SLIP OP. 07–55

TROPICANA PRODUCTS, INC., Plaintiff, and LOUIS DREYFUS CITRUS, INC., and FISCHER S/A AGROINDUSTRIA, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and A. DUDA & SONS, INC., CITRUS WORLD, INC., FLORIDA CITRUS MUTUAL, SOUTHERN GARDEN CITRUS PROCESSING CORP., and THE COCA-COLA COMPANY, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 06–00109
Public Version

OPINION

[The International Trade Commission's affirmative determination of material injury by reason of imports of certain orange juice from Brazil REMANDED.]

Dated: April 12, 2007

Neville Peterson, LLP (John M. Peterson, Catherine C. Chen, and George W. Thompson for the plaintiff.

Vinson & Elkins, LLP (Christopher A. Dunn and Valerie S. Ellis) for the plaintiff-intervenor Louis Dreyfus Citrus, Inc.

Kalik Lewin (Robert G. Kalik and Brenna S. Lenchak) for the plaintiff-intervenor Fischer S/A Agroindustria.

Peter D. Keisler, Assistant Attorney General; Jeanne Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Michael J. Dierberg), for the defendant.

James M. Lyons, General Counsel, U.S. International Trade Commission (David A.J. Goldfine and Andrea C. Casson) for the defendant.

Barnes, Richardson & Colburn (Stephen W. Brophy) for defendant-intervenor A. Duda & Sons, Inc., Citrus World, Inc., Florida Citrus Mutual, and Southern Gardens Citrus Processing Corp.

Crowell & Moring, LLP (Jeffrey L. Snyder and Alexander H. Schaefer) for the defendant-intervenor the Coca-Cola Company.

Restani, Chief Judge: This matter is before the court on Plaintiff Tropicana Products Inc.'s ("Tropicana") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Tropicana seeks review of the final determination of the International Trade Commission

("Commission") in Certain Orange Juice from Brazil, USITC Pub. 3838, Inv. No. 731–TA–1089 (Mar. 2006), List 1, P.R. Doc. 329 ("Final Determination"). Specifically, Tropicana challenges the Commission's determination that the industry in the United States producing conventional and organic frozen concentrated orange juice for further manufacturing ("FCOJM") and conventional and organic not-from-concentrate orange juice ("NFC") (collectively "certain orange juice") is materially injured by reason of imports of certain orange juice from Brazil. Fischer S/A Agroindustria ("Fischer") and Louis Dreyfus Citrus, Inc. ("Dreyfus") join the action as Plaintiff-Intervenors. A. Duda & Sons, Inc., Citrus World, Inc., Florida Citrus Mutual, Southern Gardens Citrus Processing Corp., and The Coca-Cola Co. join as Defendant-Intervenors. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000).

BACKGROUND

On December 27, 2004, several domestic producers of certain orange juice[1] filed a petition with the Commission and the Department of Commerce ("Commerce"), claiming that an industry in the United States was materially injured, or threatened with material injury, by reason of imports of certain orange juice from Brazil. Commerce instituted an antidumping duty investigation and found that certain orange juice from Brazil was being sold at less then fair value ("LTFV"). Certain Orange Juice from Brazil, 71 Fed. Reg. 2183 (Dep't Commerce Jan. 13, 2006) (notice of final determination of sales at less than fair value and affirmative final determination of critical circumstances). Thereafter, the Commission gave its final determination to Commerce.

Six commissioners participated in the final determination with three commissioners making an affirmative determination and three making a negative determination.[2] Pursuant to 19 U.S.C. § 1677(11) (2000), a tie vote is resolved in favor of an affirmative determination. Thus, the court will refer to the affirmative determination as the Commission's determination.

In determining that the domestic industry was materially injured by subject imports from Brazil, the Commission examined data from crop year ("CY") 2001/02 through CY 2004/05. The Commission found that the volume of the subject imports, both in absolute and

---

[1] The petitioners were Florida Citrus Mutual, A. Duda & Sons, Inc., Citrus World, Inc., Peace River Citrus Products, Inc., and Southern Garden Citrus Processing Corp. *Certain Orange Juice from Brazil–Staff Report*, Inv. No. 731–TA–1089 (Jan. 27, 2005), at I–1, List No. 1, P.R. Doc. 329 ("*Final Staff Report*").

[2] Chairman Stephen Koplan, Commissioner Charlotte R. Lane, and Commissioner Shara L. Aranoff made an affirmative determination while Vice Chairman Deanna Tanner Okun, Commissioner Jennifer A. Hillman, and Commissioner Daniel R. Pearson made a negative determination.

relative terms, was significant over the period of investigation ("POI"). The Commission also found that the lower-priced subject imports prevented increases in prices for the domestic like product, which otherwise would have occurred to a significant degree. Although the spread of citrus diseases and the large number of hurricanes in 2004 and 2005 in Florida caused a substantial decline in the domestic production of round oranges, the Commission concluded that these factors did not negate the "causal nexus" between the subject imports and the poor financial performance of the domestic industry, because the total volume of subject imports exceeded the shortfall in domestic production. Tropicana appeals the determination on several grounds.

STANDARD OF REVIEW

The court will uphold the Commission's final determination in an antidumping duty investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

To determine whether a domestic industry is materially injured by reason of a subject import, the Commission must find: (1) a "'present material injury or a threat thereof,'" and (2) causation of such harm by reason of subject imports. Hynix Semiconductor, Inc. v. United States, 431 F. Supp. 2d 1302, 1306 (CIT 2006) (quoting Chr. Bjelland Seafoods A/S v. United States, 19 CIT 35, 37 (1995)). In so doing, the Commission "shall consider [three factors] – (I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices . . . for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations in the United States." 19 U.S.C. § 1677(7)(B)(i)(I)–(III). Additionally, the Commission "may consider such other economic factors as are relevant to the determination. . . . " 19 U.S.C. § 1677(7)(B)(ii).

Plaintiff and Plaintiff-Intervenors argue that the Commission's determination is not based on substantial evidence for several reasons. They first argue that data upon which the Commission relied to make its determination are not representative of the entire domestic industry. They then argue that the Commission failed to examine properly several other factors that undermine the determination that the domestic industry was materially injured by reason of the subject imports. The court first describes the relevant Commission findings and then addresses the parties' arguments regarding the sufficiency of the Commission's data from the domestic industry and the Commission's affirmative determination.

I. Findings by the Commission

A. Definition of the Domestic Industry

"Domestic industry" consists of "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A). In cases involving agricultural products, such as that at issue, the Commission may include growers of a raw agricultural input within the domestic industry producing the processed agricultural product if:

> (I) the processed agricultural product is produced from the raw agricultural product through a single continuous line of production; and
> (II) there is a substantial coincidence of economic interest between the . . . growers . . . and the processors of the processed agricultural product based upon the relevant economic factors.

