SLIP OP. 07–27

CLINIQUE LABORATORIES, INC., Plaintiff, v. THE UNITED STATES, Defendant.

Before: **CARMAN**, Judge
Court No. 94–00284 (consolidated)

JUDGMENT

The Court, on its own motion, having considered the age of the present litigation and that the parties first represented to it that they would file a stipulation a judgment for some or all of the entries involved in this litigation no later than May 24, 2006, which deadline was extended to August 30, 2006; the parties having been ordered to file such stipulation of judgment no later than October 30, 2006; the parties having not complied with this Court's order; the last communication from the parties having been December 14, 2006; and the parties having given no indication to this Court that they intend to proceed with this case in the regular course; it is hereby

ORDERED that pursuant to USCIT Rule 41(b)(3) this case is dismissed, without prejudice; and it is further

ORDERED that Plaintiff may file a motion to reinstate this case no later than March 23, 2007.

Slip Op. 07–28

TEMBEC, INC., Plaintiff, and GOVERNMENT OF CANADA, GOUVERNEMENT DU QUEBEC, GOVERNMENT OF ONTARIO, GOVERNMENT OF ALBERTA, GOVERNMENT OF BRITISH COLUMBIA, CANADIAN LUMBER TRADE ALLIANCE, and ABITIBI-CONSOLIDATED, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge,
Judith M. Barzilay & Richard K. Eaton, Judges

Consol. Court No. 05–00028

Decided: February 28, 2007

[Defendant United States' motion to dismiss denied. Defendant United States' motion for reconsideration and vacatur of the court's decision in *Tembec, Inc. v. United States*, 30 CIT ____ , 461 F. Supp. 2d 1355 (2006) ("*Tembec II*") denied. *Tembec II* judgment vacated.]

Baker & Hostetler, LLP (*Elliot Jay Feldman*, *Bryan Jay Brown*, *John Burke*, *Robert Lewis La Frankie*) for Plaintiff Tembec, Inc.

Arnold & Porter, LLP (*Michael Tod Shor*) for Plaintiff-Intervenor Abitibi-Consolidated, Inc.

Steptoe & Johnson, LLP (*Mark Astley Moran*, *Alice Alexandra Kipel*, *Sheldon E. Hochberg*, *Michael Thomas Gershberg*) for Plaintiff-Intervenor Canadian Lumber Trade Alliance Executive Committee.

Arent Fox Kintner Plotkin & Kahn, PLLC (*Matthew J. Clark*, *Keith Richard Marino*) for Plaintiff-Intervenor Gouvernement du Quebec.

Hogan & Hartson, LLP (*Mark S. McConnell*, *Craig Anderson Lewis*, *Harold Deen Kaplan*, *Jonathan Thomas Stoel*) for Plaintiff-Intervenor Government of Ontario.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Spencer Stewart Griffith*, *Bernd G. Janzen*, *Anne K. Cusick*, *Jason Alexander Park*) for Plaintiff-Intervenor Government of British Columbia.

Weil, Gotshal & Manges, LLP (*M. Jean Anderson*, *Amy Tross Dixon*, *Gregory Husisian*, *John Michael Ryan*, *J. Sloane Strickler*); *Wilmer, Cutler, Pickering, Hale & Dorr, LLP* (*Randolph Daniel Moss*) for Plaintiff-Intervenor Government of Canada.

Arnold & Porter, LLP (*Lawerence A. Schneider*, *Claire Elizabeth Reade*) for Plaintiff-Intervenor Government of Alberta.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Acting Director; (*Stephen Carl Tosini*), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Dean Pinkert*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce; *Theodore R. Posner*, Associate General Counsel, Office of the United States Trade Representative for Defendant United States.

Dewey Ballantine, LLP (*Kevin M. Dempsey*, *Alan William Wolff*, *Harry Lewis Clark*, *David Adrian Bentley*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee.

OPINION AND ORDER

Per Curiam: On October 12, 2006, Defendant the United States filed a motion pursuant to USCIT Rule 12(b)(1) seeking dismissal of

the case that resulted in the issuance of *Tembec, Inc. v. United States*, 30 CIT ___ , 461 F. Supp. 2d 1355 (2006) ("*Tembec II*"). *See* Def.'s Mot. Dismiss. By its motion, Defendant maintained that the matter had been rendered moot by the action of the United States Department of Commerce ("Commerce") on October 12, 2006, revoking the contested antidumping and countervailing duty orders covering imports of Canadian softwood lumber into the United States. *See* Def.'s Mot. Dismiss 2–3; *see also Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61,714 (ITA Oct. 19, 2006) (notice) (revoking the underlying antidumping duty order) ("*AD Order Revocation*"); *Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61,714 (ITA Oct. 19, 2006) (notice) (revoking the underlying countervailing duty order) ("*CVD Order Revocation*"); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (ITA May 22, 2002) ("*AD Order*"); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (ITA May 22, 2002) ("*CVD Order*") (collectively, the "*Orders*").

The following day, October 13, 2006, we issued *Tembec II*, which directed that "all of Plaintiffs' unliquidated entries, including those entered before, on, and after November 4, 2004, must be liquidated in accordance with the final negative decision of the NAFTA panel," *Tembec II*, 30 CIT at ___ , 461 F. Supp. 2d at 1367, and further ordered Commerce to instruct the Bureau of Customs and Border Protection ("Customs") to "refund, with interest, all [antidumping duty] and [countervailing duty] cash deposits on all unliquidated entries of softwood lumber from Canada made on or after May 22, 2002." *See* J. *Tembec II* of Oct. 13, 2006, at 3.

On November 13, 2006, in a postjudgment motion styled as one seeking reconsideration and vacatur of *Tembec II*, Defendant renewed the substance of its October 12, 2006, motion to dismiss. *See* Def.'s Mot. Recons. & Vacate *Tembec II* 1 ("Def.'s Mot. Recons. & Vacate") (asking the court pursuant to USCIT R. 59 to "reconsider its decision in [*Tembec II*], and vacate that decision and judgment as moot"). By its motion, Defendant raised the additional claim that the court committed an error of law by not addressing in *Tembec II* "the Court's jurisdiction to order relief that had already been provided." Def.'s Mot. Recons. & Vacate 7.

Jurisdiction lies pursuant to 28 U.S.C. § 1581(i) (2000). *See Tembec, Inc. v. United States*, 30 CIT ___ , ___ , 441 F. Supp. 2d 1302, 1315–27 (2006) ("*Tembec I*").[1] Based on our conclusion that the

[1] Defendant appealed the court's decisions in *Tembec I* and *Tembec II* on December 11, 2006. *See Tembec I*, 30 CIT ____ , 441 F. Supp. 2d 1302 (2006), *appeal docketed*, No. 2007–1102 (Fed. Cir. Dec. 19, 2006); *Tembec II*, 30 CIT ____ , 461 F. Supp. 2d 1355 (2006), *appeal docketed*, No. 2007–1111 (Fed. Cir. Dec. 26, 2006). On January 8, 2007, Defendant filed with this Court a status report "informing the Court of a motion to remand the appeals of the final judgment in this matte[r]" that it had filed with the Court of Appeals for the Federal Circuit on the same day. Def.'s Mot. Leave File Status Report & Status Report 1. On Febru-

matter was not moot on October 13, 2006, we deny both Defendant's motion to dismiss and its motion to reconsider and vacate the court's decision in *Tembec II*. Because we find that the liquidation instructions of October 31, 2006, which resulted from a prejudgment agreement entered into by the Governments of the United States and Canada, provided Plaintiffs with the relief they sought, the *Tembec II* judgment is vacated.[2]

I. Background

On July 12, 2006, the court issued *Tembec I*, its first decision in this case, which found invalid the actions of the United States Trade Representative ("USTR") ordering the implementation of a United States International Trade Commission affirmative threat of material injury determination with respect to imports of Canadian softwood lumber into the United States. In *Tembec I*, the court reserved decision on the remedy to be imposed. *See Tembec I*, 30 CIT at ___ , 441 F. Supp. 2d at 1343.

