the beverages." Pl.'s Resp. at 9. Outer Circle points to the articles examined in *SGI* and argues

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[11] These factors are outlined in *United States v. Carborundum Co.*, and include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channel of trade in which the merchandise moves; (4) the environment of the sale (i.e., the manner in which the merchandise is advertised and displayed); (5) the usage of the compared to the use if any, in the same manner as merchandise which defines the class, and adds to additional factors of consideration; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this usage. 536 F.2d 373, 377 (CCPA 1976).

that the same analysis applies in the instant matter. Because of the subject imports' similarity to the merchandise at issue in *SGI*, "they should also be classified under Heading 3924, HTSUS." Pl.'s Brief at 3. The Court disagrees.

First, neither the Court in *SGI* nor *Dolly* conducted an analysis of the tariff term "bottle cases." While holding that the scope of Heading 4202 does "not include containers that organize, store, protect, or carry food or beverages," *SGI*, 122 F.3d at 1472, this finding is interreliant with and contingent upon the principal use of the subject merchandise. The Court's determination, in *SGI*, was based on an examination of merchandise fully capable of storing food and/or beverages without further compilation. Outer Circle's products, on the other hand, require the additional assemblage of bottle or jug to achieve this end.

Second, in both *SGI* and *Dolly* the Court undertook an analysis based on the rule of *ejusdem generis*,[12] the fulcrum of which, once again, turned on the products' ability to store food or beverages. In both cases, the merchandise at issue was found to have retained the essential characteristics of being able to transport and store food and beverages in an insulated environment. The Court therefore concluded that the proper classification was under Heading 3924. Here, the Court has already determined that the subject merchandise, as imported, are incapable of storing food or beverages. Therefore, neither of these decisions is apposite for purposes of the case at bar. Regardless, an *ejusdem generis* analysis is ill-suited for the tariff term at issue here. The rule of *ejusdem generis* is a rule of statutory construction appropriate where the statutory language is unclear. It is "applicable whenever a doubt arises as to whether a given article not specifically named in the statute is to be placed in a class of which some of the individual subjects are named."[13] *DRI Indus., Inc.*, 11 CIT at 101, 657 F. Supp. at 532 (1987) (quoting *United States v. Damrak Trading Co., Inc.*, 43 CCPA 77, 79 (1956). It may not be resorted to when there is no doubt as to the meaning of a term. *See John V. Carr & Son, Inc. v. United States*, 77 Cust. Ct. 103, 108 (1976). The term "bottle cases" in this context is not a general word or phrase, and is specifically named. Thus, the statutory language is clear. As with all principles of statutory interpretation, "*ejusdem generis* is 'used only as an instrumentality for determining the legislative intent in cases where it is in doubt.' " *Airflow Technology, Inc.*

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[12] In classification cases, the rule of *ejusdem generis* requires that the subject merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term. *See Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995).

[13] Plaintiff's statement that its bottle and jug wraps are correctly classifiable under Heading 3924 "because that provision specifically describes them" is inconsistent with its reliance on the doctrine of *ejusdem generis*. Pl.'s Brief at 5.

v. United States, 31 CIT ___ , 483 F. Supp. 2d 1337, 1346 n.11 (2007) (citations omitted). Because Outer Circle has failed to establish any ambiguity in the statutory term "bottle cases," the principle of *ejusdem generis* is not implicated.

CONCLUSION

As the merchandise is *prima facie* classifiable under Heading 4202, HTSUS, Chapter 39, Note 2(ij) precludes classification of the imports under that chapter. Therefore, Plaintiff's proposed alternative classification under subheading 3924.10.50, HTSUS cannot stand. In addition, the Court finds that the tariff term "bottle cases" is broad enough to encompass the subject containers. Accordingly, the Court finds that Customs properly classified the subject merchandise under Heading 4202.92.90, HTSUS.

Based on the foregoing, Outer Circle's motion for summary judgment is denied and Customs' motion for summary judgment is granted. Judgment to be entered accordingly.