19 U.S.C. § 1677(4)(E)(i). The Commission found both factors of § 1677(4)(E) present in this case and thus defined the domestic industry to include both the domestic processors of certain orange juice and the domestic growers of round oranges.[3] Final Determination, at 10–12.

---

[3] As to the first factor of § 1677(4)(E), a processed product is considered to be processed from the raw product in a single, continuous line of production if:

> (I) the raw agricultural product is substantially or completely devoted to the production of the processed agricultural product; and
>
> (II) the processed agricultural product is produced substantially or completely from the raw product.

19 U.S.C. § 1677(4)(E)(ii). Here, the Commission found that certain orange juice is produced from round oranges through a single, continuous line of production because the cost of the raw materials for certain orange juice, round oranges, comprised of approximately 80% of the cost of the domestic like product sold during the POI. *Final Determination*, at 10. The Commission also noted that approximately 95% of Florida round oranges are processed into orange juice. *Id.*

As to the second factor of § 1677(4)(e), the Commission may consider price, added market value, or other economic interrelationships. Further,

> (a) if price is taken into account, [the Commission shall] consider the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product; and
>
> (b) if added market value is taken into account, [the Commission shall] consider whether the value of the raw agricultural product constitutes a significant percentage of the value of the processed agricultural product.

19 U.S.C. § 1677(4)(E)(iii). Here, the Commission found that there is a "substantial coincidence of economic interest between orange growers and domestic producers" of certain orange juice. *Final Determination*, at 11. The Commission found that because the vast majority of domestic fresh oranges were sold through "participation plans," where a grower sells his oranges to an extractor in exchange for a return based on the final amount received by the extractor when the manufactured orange juice is sold, the economic interests of the

After defining the domestic industry, the Commission obtained information from both domestic processors of certain orange juice and domestic growers of round oranges to conduct its determination. The Commission obtained data from twelve out of twenty processors of orange juice in Florida. The data obtained accounted for more than 90% of the domestic production of certain orange juice in CY 2004/05. Final Staff Report , at III–1. In contrast, the Commission obtained responses from a small percentage of 400 selected growers.[4] Certain Orange Juice from Brazil–Additions & Revisions to the Staff Report , Inv. No. 731–TA–1089 (Feb. 2, 2006), at VI–26, List No. 2, C.R. Doc. 439 ("Additions & Revisions"). Of those responding, half provided usable data. Id. Those reporting usable data accounted for approximately 12% of the U.S. production of oranges. Id.

B. Conditions of Competition

Several conditions of competition informed the Commission's "analysis of whether the domestic industry [was] materially injured by reason of subject imports from Brazil." Final Determination, at 14. The Commission first examined the supply conditions of the domestic industry, finding that the domestic processors of certain orange juice are almost wholly dependent on domestic growers, mostly in Florida, for their supply of round oranges because there is no economical way to import oranges. Id. The processors thus face year-to-year fluctuations in the supply of round oranges due to weather conditions and other factors such as citrus disease. Id. For example, during the POI, the Florida orange crop declined from 230 million boxes in CY 2001/02 to 203 million boxes in CY 2002/03, before increasing to 242 million boxes in CY 2003/04, which was the second largest Florida orange crop in history. Id. In the aftermath of Hurricanes Charley, Frances, and Jeanne, however, the Florida orange crop declined to 149.6 million boxes in 2004/05. Id. Because of this "inherent volatility in the domestic supply of round oranges, domestic producers of certain orange juice maintain relatively large bulk juice inventories."[5] Id. at 15.

---

growers and processors were tied together. *Id*. The Commission also found that because the cost of oranges accounted for 80% of the cost of the domestic like product, purchasers of round oranges had an incentive to help growers lower their production costs. *Id*. at 12. In support of this, the Commission noted that cooperatives provided grove care, maintenance, and harvesting services to grower-members. *Id*. Thus, the Commission concluded that the second requirement of § 1677(4)(E) was also met. *Id*.

[4] Questionnaires were sent to 400 growers, which were selected through a random sampling of an electronic list of 11,000 grower-members of the Florida Citrus Mutual. *Final Staff Report*, at III–1. [ ] responded. *Additions & Revisions*, Inv. No. 731–TA–1089 (Feb. 2, 2006), at VI–26, List No. 2, C.R. Doc. 439 ("*Additions & Revisions*").

[5] During the POI, the size of the domestic inventory of certain orange juice amounted to approximately one-half of the domestic production in any given year. *Final Determination*, at 15. "The ratio of domestic producers' carryover stocks to U.S. production increased from 48.3 percent in crop year 2001/02 to 56.5 percent in crop year 2002/03 to 57.2 percent in

After the domestic production, the second largest supplier of certain orange juice to the United States is Brazil. Id. Brazil is the world's largest orange juice producer and exporter, supplying 84% of the global orange juice market.[6] Id. Five Brazilian firms, Cargill, Coinbra-Frutesp, Cutrale, Fischer, and Montecitrus, are covered by the scope of this antidumping duty investigation. Id. at 15 n.119. Another significant Brazilian producer, Citrovita, is not covered and its imports are considered to be non-subject imports.[7] Id.

The Commission then examined the demand conditions of the domestic industry, finding that the domestic consumption of orange juice increased modestly by 3.5 percent during the POI. Id. at 16. Domestic consumption fell from 1.45 billion gallons SSE[8] in CY 2001/02 to 1.43 billion gallons SSE in CY 2002/03. Id. It then increased slightly to 1.44 billion gallons SSE in CY 2003/04 and increased again to 1.50 billion gallons SSE in CY 2004/05. Id.

Additionally, the Commission addressed the industry practice of blending orange juice, finding that blending permits producers of orange juice to obtain consistent quality to satisfy USDA standards, industry standards, customer preferences, and country of origin labeling requirements. Id. Although blending is useful to the domestic industry, the majority of U.S. purchasers (13/23) stated that the domestic orange juice did not need to be blended with the subject imports. Id. at 17. All responding U.S. purchasers stated that domestic orange juice and subject imports from Brazil were of comparable USDA grade and viscosity to domestic juice. Id. Further, 11 out of 18 responding U.S. purchasers also stated that domestic orange juice and subject imports from Brazil were always or frequently interchangeable with the domestic juice. Id. Thus, the Commission found that the domestic juice did not need to be blended with subject imports to achieve quality specifications. Id.

C. Volume of Subject Imports

To evaluate the volume of subject imports, the Commission must determine "whether the volume of [subject imports], or any increase in that volume, either in absolute terms or relative to production or

---

crop year 2003/04 to 58.6 percent in crop year 2004/05." *Id.* at 15 n.111.