On September 12, 2006, the Governments of Canada and the United States signed an agreement designed to settle the softwood lumber dispute, albeit at an undetermined "Effective Date." *See* Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America (Sept. 12, 2006), Art. III, *as amended by* Agreement Between the Government of the United States of America and the Government of Canada Amending the Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada Done at Ottawa on 12 September 2006 (Oct. 12, 2006) ("Agreement"). By its terms, the Agreement was to enter into effect after the parties exchanged letters certifying that the conditions set out in Article II thereof were met. *See* Agreement, Art. II (stating, among other things, that the Agreement would not have legal effect unless and until "the CIT has modified the injunctions against liquidation issued in [*West Fraser Mills Ltd. v. United States*, Consol. Ct. No. 05–00079] to permit the United States to fulfill its obligations under Article III"). The certifying letters were exchanged on October

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ary 15, 2007, the Federal Circuit denied Defendant's motion and, in accordance with its rules, deactivated Defendant's appeal. *See Tembec, Inc. v. United States*, No. 2007–1102, –1111 (Fed. Cir. Feb. 15, 2007) (order denying motion to remand and deactivating appeal) (Rader, J.).

[2] Under the Federal Rules of Civil Procedure, upon which this Court's rules are based, the terms "decision" and "judgment" do not have the same meaning. A decision "consists of the court's findings of fact and conclusions of law." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2651, at 9 (3d ed. 1998). On the other hand, a judgment is "the pronouncement of that decision and the act that gives [the decision] legal effect." *Id.* (footnote omitted); *see also Rau v. Apple-Rio Mgmt. Co., Inc.*, 85 F. Supp. 2d 1344, 1346 (N.D. Ga. 1999); *Bryan v. City of Madison, Miss.*, 130 F. Supp. 2d 798, 805 (S.D. Miss. 1999). Thus, vacatur of a judgment can be had without withdrawing the decision.

12, 2006.[3] Thus, the Governments of Canada and the United States attested to each other that the Article II conditions had been satisfied, even though the injunctions on liquidation present in *West Fraser Mills* remained in place. *See W. Fraser Mills*, Consol. Ct. No. 05–00079 (CIT Mar. 7, 2005) (order granting preliminary injunction) at 2 (enjoining Defendant, during the pendency of the action, from liquidating entries of Canadian softwood lumber that "were entered, or withdrawn from warehouse, for consumption during the period May 22, 2002, through April 30, 2003"); *W. Fraser Mills*, Consol. Ct. No. 05–00079 (CIT Apr. 1, 2005) (order granting preliminary injunction) at 2 (same); *W. Fraser Mills*, Consol. Ct. No. 05–00079 (CIT May 20, 2005) (order granting preliminary injunction) at 3 (same).

Also, on October 12, 2006, Commerce retroactively revoked the *AD Order* and the *CVD Order* applicable to entries of softwood lumber from Canada. *See AD Order Revocation*, 71 Fed. Reg. at 61,714; *CVD Order Revocation*, 71 Fed. Reg. at 61,714. Under the terms of the *AD Order Revocation*, Commerce stated that it would instruct Customs "to cease collecting cash deposits, as of October 12, 2006, on imports of softwood lumber products from Canada," and would further require Customs "to liquidate all entries made on or after May 22, 2002, without regard to antidumping duties, *except that, where liquidation of certain entries is enjoined for antidumping purposes, the antidumping liquidation instructions for such entries will be issued upon removal of the injunction*." *AD Order Revocation*, 71 Fed. Reg. at 61,714 (emphasis added). The following day, Customs provided its port directors with liquidation instructions received from Commerce mirroring the terms set forth in the *AD Order Revocation*. *See* Instructions from Dir., Special Enforcement, to Dirs. of Field Operations, Port Dirs. (Oct. 13, 2006) at 1–2 ("October 13 Liquidation Instructions").

The "except" language in the October 12, 2006, *AD Order Revocation* was necessary because of the continued existence of the injunctions against liquidation present in *West Fraser Mills*. Those injunctions prevented Customs from liquidating entries of the Canadian merchandise made between May 22, 2002, and April 30, 2003. On September 21, 2006, Defendant, who is also the defendant in *West Fraser Mills*, filed a partial consent motion asking the court to lift the injunctions. The panel hearing that case granted Defendant's motion and modified the injunctions on October 27, 2006, allowing the United States to "liquidate all Covered Entries [of softwood lum-

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[3] The injunctions in *West Fraser Mills Ltd. v. United States*, Consol. Ct. No. 05–00079, were modified on October 27, 2006. *See W. Fraser Mills*, Consol. Ct. No. 05–00079 (CIT Oct. 27, 2006) (order modifying preliminary injunctions) (Restani, C.J., Eaton & Stanceu, JJ.). The *West Fraser Mills* case involves an appeal to this Court of Commerce's final determination in the first periodic review of the *AD Order* covering U.S. imports of Canadian softwood lumber. *See W. Fraser Mills*, Compl. ¶ 1.

ber from Canada] made on or after May 22, 2002 without regard to antidumping or countervailing duties and refund all deposits collected on such entries with all accrued interest pursuant to 19 U.S.C. § 1677g(b) to the Importers of Record or their designates." *W. Fraser Mills*, Consol. Ct. No. 05–00079 (CIT Oct. 27, 2006) (order modifying preliminary injunctions) (Restani, C.J., Eaton & Stanceu, JJ.) (internal quotation marks omitted).

On October 31, 2006, Customs relayed to its port directors Commerce's second set of liquidation instructions, which ordered Customs officials to: (1) "cease immediately any suspension of liquidation for all shipments of certain softwood lumber from Canada entered, or withdrawn from warehouse, for consumption from 05/22/2002 through 04/30/2003"; (2) liquidate those entries "without regard to antidumping duties"; and (3) refund "all deposits . . . with accrued interest to the importers of record or their designates." Instructions from Dir., Special Enforcement, to Dirs. of Field Operations, Port Dirs. (Oct. 31, 2006) at 1–2 ("October 31 Liquidation Instructions"). Thus, by October 31, 2006, liquidation instructions were issued with respect to all subject imports of Canadian softwood lumber, directing that they be liquidated without regard to antidumping duties and that the cash deposits be returned to the importers of record, with interest.

II. Standard of Review

Defendant's motion to dismiss asserts that the court lacked jurisdiction over the subject matter of this case when it issued the decision and judgment in *Tembec II*. Where the Court's jurisdiction is challenged, "[t]he burden of establishing jurisdiction . . . lies with the party seeking to invoke the court's jurisdiction." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). Further, the Constitution permits a federal court to exercise jurisdiction only over a live case or controversy. U.S. Const. art. III, § 2. "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a personal stake in the outcome of the lawsuit." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks & citation omitted).

A motion to reconsider or vacate a prior decision "should be granted, and the underlying judgment or order modified, when a movant demonstrate[s] that the judgment is based on manifest errors of law or fact." *Union Camp Corp. v. United States*, 23 CIT 264, 270, 53 F. Supp. 2d 1310, 1317 (1999); *see also* USCIT R. 59.

III. Discussion

The primary issue for us to decide is whether Commerce's October 12, 2006, revocation of the *Orders* rendered this case moot and thus

ousted the court of jurisdiction to issue *Tembec II*. Defendant insists that this is the case.[4] According to Defendant, this matter was moot as of October 12, 2006, because "after [the] retroactive revocation (without the possibility of reinstatement) [of the *Orders*], all further relief requested by the [P]laintiffs in their complaint had either been provided, or the provision of relief was wholly ministerial." Def.'s Mot. Recons. & Vacate 5 (citing Def.'s Mot. Dismiss 7). Specifically, Defendant maintains that "[t]he fact that [Customs's] ministerial task of liquidating all relevant entries of softwood lumber [was] not yet complete, or that liquidation of the entries during the first review period [was] enjoined, is irrelevant to the mootness analysis in this case." Def.'s Mot. Dismiss 6.[5]

For their part, Plaintiffs insist that the controversy remained alive when *Tembec II* was issued on October 13, 2006, because the "injunctions in [*West Fraser Mills*] were still in place, preventing the liquidation of all entries of softwood lumber from Canada." Pl. Tembec's Opp'n Def.'s Mot. Recons. & Vacate 2–3; *see also* Pl. CLTA's Opp'n Def.'s Mot. Dismiss 4. In other words, Plaintiffs contend that Defendant's argument overlooks both the specific nature of the relief sought by Plaintiffs and the actual effect of the *AD Order Revocation*.

Because we find that Defendant's revocation of the *Orders* on October 12, 2006, did not provide Plaintiffs with the complete relief sought in their complaint, the motion pursuant to USCIT Rule 59 to reconsider and vacate our decision and judgment as moot is denied.