[6] Four firms, Coinbra-Frutesp, Cutrale, Fischer/Citrosuco, and Montecitrus, produced the vast majority, 85%, of the total Brazilian production of subject merchandise in CY 2004/05. *Final Determination*, at 15. "Cutrale is Brazil's largest producer ([ ] percent) followed by Fischer/Citrosuco ([ ] percent)." *Certain Orange Juice from Brazil*, Inv. No. 731–TA–1089 (Mar. 2006), at 22 n.116, List 2, C.R. Doc. 559 ("*Final Determination (Confidential)*").

[7] Citrovita was previously subject to an antidumping duty order which was effectively revoked on August 5, 2004, pursuant to a negative determination on a second sunset review. *Frozen Concentrated Orange Juice from Brazil*, 70 Fed. Reg. 19,416 (ITC Apr. 13, 2005) (revocation of antidumping duty order).

[8] Single strength equivalent ("SSE") gallons are a standard volume measurement for ready-to-drink orange juice. *Final Determination*, at 17 n.132.

consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). Here, the Commission examined the volume of subject imports and found it to be significant both in absolute terms and relative to domestic production and consumption. Final Determination, at 17.

Specifically, the Commission noted that imports increased by 122.0 million gallons SSE, or 111.2%, from the first year of the POI to the last year of the POI.[9] Id. Subject imports' share of the domestic market rose by 7.9 percentage points overall, increasing from 7.6% in CY 2001/02 to 15.9% in CY 2002/03, then dropping to 10.7% to CY 2003/04 before increasing again to 15.4% in CY 2004/05. Id. at 18–19. Subject imports rose sharply from 154.2 million pounds solids in CY 2003/04 to 231.7 million pounds solids in CY 2004/05, the heavily weather affected period. Id. at 19. Although non-subject imports' share of the domestic market also increased overall by 2.8% during the POI, the Commission noted that the subject imports gained far more market share than non-subject imports. Id. Meanwhile, the domestic producers' share of the domestic market declined overall by 10.7% during the POI.[10] Id.

The Commission also found that imports of certain orange juice were "necessary to meet domestic demand." Id. at 17–18. In fact, during the POI, the increases in the amount of subject imports entering the United States occurred when domestic shipments were at their lowest levels. Id. at 18.

The Commission rejected three arguments that the volume of subject imports was insignificant. Id. at 19–21. As indicated, the Commission first rejected the argument that imports were necessary for blending, finding that the record did not establish that the blending of domestic and imported juice was necessary to meet quality standards. Id. at 19. The Commission also rejected respondents' argument that a drawback of the duties paid on the Brazilian imports made it possible for U.S. producers to export certain orange juice.[11] Id. The Commission noted that because drawback credits are collected after import duties are paid, drawback credits do not provide any net benefit for exporters. Id. The Commission further found that

---

[9] The volume of subject imports increased from 109.7 million gallons SSE in CY 2001/02 to 227.3 million gallons SSE in CY 2002/03, then decreased to 154.2 million gallons SSE in CY 2003/04 before rising again to 231.7 million gallons SSE in CY 2004/05. *Final Determination*, at 17 n.133.

[10] Non-subject imports' share of the domestic market fell from 5.2% in CY 2001/02 to 4.2% in CY 2002/03, then increased slightly to 4.5% in CY 2003/04 before increasing to 8.0% in CY 2004/05. *Final Determination*, at 19 n.137.

[11] A drawback is " '(1) a repayment in whole or in part of customs duties paid on imported merchandise that is reexported (either in the same form as imported or manufactured into a more finished article) or (2) the refund upon the exportation of an article of a domestic tax to which it has been subjected.' " Novacor Chems., Inc. v. United States, 171 F.3d 1376, 1378 n.1 (Fed. Cir. 1999) (quoting Dictionary of Tariff Information 271 (1924)).

"the fact that the value of drawback credits available significantly exceeds the value of domestic exports demonstrates that there is limited, if any, correlation between domestic exports and the availability of drawback credits." Id. at 19–20.

Finally, and most significantly, although the Commission found that imports were necessary to meet demand, the Commission rejected the argument that the subject imports here merely remedied the shortfall in the domestic production of round oranges for juice. Id. at 20. Although subject imports tend to rise in years when Florida production falls and vice-versa,[12] the Commission found that this was a "simple comparison" that masked the important changes in the supply/demand balance in the U.S. market over the POI. Id. at 20. In particular, the Commission found that "the amount of Brazilian subject imports held in U.S. inventory increased [over the POI], thereby exceeding the volume of imports necessary to counter domestic production shortfalls." Id. The Commission concluded that because the Brazilian imports' percentage share of the domestic ending stocks increased from CY 2001/02 to CY 2004/05 (4.9% to 8.7%) and because the domestic importers' end-of-the period inventories of subject imports increased from 33.8 million gallons SSE in CY 2001/02 to 51.3 million gallons SSE in CY 2004/05, more Brazilian subject imports had entered the United States than necessary to remedy a domestic supply shortage.[13] Id. at 21. Thus, the Commission found that the volume of subject imports was significant, in both absolute terms and relative to domestic production and consumption. Id.

---

[12] The data are summarized as follows:

Crop Year	2001/02	2002/03	2003/04	2004/05
Florida Production of Oranges (million of boxes)	230	203	242	149.6
Volume of Subject Imports (million of gallons)	109.7	227.3	154.2	231.7

Final Determination, at 14, 17 n. 133.

[13] The Commission examined the following data in arriving at its conclusion:

Crop Year	2001/02	2002/03	2003/04	2004/05
U.S. importers' Brazilian inventory (1,000 gallons SSE)	33,791	41,795	26,633	51,312
U.S. ending stocks (1,000 SSE)	692,163	704,509	842,139	590,000
Brazilian import inventory/ U.S. ending stocks	4.9%	5.9%	3.2%	8.7%

Final Determination, at 21.

D. Price Effect of Subject Imports

In evaluating the price effects of subject imports, the Commission must consider: (1) whether "there has been significant price underselling by the imported merchandise" as compared to the domestic like product; and (2) whether subject imports "otherwise depress[ ] prices to a significant degree or prevent[ ] price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii); see also Taiwan Semiconductor Indus. Ass'n v. United States, 23 CIT 410, 412, 59 F. Supp. 1324, 1327 (1999) (stating that the Commission must evaluate "whether price underselling by the subject imports is significant and whether domestic price depression or suppression caused by the subject imports is significant").