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[4] While the court is considering both the United States' motion to dismiss pursuant to USCIT Rule 12(b)(1) and its motion for reconsideration and vacatur pursuant to USCIT Rule 59(e), the parties agree that the arguments for and against the two motions are the same. *See, e.g.*, Def.'s Mot. Recons. & Vacate 4–5; Pl. Tembec Inc.'s Opp'n Def.'s Mot. Recons. & Vacate *Tembec II* 1 ("Defendant's Motion for Reconsideration and to Vacate has the same substantive basis as its pending motion to dismiss on mootness grounds—that the entry into force of the settlement between the Governments of the United States and Canada made the case moot on October 12, 2006, the day before the Court entered its judgment."); Pl. CLTA's Opp'n Def.'s Mot. Recons. & Vacate *Tembec II* 1 (same). Thus, the court will address issues in the context of Defendant's motion for reconsideration and vacatur.

[5] A duty is considered to be "ministerial" if its performance leaves nothing to the actor's discretion. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866) (defining ministerial duty as "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law"). Although it is true that because "Customs merely follows Commerce's instructions in assessing and collecting duties," it plays only a "ministerial role in liquidating antidumping duties," *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994), Defendant's characterization of all actions taken subsequent to the *Orders*' revocation to provide Plaintiffs complete relief as "ministerial" is overly broad. Indeed, Defendant's assertion failed to take into account that: (1) its motion to modify the injunctions against liquidation in *West Fraser Mills* was not made until September 21, 2006; (2) that motion was opposed by several Canadian softwood lumber mills; and (3) the panel hearing *West Fraser Mills* had to determine the propriety of lifting the injunctions in the face of that opposition. *See* Def.'s Mot. Modify Injs. & Req. Expedited Consideration, Attach. 2.

That the case was not moot can be seen by an examination of Plaintiffs' complaint asking the court, among other things, to:

> (c) Order Commerce to: (1) revoke the [*Orders*] on *Softwood Lumber from Canada* in full; (2) instruct Customs to terminate suspension of liquidation with regard to all entries of softwood lumber from Canada for the period May 22, 2002 forward, liquidate those entries without regard to antidumping or countervailing duties, and refund, with interest, all cash deposits collected on those entries since May 22, 2002. . . .

Am. & Supplemental Compl. ¶ 37(c).[6] Thus, Plaintiffs sought two things: (1) the revocation of the *Orders* and (2) an order directing Commerce to issue instructions to Customs directing the liquidation of all their entries without unfair trade duties, including those made from May 22, 2002, through April 30, 2003.

While the revocation of the *Orders* gave Plaintiffs the first part of the relief they sought, it fell short of affording them complete relief. That is, the *AD Order Revocation* did not direct the liquidation of all subject merchandise entered since May 22, 2002. *See AD Order Revocation*, 71 Fed. Reg. at 61,714. Likewise, as prescribed by the *AD Order Revocation*, the October 13 Liquidation Instructions did not direct liquidation of the enjoined entries, *i.e.*, those that were subject to the preliminary injunctions against liquidation in *West Fraser Mills*. *See* October 13 Liquidation Instructions at 1. As a result, Commerce's actions on October 12, 2006, did not give Plaintiffs all that they were seeking. Indeed, the language of the *AD Order Revocation* and the language of the October 13 Liquidation Instructions make clear that they were intended to grant only partial relief by expressly excepting out liquidation of the enjoined entries. As the Government of Canada points out, "[a]lthough the United States revoked the [*Orders*] on October 12 pursuant to the [Agreement], that revocation was not sufficient to secure the refund of all estimated duty deposits that had been collected since the [*Orders*]." Gov't Canada Opp'n Def.'s Mot. Recons. & Vacate 2. In short, because the revocation of the *Orders* neither purported to provide Plaintiffs with all the relief they sought, nor did it do so in fact, this case was not moot on October 12, 2006. Therefore, on October 13, 2006, the parties retained a "personal stake in the outcome of the lawsuit," *Spen-*

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[6] In *Tembec I*, we found for Plaintiffs with respect to the relief requested in paragraphs 37(a), (b) and (d) of their complaint. *See Tembec I*, 30 CIT at ____ , 441 F. Supp. 2d at 1343; *see also* Am. & Supplemental Compl. ¶ 37(a), (b) & (d) (asking court to hold unlawful Commerce's actions taken with respect to its continued enforcement of the *Orders* based on December 20, 2004 amendment). Plaintiffs also asked the court, in paragraph 37(e) of their complaint, to enjoin the USTR from taking any further action to implement the affirmative injury determination. That demand was addressed by our holdings in *Tembec I* that the USTR acted *ultra vires* in ordering the implementation of the affirmative injury determination, and thus that the *Orders* were not supported by an affirmative injury determination.

cer, 523 U.S. at 7 (internal quotation marks & citation omitted), and the court retained jurisdiction to issue *Tembec II*.

The United States makes the further argument that, even if the court had jurisdiction to issue *Tembec II*, the decision and judgment should nevertheless be vacated based on the 30-day automatic stay of execution of a judgment provided for in USCIT Rule 62(a). *See* Def.'s Supplemental Br. Resp. Ct.'s Order of Dec. 20, 2006 5 ("In any event, assuming . . . that this case did not become moot until October 31, 2006, . . . the Court . . . should vacate its decision and judgment in *Tembec II* because the judgment remained subject to the Rule 62(a) 30-day automatic stay, and, thus, was not final . . . [on] October 31, 2006. . . .") ("Def.'s Resp."); *see also* USCIT R. 62(a) ("Except as stated herein or as otherwise ordered by the court, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry."). Specifically, Defendant states that "[b]ecause *Tembec II* remained subject to the automatic stay, the Court's judgment had not yet altered the legal relationship between the parties when Commerce issued the [October 31 Liquidation Instructions]." Def.'s Resp. 5.[7] Put another way, Defendant argues that the judgment was not legally effective until Plaintiffs were in a position to enforce it.

We find Defendant's argument unconvincing. When the court issues a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945), that judgment is final and effective as of the date of entry. *See generally* Fed. R. App. P. 4 (calculating appellate time periods based on date district court judgment entered). As of entry, therefore, the judgment alters the legal relationship between the parties. The effect of the judgment is unchanged by the automatic stay of execution. Rather, USCIT Rule 62(a) simply provides the losing party with an opportunity to evaluate its options and determine what actions, if any, it wishes to take before the time for filing any of the various postjudgment motions expires. *See Am. Family Mut. Ins. Co. v. Roth*, No. 05–C3839, 2007 WL 63983, at *5 n.8 (N.D. Ill. Jan. 10, 2007) ("The stay permits a party against whom the judgment has been entered to determine what course of action to follow . . . ."). That the automatic stay of ex-

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[7] As support for its claim that the 30-day automatic stay of execution prevents a judgment from becoming final until the expiration of that period, Defendant cites *Porco v. Trustees of Indiana University*, 453 F.3d 390 (7th Cir. 2006). In that case, the district court entered a judgment instructing the Clerk to distribute funds that the defendant had deposited with the Court. *See id.* at 393–94. When the automatic stay of execution expired, the Clerk distributed the funds. The Court of Appeals for the Seventh Circuit upheld the Clerk's action, noting that the appellant could have used the time provided by Federal Rule of Civil Procedure 62(a) to file a motion to stay the execution of the judgment until the completion of the appeal. *See id.* Nothing in *Porco* supports Defendant's claim that the automatic stay prevents a judgment from "altering the legal relationship between the parties." Def.'s Resp. 5.

ecution has no effect on the finality or effectiveness of a judgment is supported by the observation that Rule 62(a) does not toll the time in which an appealing party must file its notice of appeal. *See* Fed. R. App. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."); *see also* 28 U.S.C. § 1295(a)(5) (limiting jurisdiction of Court of Appeals for the Federal Circuit to, *inter alia*, "an appeal from a final decision of the United States Court of International Trade"). Thus, while it could not be enforced against Defendant until November 13, 2006, the judgment was legally final and effective as of its entry on October 13, 2006. As a result, the stay provides no basis for vacatur of the *Tembec II* decision and judgment.

The foregoing notwithstanding, the court concludes that the *Tembec II* judgment should be vacated because no case or controversy remains as the result of prejudgment and postjudgment events. As noted above, on October 12, 2006, by the exchange of letters, the Governments of the United States and Canada finalized their mutually-agreed-upon settlement of this dispute. The terms of the Agreement provided for the issuance of liquidation instructions with respect to the enjoined entries upon the lifting of the *West Fraser Mills* injunctions. *See* Agreement, Art. III(2)(b). These instructions were issued on October 31, 2006. Thus, Plaintiffs gained complete relief in fact on October 31, 2006, by reason of the parties having entered into the Agreement before the judgment was issued.

The facts of this case, then, are unlike those presented in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that, absent exceptional circumstances, "mootness by reason of [a postjudgment] settlement does not justify vacatur of a judgment under review"). Here, although the October 31 Liquidation Instructions were not issued until after the judgment was entered, the instructions were the direct result of the prejudgment Agreement. Thus, this is not a situation where a losing party has abandoned its right to review by entering into a postjudgment settlement. *See U.S. Bancorp*, 513 U.S. at 26 ("Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo of the . . . judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been."). Here, a party has not rendered its case unreviewable by its "own choice" upon surrendering its right to have an adverse judgment overturned. *Id.* at 25. Rather, this is a case where the terms of the Agreement were agreed to before the judgment was entered and, more importantly, before the parties knew which would prevail. The Agreement anticipated the removal of the *West Fraser Mills* injunc-

tions, specifically requiring that "[n]o later than 3 days after a court of competent jurisdiction has modified any injunction against liquidation to permit liquidation and the return of deposits . . . [Commerce] shall instruct [Customs] . . . to liquidate the entries that were subject to that injunction in accordance with paragraph 8 of Annex 2C." Agreement, Art. III(2)(b). Once the panel hearing *West Fraser Mills* modified the injunctions in that case on October 27, 2006, thereby allowing the issuance of the second set of instructions, the terms of the Agreement could be fulfilled, and Plaintiffs could receive total relief. This result having been achieved in accordance with the terms of the prejudgment Agreement, we find it appropriate to vacate the judgment in *Tembec II*.

That neither party has asked the court to vacate its judgment based on the Agreement does not bar the court from doing so *sua sponte*. *See* USCIT R. 60(b) ("On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . ."); *see also Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 110–11 (2d Cir. 2001) ("We note parenthetically that there can be no question that the district court had the power to vacate its original judgment. . . . [N]othing forbids the court to grant such relief *sua sponte*.").

Because the court finds that the issues in *Tembec II* were decided within the context of a live controversy, however, the court will not withdraw its decision. When determining whether to vacate a prior decision, the court cannot ignore the substantial public interest in the establishment of judicial precedent. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp*, 513 U.S. at 26 (internal quotation marks & citation omitted). In addition, the Court of Appeals for the Federal Circuit has recognized that vacatur of a judgment does not necessarily require vacatur of the court's decision. Thus, when asked by an appealing party to vacate both the lower court's judgment and decision, the Federal Circuit stated that because the "opinion is merely an explanation for the now-vacated judgment, there is no need to separately vacate the opinion." *Jilin Henghe Pharm. Co. v. United States*, 123 F. App'x 402, 403 (Fed. Cir. 2005) (not published in the Federal Reporter).

Finally, the court's finding that this matter was not moot on October 12, 2006, leads to the additional conclusion that Defendant's October 12, 2006, motion to dismiss for mootness is without merit. Because this case was still alive on October 12, 2006, Defendant's motion was premature. Moreover, it is apparent that Defendant has not been precluded from having its arguments heard by the court. The court, therefore, having considered the arguments raised by Defendant in its motion to dismiss and having found them meritless,

concludes that it committed no error of law by declining to consider the motion prior to issuing *Tembec II*.

IV. Conclusion

Based on the foregoing, it is hereby

ORDERED that Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) is denied;

ORDERED that Defendant's motion for reconsideration and to vacate *Tembec II* pursuant to USCIT Rule 59 is denied; and it is further

ORDERED that the *Tembec II* judgment is vacated.

Slip Op. 07–29

CABLESA S.A. DE C.V., *Plaintiff*, v. UNITED STATES, *Defendant,* and AMERICAN SPRING WIRE CORP., INSTEEL WIRE PRODUCTS COMPANY, and SUMIDEN WIRE PRODUCTS CORP., *Defendant-Intervenors.*

Court No. 05–00388

[Commerce's Final Scope Determination is sustained.]

Decided: March 1, 2007

Arent Fox, PLLC (*Kay C. Georgi* and *Mark P. Lunn*), for Plaintiff.

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OPINION

RIDGWAY, Judge:

In this action, Plaintiff Cablesa S.A. de C.V. — a Mexican manufacturer of prestressed concrete steel wire strand ("PC strand") – contests the U.S. Department of Commerce's final determination that Cablesa's zinc-coated product is within the scope of the antidumping duty order on PC strand from Mexico. *See* Prestressed Concrete Steel Wire Strand from Mexico: Scope Inquiry Final Determination, Inv. No. A–201–831 (June 16, 2004) ("Final Scope Determination").

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Cablesa urges that Commerce's Final Scope Determination be vacated. Emphasizing that the antidumping duty

order at issue expressly excludes "galvanized" PC strand, and asserting that its zinc-coated product is in fact "galvanized," Cablesa contends that Commerce should have reached a negative scope determination without conducting a *Diversified Products* analysis. In the alternative, Cablesa argues that Commerce's *Diversified Products* analysis was flawed, and that the agency's conclusion as a result of that analysis is not supported by substantial evidence in the record. *See generally* Plaintiff's Memorandum in Support of Motion for Judgment on the Agency Record ("Pl.'s Brief"); Reply Brief in Support of Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Pl.'s Reply Brief").

Cablesa's motion is opposed by the Government and by Defendant-Intervenors, American Spring Wire Corporation, Insteel Wire Products Company, and Sumiden Wire Products Company ("the Domestic Industry"), who maintain that the Final Scope Determination is supported by substantial evidence and is otherwise in accordance with law, and should therefore be sustained in all respects. *See generally* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Brief"); Defendant-Intervenors' Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[1] For the reasons set forth below, Cablesa's Motion for Judgment on the Agency Record is denied.

I. *Background*

In late February 2003, the Commerce Department initiated an antidumping investigation of prestressed concrete steel wire strand ("PC strand") from Mexico (among other countries), pursuant to a petition filed by the Domestic Industry. *See* Prestressed Concrete Steel Wire Strand from Brazil, India, the Republic of Korea, Mexico, and Thailand: Initiation of Antidumping Duty Investigations, 68 Fed. Reg. 9050 (Feb. 27, 2003) ("Notice of Investigation"). The Notice of Investigation defined the scope of the investigation at issue:

> For purposes of these investigations, prestressed concrete steel wire (PC strand) is steel strand produced from wire of non-stainless, *non-galvanized* steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

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[1] All statutory citations herein are to the 2000 edition of the U.S. Code.

Similarly, all citations to regulations are to the 2003 edition of the Code of Federal Regulations. However, the pertinent text of the cited provisions remained the same at all relevant times.

> The merchandise under these investigations is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Notice of Investigation, 68 Fed. Reg. at 9050-51 (emphasis added).

The Notice of Investigation thus framed the scope of the investigation in language that was broad and inclusive (encompassing "covered and uncovered strand and all types, grades, and diameters of PC strand"), carving out two specific exceptions for wire that was produced from either "stainless" or "galvanized" steel. Neither "stainless" nor "galvanized" were further defined in either the Domestic Industry's petition or the Notice of Investigation.[2]

The Notice of Investigation invited comments from interested parties as to the scope of products to be either covered or excluded from the antidumping investigation. *See* Notice of Investigation, 68 Fed. Reg. at 9050–51. In response, Cablesa filed comments asserting that Commerce should exclude from the investigation PC strand coated with textile or any other "nonmetallic" material, in particular plastic-coated ("covered") PC strand. *See generally* Domestic Industry's Rebuttal Letter (April 23, 2004). Cablesa's comments made no reference to PC strand coated with zinc.