Here, the Commission found that subject imports of FCOJM undersold the domestic like product by approximately 8.2%. Final Determination, at 22. In contrast, NFC subject imports often oversold the domestic like product. Id. Nevertheless, the Commission found that there was significant underselling overall because NFC accounted for less than 10% of the subject imports by volume during the POI and because the domestically produced FCOJM represented a substantial volume of domestic sales during the POI. Id.

The Commission also found that "subject import prices are suppressing domestic price increases, which otherwise would have occurred, to a significant degree." Id. at 23. The Commission found that because the unit costs of goods sold ("COGS") for domestic processors increased only slightly while the domestic industry's ratio of COGS to net sales had been increasing steadily, "the domestic industry has been unable to recoup its rising production costs through higher prices on its sales of the domestic like product."[14] Id.

The Commission attributed such "cost-price squeeze" to the volume of Brazilian imports entering the United States at lower than market prices rather than to demand factors. Id. at 23–24. The Commission noted that the domestic industry's cost-price squeeze accelerated in the last year of the POI when Brazilian imports were at their highest levels and that between 2003 and 2004, this cost-price squeeze resulted in a 7.8% decline in the domestic industry's operating margin. Id. at 24.

The Commission again emphasized that the increase in subject imports in CY 2004/05 "did not simply meet demand and make up for the reduced U.S. supply." Id. The Commission found that the volume of subject imports increased 77.5 million gallons SSE from

---

[14] The domestic industry's COGS in dollars per pound decreased from $0.76 in 2002 to $0.72 in 2003, then rose to $0.77 in 2004 before rising again to $0.81 in the interim of 2005. *Final Determination*, at 23 n.161. The domestic industry's COGS as a share of net sales increased from 90% in 2002 to 92.9% in 2003, then rose again to 96.3% in 2004 before falling slightly to 93.5% in the interim of 2005. *Id.* at 23 n.162.

154.2 million gallons SSE in CY 2001/02 to 231.7 million gallons SSE in CY 2004/05. Id. The Commission then noted that the "inventories of subject imports increased from 26.6 million gallons at year end 2003/04 to 51.3 million gallons at year end 2004/05, an increase of 24.7 million gallons." Id. The Commission found that 32% of this increase went into inventories and was not "used to meet U.S. demand and replace decreased domestic supplies caused by the 2004 hurricanes." Id. The Commission found that this inventory-related increase meant that "subject imports [were] suppressing prices" because "lower inventories would have created upward pressure on domestic prices of certain orange juice, allowing domestic processors an opportunity to more fully recover cost increases." Id. Thus, the Commission concluded that "the increasing volumes of lower-priced subject imports prevented increases in domestic prices for certain orange juice, which otherwise would have occurred, to a significant degree." Id. at 24–25.

E. Impact of Subject Imports

After the Commission has determined that the volume and price effects of subject imports are significant, the Commission must assess "the impact of imports of such merchandise on domestic producers of domestic like products." 19 U.S.C. § 1677(7)(B)(i)(III). To do so, the Commission must "evaluate all relevant economic factors which have a bearing on the state of the [domestic] industry." 19 U.S.C. § 1677(7)(C)(iii). Relevant factors include, but are not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices, [and]
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

Id. § 1677(7)(B)(iii). The Commission has the discretion "to determine the significance of any particular factor or of the various factors affecting an industry in each particular case." Hynix, 431 F. Supp. 2d at 1313.

The Commission found that the domestic industry's condition worsened over the POI. "Domestic producers' market share declined from 87.2 percent in crop year 2001/02 to 79.9 percent in crop year 2002/03, increased to 84.8 percent in crop year 2003/04, and fell to 76.5 percent in crop year 2004/05." Final Determination, at 25. While domestic processors' capacity increased by 2.7% overall during the POI, their capacity utilization dropped by 28.3 percentage points

between CY 2001/02 and CY 2004/05.[15] Id. at 25–26. Domestic production fell 31.3% during the POI. Id. at 26. Domestic producers' end-of-year inventories of certain orange juice also fell overall, although the amount of Brazilian subject imports held in U.S. inventories increased. Id. The Commission found that relative to production, U.S. shipments, and total shipments, domestic producers' inventories increased between CY 2001/02 and CY 2004/05, and reported inventories of the subject imports increased from 2.3% of total available supply in CY 2001/02 to 3.4% of total available supply in CY 2004/05.[16] Id.

The Commission examined the financial indicators for domestic processors, finding that there was "an overall decline in their operating performance" for the POI. Id. By volume, net sales for domestic processors declined from 985.0 million pounds solids in 2002 to 975.0 million pounds solids in 2003 to 904.5 million pounds solids in 2004 to 695.5 million pounds solids in interim 2005.[17] Id. By value, net sales for domestic producers declined from $852.0 million in 2002 to $781.9 million in 2003 to $718.7 million in 2004 to $603.8 million in interim 2005. Id. The ratio of operating income to net sales and the profitability, cash flow, and return on investment for domestic processors also declined during the POI. Id. at 26–27.

The Commission then examined the condition of the growers, finding that they experienced declining operating profitability during the POI. Id. at 27. Domestic growers' operating income declined from $12.7 million in 2002 to $3.9 million in 2004. Id. Domestic growers' ratio of operating income to net sales and net sales by value also declined during the POI. Id. The Commission noted that the domestic growers experienced this declining profitability despite receiving $5.7 million in U.S. government financial assistance in 2003 and 2004. Id.

The Commission rejected arguments that the injury to the domestic industry was attributable to reduced domestic demand, domestic supply shortages, U.S. inventory levels, the "necessity of subject imports for blending and duty drawback, and the growing presence of non-subject imports." Id. Although the Commission recognized that some of the declining trends experienced by the domestic industry were the result of hurricanes and citrus disease, the Commission concluded

---

[15] "Domestic industry capacity utilization declined from 85.4 percent in crop year 2001/02 to 74.5 percent in crop year 2002/03, increased to 86.7 percent in crop year 2003/04, and dropped to 57.1 percent in crop year 2004/05." *Final Determination*, at 26 n.176.

[16] The number of production workers employed by domestic processors, the hours worked, and the wages paid also declined from CY 2001/02 to CY 2004/05. *Final Determination*, at 26 & n.181.

[17] The financial indicators for processors and growers are expressed on a fiscal year basis. *Final Determination*, at 26 n.183.

> that the record demonstrates a causal nexus between subject imports and material injury to the domestic industry independent of these other factors, based on the extent to which the total volume of Brazilian subject merchandise present in the U.S. market exceeds any supply shortage and the effect of low prices of such volumes on the domestic industry's pricing and financial performance.

Id. at 28. As to non-subject imports, the Commission found that "while the volume of nonsubject imports rose over the period examined, they grew at a slower rate and represented a smaller share of apparent consumption than Brazilian subject imports." Id. at 27–28. Thus, the Commission determined that "the domestic industry producing certain orange juice [was] materially injured by reason of subject imports of certain orange juice from Brazil that [were] sold in the United States at less than fair value." Id. at 28.