In its Preliminary Antidumping Determination, the Commerce Department concluded that "covered" (*e.g.*, plastic-coated) PC strand was included in the scope of the investigation, and that both covered and uncovered PC strand "constitute one class or kind of merchandise," based on the agency's analysis of the five *Diversified Products* criteria. *See* Prestressed Concrete Steel Wire Strand from Mexico: Notice of Preliminary Determination, 68 Fed. Reg. 42,378, 42,379 (July 17, 2003) ("Preliminary AD Determination") (*citing Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983)). Commerce further stated that the "defining characteristic of these products continues to be the strand, and covering the merchandise does not change the strand or its chemical or physical properties." *Id.* The Preliminary AD Determination calculated Cablesa's preliminary dumping margin at 77.2%. *Id.* at 42,382.[3]

Cablesa first mentioned the existence of U.S. sales of its zinc-coated PC strand only after the factual record of the antidumping investigation had closed. *See* Domestic Industry's Scope Request (Feb.

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[2] The petition filed by the Domestic Industry noted that PC strand covered by the investigation generally is produced to ASTM specifications (specifically, ASTM A–416).

[3] Commerce calculated Cablesa's preliminary margin based on total adverse facts available, based on its determination that Cablesa had provided unreliable and misleading information in the course of the investigation. *See* Preliminary Determination, 68 Fed. Reg. at 42,380–82. Commerce's use of adverse facts available is not contested here.

6, 2004) at 2. In response, the Domestic Industry sought to have Commerce confirm that only PC strand manufactured from steel wire that conformed to ASTM A–475 ("Standard Specification for Zinc Coated Steel Wire Strand") qualified under the exclusion for "galvanized" steel wire. *See* Pl.'s Brief at 4. However, Commerce rejected the Domestic Industry's requests as untimely. *See id*.

In early December 2003, Commerce reached its final determination in the antidumping investigation, calculating Cablesa's final antidumping duty margin based on total adverse facts available (as its preliminary margin had been calculated). *See* Prestressed Concrete Steel Wire Strand from Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 68 Fed. Reg. 68,350, 68,350–51 (Dec. 8, 2003) ("Final AD Determination"). In late January 2004, Commerce's Antidumping Order issued, directing Customs to assess antidumping duties on Cablesa's entries of subject merchandise. The scope language in both the Final AD Determination and the Antidumping Order was virtually identical to the language in the Notice of Investigation. No further explanation of what constituted "galvanized" steel wire was provided. *See* Final AD Determination, 68 Fed. Reg. at 68,350; Prestressed Concrete Steel Wire Strand from Mexico: Notice of Antidumping Duty Order, 69 Fed. Reg. 4112 (Jan. 28, 2004) ("Antidumping Order").[4]

In January 2004, Cablesa attempted to import its zinc-coated PC strand without paying antidumping duties, asserting that the product was excluded from the scope of the Antidumping Order as "galvanized" PC strand. Customs disagreed, and Cablesa sought a ruling from the Commerce Department. *See* Cablesa's Scope Request (Feb. 3, 2004).

The Domestic Industry filed its own request for a ruling several days later. The Domestic Industry urged Commerce to find that, "for purposes of the antidumping duty order, the term 'galvanized' has its common meaning in the industry, and that meaning is that the product must be coated with a continuous and reasonably uniform layer of zinc and/or zinc oxide to the minimum specifications set forth in ASTM A–475, which represents the industry understanding of the minimum zinc application necessary to meet the purpose of preventing corrosion." *See* Domestic Industry's Scope Request (Feb. 6, 2004) at 3.[5]

In determining whether a product is within the scope of an antidumping duty order, Commerce engages in a three-step process.

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[4] Commerce made only the necessary conforming changes, such as changing the language "merchandise under these investigations . . ." to "merchandise subject to the order . . . ." *Id*.

[5] The Domestic Industry also argued that, because Cablesa's zinc-coated product is classified within the HTSUS numbers specified in the petition and in the Antidumping Order, it is subject merchandise. *Id*.

Commerce first must examine the language of the order at issue. The "predicate for the interpretive process is language in the order that is subject to interpretation." *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005). If the terms of the order are dispositive, then the order governs. If the order alone is not dispositive, the interpretive process is governed by 19 C.F.R. § 351.225(d), which directs Commerce to determine whether it can make a ruling based upon the request for a scope ruling and the factors listed in section 351.225(k)(1) – specifically, "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations [of Commerce] (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If that analysis is not dispositive, Commerce initiates a scope inquiry pursuant to 19 C.F.R. § 351.225(e), and applies the five *Diversified Products* criteria as codified in the agency's regulations. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Prods.*, 6 CIT 155, 572 F. Supp. 883.

In this case, Commerce found that the scope of the order was ambiguous and subject to interpretation as to the definition of "non-galvanized" wire. Commerce examined the Antidumping Order, the underlying petition, and the preliminary and final results of the investigations of both Commerce and the ITC. Commerce also considered the arguments advanced by Cablesa and the Domestic Industry as to the definition of PC strand made from galvanized wire.

Cablesa asserted that its "galvanizing process and the zinc content of [its] product meet all applicable industry standards and guidelines for galvanized product," although it provided no galvanization standard applicable to PC strand. *See* Cablesa's Scope Request at 8. The Domestic Industry argued, in turn, that galvanized PC strand is understood in the industry to mean PC strand "coated with a continuous and reasonably uniform layer of zinc and/or zinc oxide to the minimum specifications set forth in ASTM A–475." Domestic Industry's Scope Request at 3. The Domestic Industry further argued that the plain language of the petition states that only galvanized wire strand that falls outside the HTSUS numbers listed in the Antidumping Order is excluded from the scope of the order. According to the Domestic Industry, "because Cablesa's zinc-coated product is classified within the HTSUS numbers listed in the petition and the scope of the order, it is subject PC strand." *Id*.

Commerce determined that the scope language of the Antidumping Order, together with the product descriptions in the original petition and the Commission's preliminary and final determinations, provided no clear definition of galvanized PC strand. *See* Scope Inquiry Initiation (Feb. 23, 2004) at 3. Commerce therefore initiated a scope inquiry pursuant to 19 C.F.R. § 351.225(e). In the course of its inquiry, Commerce issued two questionnaires to Cablesa, requesting information relevant to the *Diversified Products* criteria, including

the physical characteristics of Cablesa's zinc-coated PC strand, the expectations of ultimate purchasers, the ultimate use of the merchandise, channels of trade, and how the merchandise is advertised and displayed. Cablesa responded, and all parties filed comments and rebuttal comments.

Commerce's Final Scope Determination concluded that Cablesa's zinc-coated PC strand "did not differ in any material way from the grease and plastic coated PC strand also sold by Cablesa," and did not "meet any industry standard for galvanization." Final Scope Determination at 1. The Final Scope Determination further explained:

> Cablesa's PC strand with a 0.05 oz./sq. ft. zinc coating has no physical properties or end uses that are substantially different from subject PC strand. Cablesa has not presented any recognized industry standard to support its claim that its 0.05 oz./sq. ft. zinc coated PC strand is truly galvanized or any technical evidence that a zinc coating of 0.05 oz./sq. ft. provides better corrosion protection than a plastic and grease coating.

Final Scope Determination at 8. Accordingly, Commerce determined that Cablesa's zinc-coated PC strand was included within the scope of the original Antidumping Order on PC strand from Mexico, and that PC strand is properly classified as "galvanized" only if it meets ASTM A–475 standards. *Id*.

II. *Analysis*

Cablesa contends that the Commerce Department erred in finding that "non-galvanized steel" was ambiguous as used in the Antidumping Order and, thus, that Commerce improperly conducted a *Diversified Products* analysis rather than finding that Cablesa's zinc-covered PC strand was excluded from the scope of the Order pursuant to 19 C.F.R. § 351.225(d).

Distilled to its essence, Cablesa's theory is that the plain meaning of the language defining the scope of the Antidumping Order can be discerned by reference to the American Heritage Dictionary, which defines "galvanized" as "to coat (iron or steel) with *rust-resistant* zinc." *See* American Heritage Dictionary of the English Language at 744 (3d ed. 1992) (emphasis added). Cablesa emphasizes that its product is in fact coated with zinc, and thus affords protection against corrosion, which is the purpose of galvanization. As discussed below, however, Cablesa's arguments are unavailing.

A.

The Commerce Department's starting point was the relevant language of the Antidumping Order itself. A review of that language indicates that it is quite broad, encompassing "all types, grades and diameters" of PC strand, including both covered and uncovered (or

coated and uncoated) PC strand. On its face, the Order is broadly written to embrace PC strand with any covering or coating, as further specified under the HTSUS.[6] Although an order cannot be interpreted broadly when a broad construction is "belied by the terms of the order," the language of the Order at issue here is generally expansive. *See Allegheny Bradford Corp. v. United States*, 28 CIT ___ , ___ , 342 F. Supp. 2d 1172, 1186–87 (2004) (*citing Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1098 (Fed. Cir. 2002), *quoting Eckstrom Indus. Inc. v. United States*, 254 F.3d 1068, 1073 (Fed. Cir. 2001)).

The language of the Antidumping Order does define the subject merchandise to require that the strand be manufactured from "non-stainless, *non-galvanized* steel." Cablesa argues that there is no need to resort to extrinsic evidence to define "non-galvanized steel" wire. But Cablesa itself looks beyond the four corners of the Order and invokes the American Heritage Dictionary to support its claim that its zinc-coated product is a "galvanized" product outside the scope of the Order. Thus, as even Cablesa implicitly concedes, reference to *some* extrinsic evidence is necessary to give meaning to the term "galvanized" as it is used in the Antidumping Order. It is Commerce's decision to resort to industry standards rather than a dictionary that is the gravamen of Cablesa's complaint.

Commerce's reasoning in this case is fully consonant with the case law in similar cases involving ambiguity in the definition of manufacturing processes. In *Novosteel*, for example, the Court of Appeals held that Commerce properly applied the *Diversified Products* factors where the petitions and the initial investigations failed to clarify whether the term "flat-rolled" unambiguously encompassed the merchandise in question. *See Novosteel, SA v. United States*, 284 F.3d 1261, 1266, 1274 (Fed. Cir. 2002). Similarly, the court in *Tak Fat* agreed that the terms "pickled," "marinated," and "acidified," as used in an antidumping order on preserved mushrooms, were subject to interpretation. The court upheld Commerce's reliance on extrinsic evidence to establish a minimum acid content for "acidified" mushrooms (an undefined term set forth in the order), and rejected the foreign producer's argument that any acid content qualified its product for exclusion from the order. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1385–86 (Fed. Cir. 2005). *See also Allegheny Bradford*, 28 CIT at ___ , 342 F. Supp. 2d at 1186 (as used in order, terms "elbows," "trees," "reducers," "stub ends," and "caps" were "general," and allowed Commerce "room to interpret whether a given product bears a shape that is covered by the scope").

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[6] The petition filed by the Domestic Industry indicated that ASTM-conforming galvanized PC strand was classified under a different tariff subheading (HTSUS 7312.10.3074) than subject PC strand. *See generally* Domestic Industry's Scope Request at Exhs. 6, 7.

As the Government aptly observes, like the production processes referred to in the orders at issue in *Novosteel* and *Tak Fat*, the term "galvanized" in the Order here "generally *identifies* a process without specifically *defining* the process." *See* Def.'s Brief at 11. It was therefore not unreasonable for Commerce to find that the scope of the Order was ambiguous and that a *Diversified Products* analysis was necessary.

Relying on *Ericsson*, Cablesa seeks to portray Commerce's actions as an impermissible and unfair expansion of the scope of the Order. *See* Pl.'s Brief at 13–14; Pl.'s Reply Brief at 5 (*citing Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)). But – in contrast to *Ericsson* – Commerce in this case did not abandon one scope determination for a more exacting one. *See Ericsson*, 60 F.3d at 783. Nor did Commerce nullify any portion of the Order's scope which would otherwise have excluded Cablesa's product (as Commerce was found to have done in *Allegheny Bradford*).[7] Thus, for example, Commerce did not re-define the scope of the Order to include galvanized steel (a product that is excluded by the plain language of the Order). Commerce instead sought merely to determine the meaning of "non-galvanized steel" as that term was used in the Order.

Contrary to Cablesa's claims, the facts of this case are closer to *San Francisco Candle* than to *Ericsson*. *See generally San Francisco Candle Co., Inc. v. United States*, 104 Fed. Appx. 714 (Fed. Cir. 2004), *aff'g* 27 CIT 704, 265 F. Supp. 2d 1374 (2003). The Court of Appeals there reasoned that Commerce could apply an objective test to determine whether certain products fell under an exclusion from the scope of an antidumping order on petroleum wax candles from China. *See San Francisco Candle*, 104 Fed. Appx. at 717 (discussing Commerce's application of "minimally decorative" test to determine which candles are excluded from scope of order as Christmas novelty candles); *see also Tak Fat*, 396 F.3d at 1386 (sustaining Commerce's use of standard definition of "pickling" and "acidified" based upon acetic acid concentrations).

So too Commerce in this case reasonably determined that the scope of the Order was ambiguous, and sought to establish an objective standard for products falling within the exclusion for PC strand made of galvanized wire. Indeed, as the Government notes, Cablesa itself implicitly conceded in the course of the scope inquiry that there is some amount of zinc coating that – as a practical matter – does not suffice to resist corrosion. *See* Def.'s Brief at 10 (*citing* Cablesa's

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[7] Invoking *Allegheny Bradford*, Cablesa argues that including its zinc-coated PC strand within the scope of the Order undermines the "integrity of the investigation's prior stages." *See* Pl.'s Brief at 18 (*citing Allegheny Bradford*, 28 CIT at ____ , 342 F. Supp. 2d at 1188. As the Domestic Industry notes, however, the existence of imports of Cablesa's zinc-coated PC strand were not disclosed until late in the investigation. *See* Def.-Ints.' Brief at 24.

Scope Request at 8, which asserted that the zinc coating on Cablesa's product meets the industry standard sufficient to prevent corrosion). In contrast, in the course of this litigation, Cablesa went so far as to claim that "any strand coated with *any level of zinc* is excluded from the scope of [this] order." *See* Pl.'s Brief at 19. Taking that argument to its logical extreme, the Domestic Industry pointedly notes that "[u]nder Cablesa's logic, a PC strand coil that was spray painted with zinc paint, or that contained trace amounts of zinc within the wire itself, would be excluded as 'galvanized' because it contained or was coated with some zinc." *See Def.-Ints.' Brief at 20.*[8]

In sum, nothing required Commerce to reject technical standards developed within the industry in favor of an arbitrary definition of "galvanized" – much less no definition at all.[9] Commerce committed no error in determining that the term "galvanized" was ambiguous as used in the scope of the Order and proceeding to a *Diversified Products* analysis.

B.

Cablesa contends that, even if a *Diversified Products* analysis was warranted, Commerce's conduct of that analysis was flawed, and the conclusion that the agency reached was erroneous. *See generally* Pl.'s Brief at 20–23; Pl.'s Reply Brief at 8–15. As detailed below, however, Commerce's analysis was generally sound, and its Final Scope Determination is both supported by substantial evidence in the record and otherwise in accordance with law.

1. *Cablesa's Threshold Claim*

Cablesa's threshold attack on Commerce's *Diversified Products* analysis accuses Commerce of engaging in circular logic and defeating the purpose of the *Diversified Products* analysis by defining "gal-

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[8] The Domestic Industry seeks to drive its point home by reference to another critical term that is not defined in the Order in this case: "[T]he Order . . . also states that PC strand made from stainless wire is excluded. Like the term 'galvanized,' the term 'stainless' is subject to detailed industry standards as to minimum levels of specified alloy contents. The dictionary, however, merely defines 'stainless steel' as 'steel alloyed with chromium, etc., virtually immune to rust and corrosion.' *See* Webster's New World Dictionary at 1304 (3d College Ed. 1988). If such simplistic dictionary terms were employed to define steel terms that are recognized within the industry to have very specific meanings, foreign producers intent on evading an order could easily undertake a slight modification to their product and claim that the product falls outside a generic dictionary definition of a term." *See* Def.-Ints.' Brief at 20–21.

[9] Cablesa emphasizes that Commerce rebuffed the Domestic Industry's attempts in the course of the antidumping proceeding to persuade the agency to define "galvanized" by reference to ASTM A–475. *See generally* Pl.'s Brief at 4, 11. But Cablesa reads much too much into Commerce's rejection of the Domestic Industry's submissions. Commerce simply returned the submissions as untimely. In accordance with 19 C.F.R. § 351.104, Commerce did not consider the content of the submissions, and did not address the merits of the Domestic Industry's claims. *See* Def.'s Brief at 13; Def.-Ints.' Brief at 5.

vanization" before examining the physical characteristics of Cablesa's zinc-coated PC strand. *See generally* Pl.'s Brief at 22–23; Pl.'s Reply Brief at 8–10. To be sure, Commerce might have articulated parts of its rationale more artfully. But Cablesa's critique is largely lacking in merit.