II. Tropicana's Claims Regarding the Sufficiency of the Data from the Domestic Industry

Tropicana argues that the limited data received from the growers were not representative of the growers and thus, the Commission should not have relied upon it to evaluate the condition of the entire industry. Tropicana argues that because the orange juice industry was defined to consist of both growers and processors, the Commission must conduct a separate analysis of each group under 19 U.S.C. § 1677 to determine whether the domestic industry as a whole was materially injured by reason of the subject imports.

Tropicana's argument is flawed insofar as it asks the court to direct the Commission to segment the domestic industry into growers and processors and to conduct a separate analysis for each segment of the industry. "[I]t [is] clear from the language of 19 U.S.C. § 1677(4)(A) (1988) that 'Congress intended for the Commission to consider the entire industry'. . . ."[18] Comm. for Fair Coke Trade v. ITC, Slip Op. 04-68, 2004 Ct. Int'l Trade LEXIS 87, at *69 (CIT June 10, 2004) (quoting Calabrian Corp. v. United States, 16 CIT 342, 350, 794 F. Supp. 377, 385 (1992)) (footnote omitted). Indeed, the "language [of § 1677(4)(A)] defies the suggestion that the [Commission] must make a disaggregated analysis of material injury." [Commission] d[oes] not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of [different segments of the industry] separately." Comm. for Fair Coke Trade, 2004 Ct. Int'l Trade LEXIS 87, at *69.

---

[18] As previously stated, 19 U.S.C. § 1677(4)(A) defines an industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."

Although the Commission is not required to make a disaggregated analysis of material injury and instead can rely upon a set of data that is representative of both the growers and the processors, here it examined both financial data from processors and from growers to assess the impact of the subject imports on the domestic industry. Tropicana challenges this, arguing that the data is not representative of the entire domestic industry because the information from the growers is derived from responses of less than half a percent of an estimated 11,000 growers, representing only 12% of the domestic production of round oranges.[19] Tropicana essentially argues that under Chung Ling Co. v. United States, the Commission errs "in making findings and conclusions as to many financial conditions and trends of the 'industry' based merely on a small and random portion of the initial representative sampling of producers . . . [because] [s]uch a data base ha[s] no pretense of being representative." 16 CIT 636, 640, 805 F. Supp. 45, 49 (1992).

Here, the Commission responded to criticism regarding the data from the growers, stating that:

> In accordance with the grower/processor provision, we have included growers in our domestic industry definition. We note, however, that our conclusions regarding the significant adverse impact of subject imports on the domestic industry would be the same whether growers are included in the domestic industry or not.

Final Determination, at 27 n.193.

It appears that the Commission decided to rely heavily on data from processors rather than the small amount of data from growers. In itself, this is not improper, as legislative history shows that,"[i]n making its injury determination, the [Commission] may give greater weight to one or the other group within the industry, in proportion to their relative importance, if either group accounts for a significant portion of the total value of the processed product." S. Rep. No. 100–71, 100th Cong., at 111 (1987). It is not per se unreasonable for the Commission to weigh the processors' data more heavily than that of the growers, particularly because the processors were the direct producers of the end domestic like product at issue. Further, given the Commission's finding that the economic interests of the growers coincide with those of the processors, see Final Determination, at 11–12, it is also reasonable to conclude that the processors' data may partially reflect the condition of the growers. Thus, despite the mi-

---

[19] The Commission's Staff Report also stated that the "extremely small number," i.e. [ ], of responses from domestic growers "may well not represent a true picture of the operational results of all U.S. growers." *Final Staff Report*, at VI–11; *Additions & Revisions*, at VI–26.

nuscule response rate from the growers, the remainder of the data collected might be sufficient to support the Commission's determination.

This matter, however, cannot be judged in isolation. The decision as to which data to rely on affects other aspects of the determination and given the other problems addressed here, the fact of the extremely small amount of data from growers may lead to an unsupported determination.

III. The Parties' Claims Regarding the Commission's Affirmative Determination of Material Injury by Reason of Subject Imports

Putting aside the sufficiency of the Commission's data gathering, as previously discussed, the Commission must evaluate three factors: (1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of the domestic like products. 19 U.S.C. § 1677(7)(B)(i)(I)–(III). As indicated, from its evaluation of these factors, the Commission must find: (1) a " 'present material injury or a threat thereof,' " and (2) a casual link to the subject imports. Hynix, 431 F. Supp. 2d at 1306 (citing Chr. Bjelland Seafoods A/S, 19 CIT at 37). To support a finding of material injury, the Commission must show that the harm suffered by the domestic industry is "not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). To support a finding of a causal relationship, the Commission must show a "causal – not merely temporal – connection between the [subject imports] and the material injury." Gerald Metals, Inc. v. United States, 132 F.3d 716, 720 (Fed. Cir. 1997). At issue here is whether the Commission demonstrated the existence of a causal relationship between the subject imports and the condition of the domestic industry.

Although the Commission is not required to employ any particular methodology in determining whether the causation element is met, "causation is not shown if the subject imports contributed only 'minimally or tangentially to the material harm.' " Bratsk Aluminium Smelter v. United States, 444 F.3d 1369, 1373 (Fed. Cir. 2006) (quoting Gerald Metals, 132 F.3d at 722); requirement is met so long as the effects of dumping are not merely incidental, tangential, or subject imports contributed only minimally to the injury"). Subject imports, however, "need not be the sole or principal cause of injury . . . [so] long as [their] effects are not merely incidental, tangential or trivial." Nippon Steel Corp. v. ITC, 345 F.3d 1379, 1381 (Fed. Cir. 2003).

In making its determination, " '[t]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject

imports.' " Taiwan Semiconductor Indus. Ass'n v. ITC, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (quoting H.R. Doc. No. 103–316, Vol. 1, at 852 (1994)). In so doing, the Commission cannot "simply not[e] a potential factor and issu[e] a conclusory assertion that such a factor did or did not play a major role in causing a material injury." Hynix, 431 F. Supp. 2d at 1320. Instead, the Commission must "analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing that injury." Id. at 1317; Taiwan Semiconductors, 266 F.3d at 1345 ("[T]o properly make a material injury determination, the Commission must analyze contradictory evidence or evidence from which conflicting inferences could be drawn, to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way." (citations & quotation marks omitted)).