Contrary to Cablesa's assertions, Commerce did not define the standard for PC strand made from galvanized wire before analyzing the *Diversified Products* factors. Rather, Commerce compared Cablesa's zinc-coated product to two standards – one recognized by all to be galvanized (ASTM A–475), and the other recognized by all to be non-galvanized (subject PC strand). *See generally* Final Scope Determination at 6–7; Def.'s Brief at 14–15. Commerce considered the arguments and factual submissions of both Cablesa and the Domestic Industry. And, when Cablesa asserted that its zinc-coated PC strand met the minimum industry standards for galvanization, Commerce properly requested that Cablesa identify any standards on which it relied. But Cablesa then argued – as it does now – that in fact no such standard exists. *See* Cablesa's Scope Questionnaire Responses (March 18, 2004) at 2–5 (stating "no ASTM standard applies to galvanized PC strand" and "there are no official specifications for galvanized PC strand").

2. *Cablesa's Challenges to the Merits of Commerce's "Diversified Products" Analysis*

As discussed above, in *Diversified Products*, this court held that – in determining whether a product falls within the scope of an order – Commerce should consider five criteria: (1) the physical characteristics of the product in question as compared to subject merchandise; (2) customer expectations with respect to the product in question as compared to subject merchandise; (3) end uses of the product at issue as compared to subject merchandise; (4) channels of distribution for the product at issue as compared to subject merchandise; and (5) the manner in which the products are advertised and displayed. *See generally Diversified Prods.*, 6 CIT at 162, 572 F. Supp. at 889; 19 C.F.R. § 351.225(k)(2). In the case at bar, Commerce properly determined that – while the fifth criterion is not relevant to the PC strand industry – the remaining four factors all support the conclusion that Cablesa's zinc-coated PC strand is within the scope of the Order.

The parties' arguments as to each of the four applicable criteria are addressed below, in turn.

a. *Physical Characteristics*

Commerce's determination that the physical characteristics of Cablesa's zinc-coated PC strand are not materially different from PC strand covered by the Order is supported by substantial evidence. As part of its *Diversified Products* analysis, Commerce compared the physical characteristics of Cablesa's PC strand to both subject PC

strand and ASTM A–475, the generally accepted industry standard for galvanization of steel wire, to determine whether Cablesa's product met the requirements for exclusion from the Order – that is, whether Cablesa's product is indeed "galvanized." *See generally* Final Scope Determination at 6. Commerce concluded that, although PC strand made from ASTM A–475 galvanized wire is substantially different from subject PC strand, Cablesa's zinc-coated PC strand lacks physical properties sufficient to differentiate it from subject PC strand in any significant way. *Id.* at 8.

Comparing the physical characteristics of the respective products, Commerce found that "the physical properties and end uses of galvanized PC strand per ASTM A-475 are substantially different from subject PC strand," while Cablesa's zinc-coated PC strand "has no physical properties or end uses that are substantially different from subject PC strand." *See* Final Scope Determination at 8. In examining Cablesa's zinc-coated product, Commerce properly focused on the zinc coating, because all parties agreed that the diameter, grade, and "type" (normal or low relaxation) of Cablesa's zinc-coated product was covered by the Order. *See, e.g.*, Domestic Industry's Scope Request at 9, 12. Those other physical properties are identical to the physical properties of subject PC strand and are, indeed, the critical properties identified in the specification for PC strand. In particular, ASTM A–416 sets forth the defining characteristics of PC strand, and refers to three physical characteristics – diameter, grade, and type (normal or low relaxation).

Cablesa concedes that its zinc-coated PC strand satisfies all of the technical specifications for subject PC strand consistent with ASTM A–416. Cablesa therefore emphasizes the zinc coating on its product to attempt to distinguish its PC strand from the other PC strand products covered by the Order. *See generally* Pl.'s Brief at 23–31. Cablesa maintains that the zinc coating it applies provides "protection against corrosion," rendering its product more like galvanized PC strand conforming to ASTM A–475 (which is excluded from the Order) than it is to the PC strand products that are subject to the Order. *Id.*

However, Commerce found that the zinc coating applied to Cablesa's PC strand is minimal – 0.05 oz./sq. ft., in contrast to the minimum coating weight of 0.40 oz./sq. ft. required for "galvanized" steel wire, as specified by ASTM A–475. *See* Final Scope Determination at 2–7. Other record evidence indicated that, in violation of ASTM A–475, the zinc coating on Cablesa's product was not uniform, but was instead thin and uneven. *See* Domestic Industry's Scope Request at 11-12. In addition, there was evidence that samples of Cablesa's zinc-coated PC strand showed evidence of corrosion only a few months after importation, indicating a lack of the corrosion-resistance that one would expect of a "galvanized" product. *Id.* at l2.

Moreover, as Commerce found, even if the zinc coating applied to Cablesa's product in fact imparted some modest incremental degree of corrosion resistance to the PC strand, that fact alone would not be sufficient to distinguish Cablesa's product from subject PC strand. *See* Final Scope Determination at 7. In the original antidumping investigation, for example, Commerce concluded that *plastic-coated* PC strand was properly within the scope of the investigation (notwithstanding whatever additional protection the plastic coating might provide). As Commerce there stated, the "defining characteristic [of PC strand] continues to be the strand, and covering the merchandise does not change the strand or its chemical or physical properties." *See* Preliminary AD Determination, 68 Fed. Reg. at 42,379 (citation omitted).

Evidence of record supports Commerce's finding that the zinc coating on Cablesa's PC strand does not provide the corrosion resistance that Cablesa claims. For example, the results of tests conducted on a sample of Cablesa's product indicated that it had an average zinc coating weight on each of the seven wires of the strand of only 0.039 oz./sq. ft. – below even the 0.05 oz./sq. ft. coating that Cablesa claims, and less than one-tenth of the zinc coating required for galvanized steel wire under ASTM A–475. The tested sample also showed evidence of corrosion. *See generally* Domestic Industry's Scope Request at Atts. 1, 4. The ASTM A–475 specification for galvanized steel requires that the zinc coating be "continuous and reasonably uniform." Cablesa's product did not meet that requirement.

In an effort to respond to the test results, Cablesa provided an affidavit from Dr. Ned Burns, to support its claims as to the alleged corrosion resistant properties and the galvanized nature of its zinc-coated PC strand. *See* Cablesa's Additional Scope Comments (April 6, 2004) at Att. A. However, information and argumentation submitted by the Domestic Industry substantially undermined the Burns Affidavit. *See generally* Def.-Ints.' Brief at 29.

For example, the Domestic Industry questions whether the sample of zinc-coated PC strand that Cablesa provided to Dr. Burns was representative. *Id*. The Domestic Industry further notes that there is no evidence that Dr. Burns tested the sample that he received; the record is thus devoid of any test results to rebut those submitted by the Domestic Industry. *Id*. Nor did the Burns Affidavit attest that Cablesa's zinc-coated PC strand conformed to any independently-published standards for specified characteristics of galvanized steel. *Id*.

Cablesa argues that it should not be required to identify independent sources or standards to establish that its product is galvanized. However, Commerce had to weigh the Burns Affidavit in light of the evidence submitted by the Domestic Producers that undercuts – and, in some instances, flatly contradicts – Dr. Burns' findings. Under the

circumstances, it was not unreasonable for Commerce to seek information from objective or independent sources to support the contentions in the parties' submissions.

Cablesa also submitted internal company documents such as purchase orders and mill certificates in an effort to prove customer demand for its zinc-coated PC strand, and points to those documents as evidence that its zinc-coated PC strand is recognized as galvanized. *See generally* Pl.'s Brief at 31–34. But Commerce and the Domestic Producers identified numerous internal inconsistencies and discrepancies in Cablesa's documents. Under the circumstances, it was not unreasonable for Commerce to decline to rely on them.

Commerce concluded that "the primary purpose of galvanization is to protect steel which is exposed to the elements from corrosion and it does not appear that Cablesa's product rises to this level." *See* Scope Determination at 7. Contrary to Cablesa's claim that Commerce never actually determined that its zinc-coated PC strand is, in fact, not galvanized (*see* Pl.'s Brief at 12), the Final Scope Determination expressly states that Cablesa's product "does not have the physical characteristics described in any industry standard for galvanization." *See* Final Scope Determination at 6.