Here, the Plaintiff and Plaintiff-Intervenors argue that the Commission's affirmative determination of material injury by reason of subject imports is not supported by substantial evidence because the Commission did not examine all the issues relating to the shortfall in domestic production of certain orange juice, the opposition of certain domestic orange juice processors to the petition, the impact of non-subject imports, the effects of PepsiCo's imports of ultra low pulp orange juice ("ULPOJ"), and the need of U.S. producers to use Brazilian imports for blending with domestic juice and for obtaining duty drawbacks for their U.S. exports.

The court agrees that the Commission did not examine all of the significant issues relating to the shortfall in domestic production of certain orange juice, the opposition of certain domestic orange juice processors to the petition, or the impact of non-subject imports. The court does not agree, however, that, as isolated matters, the Commission erred in not addressing the effect of ULPOJ imports in its final determination or in finding that it is unnecessary to use subject imports for blending with domestic juice or for obtaining duty drawbacks.

A. Consideration of the Shortfall in the Supply of Domestic Round Oranges

Tropicana and the Plaintiff-Intervenors contend that the Commission erred in discounting the effect of a shortfall in the production of the domestic like product on the domestic industry. Specifically, they argue that the volume of subject imports and the price effect of subject imports are not significant because subject imports were necessary to remedy the short supply of domestic oranges. They reason that any injury experienced by the domestic industry is due to the dramatic fall in the domestic production of certain orange juice in CY 2004/05.

Here, the Commission did find that subject imports were necessary to meet domestic demand. Final Determination, at 17–18. The

record also shows that the level of subject imports is inversely related to the level of the domestic production of the like product – the amount of subject imports rises when domestic production falls, and vice versa.[20]

Despite its own findings, the Commission concluded that the volume of the subject imports and the price effect of the subject imports were significant and that subject imports were causing material injury to the domestic industry. Id. at 28. The Commission's conclusion relied heavily upon its finding that "Brazilian subject imports increasingly exceeded residual demand throughout the period examined." Id. at 19. The Commission found that the volume of Brazilian subject imports must have exceeded the volume necessary to counter domestic production shortfalls because the volume of subject imports held in domestic inventory and the percentage of inventories comprised of subject imports increased from CY 2003/04 to CY 2004/05. Id. at 21. Thus, the Commission found that the volume of subject imports, both absolute and relative to domestic production and consumption, was significant,[21] id., and that the subject imports were suppressing prices because "lower inventories would have created upward pressure on domestic prices of certain orange juice." Id. at 24. The Commission's determination is lacking.

While the Commission relies upon its finding that subject imports increasingly exceeded residual demand, the Commission never actually determined the level of residual demand. As Plaintiff-Intervenor Dreyfus suggests, residual demand can be defined as the difference between the domestic consumption and the domestic juice available.[22] When so defined, the record shows that subject imports did not increasingly exceed residual demand but fluctuated from year to year, increasing when domestic production was higher and decreasing when domestic production was lower.[23] This may be easily explained by the difficulty in predicting the exact production levels in

---

[20] The domestic production of certain orange juice decreased from approximately 1.432 billion gallons SSE in CY 2001/02 to 1.246 billion gallons SSE in CY 2002/03 before increasing to 1.471 billion gallons SSE in CY 2003/04 and then decreasing significantly to 1.006 billion gallons SSE in CY 2004/05. *Final Staff Report*, at Table IV–6. Meanwhile, the volume of subject imports increased from 109.7 million gallons SSE in CY 2001/02 to 227.3 million gallons SSE in CY 2002/03, then decreased to 154.2 million gallons SSE in CY 2003/04 before rising again to 231.7 million gallons SSE in CY 2004/05. *Final Determination*, at 17 n.133.

[21] The parties do not appear to contest that the absolute volume of subject imports was significant. Although a finding that the volume of subject imports is significant in absolute terms may be sufficient to support a finding of an overall significant volume of imports, *see Hynix*, 431 F. Supp. 2d at 1308, there nevertheless may be a negative determination if subject imports contributed only minimally to the injury. *Gerald Metals*, 132 F.3d at 722.

[22] The amount of domestic juice available each year can be defined as the sum of domestic production for that year and the change in domestic inventory levels, whether positive or negative.

[23] The data, in 1,000 gallons SSE, can be summarized as follows:

order to adjust the level of subject imports to correspond perfectly. Furthermore, in the last year of the POI, the level of subject imports did not exceed the residual demand but was actually insufficient to meet the domestic demand. See supra, n.21. The Commission did not address this aspect of the problem.

Rather than examine the amount of residual demand throughout the POI to assess whether the level of subject imports exceeded the level of residual demand in each year, the Commission instead relied upon an increase in domestic inventory levels of subject imports from the first year of the POI to the last year of the POI to negate the relationship between domestic production levels and subject import levels. Final Determination, at 20–21. In so doing, the Commission fails to address the fact that the level of Brazilian imports held in domestic inventory actually fluctuated every year of the POI. See id. at 21. The level of Brazilian imports held in domestic inventory increased from 33.8 million gallons SSE in CY 2001/02 to 41.8 million gallons SSE in CY 2002/03, then fell to 26.6 million gallons SSE in CY 2003/04 before increasing again to 51.3 million gallons SSE in CY 2004/05. See id. Likewise, the ratio of subject imports in domestic inventory to the total ending stocks of domestic inventory also fluctuated year to year, increasing from 4.9% in CY 2001/02 to 5.9 % in CY 2002/03 before falling to 3.2% in CY 2003/04 and increasing again to 8.7% in CY 2004/05. See id. Meanwhile, domestic production fell from 1.432 billion gallons SSE in CY 2001/02 to 1.246 billion gallons SSE in CY 2002/03 before increasing to 1.471 billion gallons SSE in CY 2003/04 and then falling again to 1.006 billion gallons SSE in CY 2004/05. Final Staff Report, at Table IV–6. As seen here, the level of subject imports held in domestic inventory was inversely

---

CY	Domestic Production	Increase/ (Decrease) in Domestic Inventory Levels	Available Domestic Juice	Domestic Consumption	Residual Demand	Imports from Brazil	Excess of Imports over Residual Demand
2001/02	1,432,162	(6,301)	1,438,463	1,445,959	7,496	109,728	102,232
2002/03	1,246,761	12,346	1,234,415	1,422,460	188,045	227,280	39,235
2003/04	1,471,334	137,630	1,333,704	1,432,822	99,118	154,203	55,085
2004/05	1,006,642	(252,139)	1,258,781	1,497,781	239,000	231,711	(7,289)

Final Staff Report, at Table IV–6. In years when the domestic inventory levels decreased, more juice was available for domestic consumption, and vice versa.