Based on the record evidence as a whole, Commerce found that the physical characteristics of Cablesa's PC strand were comparable to those of subject PC strand products within the scope of the Order, because an objective, quantitative, generally-accepted industry standard requires that PC strand be coated with a uniform layer of at least .40 oz./sq. ft. of zinc to be considered galvanized (in contrast to the 0.05 oz./sq. ft. that Cablesa claims). *See* Final Scope Determination at 6–7. Commerce further found that – even if it accepted Cablesa's argument that the zinc coating on its product provided some incremental corrosion protection – it offered no protection beyond that afforded by the plastic-coated PC strand that is subject to the Order. *See* Final Scope Determination at 6–7. In this sense, Cablesa's product is not "like" the ASTM-conforming galvanized steel that is excluded from the Order, and it is instead "like" the subject PC strand covered by the Order. Moreover, Cablesa presented no other evidence to suggest that the physical characteristics of its zinc-coated PC strand differed in any other way from subject PC strand.

Accordingly, substantial record evidence supports Commerce's conclusion as to the first criterion in its *Diversified Products* analysis. Cablesa's zinc-coated PC strand has no physical properties different from subject PC strand.

b. *Customer Expectations*

In the course of its analysis of the second *Diversified Products* criterion, Commerce determined that Cablesa's customers had no unique expectations for Cablesa's product beyond those for regular, non-coated PC strand. *See* Final Scope Determination at 7. Indeed,

Commerce relied in part on Cablesa's own statements that its zinc-coated product is used for the same applications as subject PC strand. *Id.*

Commerce's determination on customer expectations is bolstered by record evidence concerning the pricing of Cablesa's product as compared to the pricing of uncoated or plastic-coated PC strand. *See generally* Domestic Industry Comments on Cablesa's March 17, 2004 Questionnaire Response (March 30, 2004) at 3, 7–8. In particular, the Domestic Industry questions the veracity of Cablesa's assertion that it made substantial investments to electro-galvanize its product, arguing that the statement makes no "economic sense" since "there is no market" for the zinc-coated product (other than the market for uncoated PC strand). *See generally* Def.-Ints.' Brief at 32–33.

In response, Cablesa states that it has been shipping its zinc-coated product to the U.S. "since 1996 at the direct request of customers," and points to purchase orders, quality certificates, and customer affidavits in support of its claim. *See* Cablesa Brief at 34. As discussed above, however, there are significant inconsistencies in those documents. Those inconsistencies, coupled with the record evidence summarized above (establishing that customers have no different expectations for Cablesa's zinc-coated PC strand, as compared to subject PC strand) adequately justified Commerce's conclusion as to the second *Diversified Products* criterion.

c. *End Use*

As to the third *Diversified Products* criterion, Commerce found that Cablesa's zinc-coated PC strand has no end uses that are different from those of subject PC strand. *See* Final Scope Determination at 8. Significantly, Cablesa concedes that the end uses for its zinc-coated PC strand are the same as those for plastic-coated PC strand. *See* Pl.'s Brief at 34. Although – as Cablesa emphasizes – that fact is not alone "dispositive" (*see id.*), it is yet another piece of evidence supporting Commerce's conclusion that Cablesa's zinc-coated PC strand is covered by the Antidumping Order.

Other evidence similarly supports Commerce's finding of identical end uses for Cablesa's zinc-coated PC strand and the subject merchandise, including product information provided by certain of Cablesa's customers. *See generally* Domestic Industry's Rebuttal Letter (April 23, 2004) at 6 & Att. 4. Cablesa cites to two affidavits in response. *See* Pl.'s Brief at 35-36. But, as the Domestic Producers emphasize in their brief, the affidavits on which Cablesa relies do not say as much as Cablesa suggests, and are otherwise of limited utility. *See generally* Def.-Ints.' Brief at 34–35.

Finally, Cablesa contends that Commerce incorrectly concluded that its product could not be used in exposed environments. But

even the Burns Affidavit that Cablesa relies on controverted Cablesa's position. *See generally* Def.-Ints.' Brief at 35. Moreover, Cablesa pointed to no evidence that its zinc-coated strand had actually been used in such an application. The purchase orders that Cablesa points to do not establish such actual use. Indeed, the record evidence seems to indicate that the PTI Barrier Cable specification that Cablesa cites actually requires zinc coating weights in compliance with ASTM A–475. *See* Domestic Industry's Factual Information Submission (March 19, 2004) at Att. 1. Because the zinc coating on Cablesa's PC strand does not meet the ASTM A–475 standard, it could not be used in such applications.

Like Commerce's conclusions as to the first two criteria, its conclusion as to the third criterion in its *Diversified Products* analysis is supported by substantial evidence in the record. Commerce thus did not err in concluding that the end uses of Cablesa's zinc-coated PC strand are the same as those of subject PC strand. And that conclusion lends further support to the agency's finding that Cablesa's zinc-coated PC product is within the scope of the Antidumping Order.

d. *Channels of Trade*

In evaluating the fourth and final criterion of its *Diversified Products* analysis, Commerce found that Cablesa sells all PC strand (whether zinc-coated or not) through the same channel of trade – specifically, distributors. *See* Final Scope Determination at 7. Although Cablesa seeks to dismiss that fact as "largely irrelevant," the criterion is – as the Domestic Producers note – drawn directly from the court's opinion in *Diversified Products* and specifically codified in Commerce's regulations. *See* Pl.'s Brief at 36; Def.-Ints.' Brief at 36.

Cablesa seeks, in effect, to recast the criterion to inquire not whether Cablesa's zinc-coated PC strand and the subject merchandise are sold through the same channel of trade, but – rather– whether galvanized PC strand that is sold pursuant to the ASTM A–475 specification is sold through a different channel of trade. *See* Pl.'s Brief at 36. However, Cablesa's proposed inquiry is at odds with the plain language of the applicable regulation. Further, the record is devoid of evidence on point, because Cablesa does not manufacture galvanized PC strand that is produced to the ASTM standard.

More to the point, the record indicates that Cablesa not only employs the same channel of trade for both subject PC strand and zinc-coated PC strand; Cablesa also sells both products to the same customers. *See* Final Scope Determination at 7–8. That fact provides further strong support for Commerce's conclusion that Cablesa's zinc-coated PC strand shares all pertinent physical characteristics, end uses, and channels of trade with subject PC strand, and that

Cablesa's zinc-coated product – like all other PC strand – is within the scope of the Antidumping Order in this case.

III. *Conclusion*

For all the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record is denied, and the Commerce Department's Final Scope Determination is sustained.

Judgment will enter accordingly.

CABLESA S.A. DE C.V., *Plaintiff, v.* UNITED STATES, *Defendant*, and AMERICAN SPRING WIRE CORP., INSTEEL WIRE PRODUCTS COMPANY, and SUMIDEN WIRE PRODUCTS CORP., *Defendant-Intervenors*.

Court No. 05–00388

JUDGMENT

This case having been duly submitted for decision; and the Court, after due deliberation, having rendered a decision herein;

NOW, therefore, in conformity with said decision, it is

ORDERED that Plaintiff's Motion for Judgment on the Agency Record is denied; and it is further

ORDERED that the U.S. Department of Commerce's Scope Inquiry Final Determination in *Prestressed Concrete Steel Wire Strand from Mexico*, Inv. No. A–201–831 (June 16, 2004) is sustained; and it is further

ORDERED, ADJUDGED and DECREED that this action be, and it hereby is, dismissed.

SLIP OP. 07–30

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

BEFORE: HON. GREGORY W. CARMAN, JUDGE

Court No. 05–00341

JUDGMENT ORDER

Whereas the Court of Appeals for the Federal Circuit reversed in part and vacated in part the judgment of the Court of International Trade (*International Custom Products v. United States*, 374 F. Supp. 2d 1311 (CIT 2005)), it is hereby

ORDERED that U.S. Customs and Border Protection may liquidate or reliquidate, under subheading 0405.20.30, Harmonized Tariff Schedule of the United States, at the duty rate of S1.996/kg, plus additional safeguard duties, the entries listed in the April 18, 2005 Notice of Action issued to plaintiff; and it is further

ORDERED this action be. and hereby is, dismissed.