The large excess in CY 2001/02 may be explained by the large decrease in domestic consumption from the years preceding the POI to CY 2001/02. During the four years prior to the POI, domestic consumption was over 1.5 billion gallons SSE in each year, reaching 1.596 billion gallons SSE in CY 1997/98. *Id*. In particular, domestic consumption was at 1.521 billion gallons SSE in CY 2000/2001 before falling significantly to 1.445 billion gallons SSE in CY 2001/02. *Id*.

correlated to the level of production of the domestic like product – rising when production levels fell and vice-versa.

This correlation is likely explained by the need of the "domestic producers of certain orange juice [to] maintain relatively large bulk juice inventories" to ensure their supply of certain orange juice during fluctuations in domestic production. Final Determination, at 15. For instance, the increase in the level of subject imports held in domestic inventory between CY 2003/04 and CY 2004/05 was accompanied by a dramatic decrease in production levels between those crop years.[24] In fact, the ending stocks of domestic inventory were lower in CY 2004/05 when compared to any other year in the POI. Final Determination, at 21. In light of the fact that the domestic producers chose to maintain large bulk inventories, the domestic industry may very well have needed to increase their imports of certain orange juice from Brazil to prevent the inventory levels from falling even further. The Commission's determination, however, did not examine whether the domestic industry was importing certain orange juice from Brazil to maintain a certain level of inventories in order to deal with volatility in domestic production.[25] By "fail[ing] to consider [several] important aspect[s] of the problem," the Commission's determination is arbitrary and capricious. See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Thus, the court remands this issue to the Commission to address.

Relatedly, because the Commission has relied upon the increase in the level of subject imports held in domestic inventory to support its findings that the price effect of the subject imports is significant and that the subject imports have adversely impacted the domestic industry, the Commission must also revisit those conclusions. As to the price effects of subject imports, it is unclear why the Commission attributed a cost-price squeeze experienced by the domestic industry to the volume of Brazilian imports entering the U.S. without examin-

---

[24] As previously stated, domestic production of certain orange juice fell from 1.471 billion gallons SSE in CY 2003/04 to 1.006 billion gallons SSE in CY 2004/05. Final Staff Report, at Table IV–6. Meanwhile, the subject imports in domestic inventory rose from 2.3% of total available supply in CY 2001/02 to 3.4% of total available supply in CY 2004/05. Final Determination, at 26.

[25] The record is unclear as to the level of inventory that the domestic industry desires to maintain. One witness claims that domestic processors prefer to maintain an inventory level of between 16 and 20 weeks of inventory but that during the POI, the inventory levels exceeded 20 weeks and became a costly liability. (ITC Hr'g Tr. 52:10–22, Jan. 10, 2006). The Commission has not examined this in its determination and the record presented also does not address it further.

As previously stated, the record shows that during the POI, the size of the domestic inventory of certain orange juice amounted to about one-half of the domestic production in any given year. *Final Determination*, at 15. "The ratio of domestic producers' carryover stocks to U.S. production increased from 48.3 percent in crop year 2001/02 to 56.5 percent in crop year 2002/03 to 57.2 percent in crop year 2003/04 to 58.6 percent in crop year 2004/05." *Id.* at 15 n.111.

ing how demand factors, such as the limited increase in domestic consumption of certain orange juice during the POI,[26] may have prevented the domestic industry from raising prices. See Final Determination, at 23–24. The Commission should also consider how the low level of subject imports held in inventory, consisting at the most of 8.7 % of the domestic inventories during the POI, and less than 5% in two of the years of the POI, contributed significantly, rather than minimally, to the suppression of domestic prices.[27]27 Id. at 21.

As to the impact of the subject imports, the performance of the different domestic processors varied depending on whether the processor was affected by the hurricanes in central Florida in 2004. For instance, processors which were not affected by the hurricanes, such as Southern Gardens and Sunkist, were not negatively affected in CY 2004/05, while processors hit hardest by the hurricanes were negatively affected.[28] Final Determination (Confidential) domestic market declined over the POI does not sufficiently explain the situation here. The Commission failed to mention that the domestic industry's share of the domestic market is directly correlated to domestic production levels of the like product, including round oranges.[29]

---

[26] As stated previously, in the four years prior to CY 2001/02, domestic consumption had been above 1.5 billion gallons SSE. *Final Staff Report*, at Table IV–6. It then fell from 1.521 billion gallons SSE in CY 2000/01 to 1.445 billion gallons SSE in CY 2001/02, 1.422 billion gallons SSE in CY 2002/03, before rising modestly to 1.432 billion gallons SSE in CY 2003/04 and then to 1.497 billion gallons SSE in CY 2004/05. *Id*.

[27] The Government claims that because Tropicana did not raise arguments challenging the Commission's findings on the price effects of subject imports, Plaintiff-Intervenor Dreyfus' arguments relating to the Commission's findings on price effects fall outside the scope of this case. Generally, a plaintiff-intervenor is "limited to the field of litigation open to the original parties, and cannot enlarge the issues tendered by or arising out of plaintiff's bill." *Torrington Co. v. United States*, 14 CIT 56, 57, 731 F. Supp. 1073, 1075 (1990).

Here, although Tropicana did not expressly state that it was challenging the Commission's findings as to the price effects of subject imports, that challenge is necessarily implied by Tropicana's overall challenge of the Commission's reliance on the increasing level of subject imports held in domestic inventory to sever the causal connection between a shortage in the supply of domestic round oranges and injury to the domestic injury. Thus, the court finds that Dreyfus' argument relating to the effect of the inventory levels of the subject import on the price of the domestic product to be within the scope of this case.

The court further finds that Dreyfus' argument that there is no relationship between subject imports and domestic prices is also within the scope of this case. Tropicana's challenge to the Commission's determination that subject imports caused material injury to the domestic industry implicitly entails a challenge to the determination that subject imports affected the domestic industry by suppressing domestic prices. Here, Dreyfus pointed to the dissenting Commissioner's conclusion that monthly subject import volumes fluctuated significantly in a manner that did not correlate with fluctuations in prices. Dreyfus' Br. 27–28. The Commission did not consider this in its determination and should do so on remand.

[28] Southern Gardens and Sunkist were [ ] in CY 2004/05 while processors hit hardest by the hurricanes were [ ] profitable. Final Determination (Confidential) (Dissent), at 75.

[29] As previously stated, "[d]omestic producers' market share declined from 87.2 percent in crop year 2001/02 to 79.9 percent in crop year 2002/03, increased to 84.8 percent in crop year 2003/04, and fell to 76.5 percent in crop year 2004/05." *Final Determination*, at 25. As previously stated, domestic production fell from 1.432 billion gallons SSE in CY 2001/02 to 1.246 billion gallons SSE in CY 2002/03 before increasing to 1.471 billion gallons SSE in CY

It is not surprising that the domestic industry's share of the domestic market declined when there was a tremendous fall in domestic production in CY 2004/05 because of orange shortages. This would have occurred even if the level of subject imports had remained the same. Likewise, it is not surprising that the domestic industry experienced a decline in domestic capacity utilization from the first year of the POI to the last year of the POI given the dramatic decline in domestic production.

In sum, the Commission's determination is not supported by substantial evidence when the record as a whole is considered. Instead, its decision is arbitrary and capricious because it did not address many important issues relating to the effects of the short supply of domestic oranges upon the domestic industry. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (stating that an agency's decision is arbitrary and capricious if it "fail[s] to consider an important aspect of the problem, [or] offer[s] an explanation for its decision that runs counter to the evidence before the agency"). Accordingly, the court remands this issue to the Commission to examine the all the relevant issues relating to the impact of the shortfall in the domestic production of round oranges on the domestic industry, including, but not limited to, the levels of residual demand, the inverse correlation between inventory levels of subject imports and domestic production, and the need of the domestic industry to maintain high inventories.

B. Consideration of a Majority of the Domestic Industry's Opposition to the Petition

Tropicana also claims that the Commission's determination is unsupported by substantial evidence because it failed to consider the opposition of the vast majority of the domestic processors to the petition.[30] Tropicana essentially argues that the Commission's determination is undermined because the opposition to the petition from a majority of the domestic industry reflects the domestic industry's belief that it was not negatively affected by the subject imports.

In making its determination, the Commission must "consider the whole record and whatever in the record fairly detracts from its finding." Suramerica de Aleaciones Laminadas, C.A. v. United States, 17 CIT 146, 164, 818 F. Supp. 348, 365 (1993). This may include the opposition of the industry because "[t]he industry's position is highly relevant to whether an industry has been injured by imports." Id. at 163, 818 F. Supp. at 364; Suramerica de Aleaciones own economic interests and, therefore, its views can be considered an economic factor."). Thus, although opposition to the petition by the majority of do-

---

2003/04 and then falling again to 1.006 billion gallons SSE in CY 2004/05, the heavy hurricane period. *Final Staff Report*, at Table IV–6.

[30] [ ] of the processors opposed the petition. *Final Determination (Confidential)*, at 41 n.197.

mestic producers does not preclude an affirmative present material injury determination, the Commission must explain its rationale for discounting the opposition of the majority of the domestic industry.[31] Suramerica, 17 CIT at 165, 818 F. Supp. at 365.

In its final determination, the Commission briefly discussed the industry's opposition to the petition, stating in a footnote that:

> [it] recognize[d] that U.S. processors accounting for [the majority] of U.S. certain orange juice production in crop year 2004/05 oppose the petition in this final phase investigation. . . . While the degree of support by members of the domestic industry for the petition may be a factor considered by the Commission, such a factor is not dispositive. Indeed, the Commission has issued an affirmative determination even when a substantial percentage of the industry opposed the petition.

Final Determination (Confidential), at 41 n.197 (citation omitted).

The Government argues that the Commission had sufficiently considered the opposition of the domestic industry to the petition and asks the court to hold as it did in Citrosuco Paulista, S.A. v. United States, 12 CIT 1196, 1216, 704 F. Supp. 1075, 1093 (1988). In Citrosuco, the Commission expressly found that the processors opposing the petition were more dependent upon Brazilian imports than those supporting the petition. Id. The Commission then concluded that the processors opposing the petition did not adequately reflect the economic interest of all the processors and the Commission discounted their opposition to the petition. Id. The court affirmed the determination, holding that the Commission had properly considered and discounted the opposition to the petition. Id. at 1217, 704 F. Supp. at 1093.

This case, however, is unlike Citrosuco. While Citrosuco found that the processors opposing the position did not reflect the interests of all the domestic processors, the Commission here made no such finding.[32] Unlike in Citrosuco, here, the Commission did not explain why the opposition of the domestic industry did not cast doubt upon

---

[31] The Government argues that *Suramerica* is limited to the context of a threat of material injury, and court should find as in *Minebea Co. v. United States*, 16 CIT 550, 794 F. Supp. 1161 (1992). *Minebea* stated that "when the [Commission] is determining whether LTFV imports are a cause of material injury suffered by a U.S. industry, the position of any segment of the U.S. industry as to the cause of its difficulties is not something which the [Commission] is required to consider." *Id.* at 554, 794 F. Supp. at 1165. *Minebea*, however, is not applicable here. As *Suramerica* explained, *Minebea* did not involve a challenge that the Commission's determination was not supported by substantial evidence, rather it involved an issue of law. *Suramerica*, 17 CIT at 163, 818 F. Supp. at 364. When "the heart of the issue is whether the [Commission's] determination was based on substantial evidence," as in this case, "[t]he industry's position is highly relevant to whether an industry *has been injured by imports*." *Id.* (emphasis added).

[32] The Commission here did find that many domestic processors imported from Brazil. *Final Determination*, at 12–13. The Commission, however, did not find that these proces-

the Commission's findings. See Final Determination (Confidential), at 41 n.197. Instead, the Commission summarily concluded that the industry's opposition to the petition is "not dispositive." Id. This is not an explanation for its actions. Given that the Commission has implicitly chosen to weigh the domestic processors' data more heavily than that of the domestic growers, and that very few growers actually responded to the questionnaire in order to support the petition, it is particularly troubling that the Commission did not explain why it chose to discount the apparent opinion of the majority of domestic processors.

Accordingly, because the Commission did not explain why the domestic industry's opposition to the petition did not undermine its affirmative determination of material injury by reason of subject imports, this case is also remanded on this ground. See Timken U.S. Corp. v. United States, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (agency decision is arbitrary and capricious if the agency " 'entirely failed to consider an important aspect of the problem' ") (quoting Motor Vehicle Mfrs. Ass'n, 483 U.S. at 43). On remand, the Commission must consider the domestic industry's position to the petition and explain how a finding of material injury by reasons of subject imports can be supported despite the opposition of a large portion of the industry.

C. Consideration of Non-Subject Imports

Tropicana also argues that the Commission failed to consider the effect of non-subject imports on the domestic industry as required by Gerald Metals. Tropicana argues that such an analysis is especially appropriate in this case because a large Brazilian producer of certain orange juice, Citrovita, is not subject to the current investigation. Tropicana claims that Citrovita has the capacity to replace the subject imports in the domestic market completely.[33] Tropicana thus argues that the Commission erred by not considering whether an affirmative determination would fail to benefit the domestic industry.

As previously stated, in addition to considering the volume, price effects, and the impact of subject imports on the domestic industry, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii). "The effect of non-subject imports . . . is often a relevant 'other economic factor' that the Commission looks at when considering whether a particular

---

sors "derived any significant finances benefits from their relationships with Brazilian operations" and did not exclude them from the analysis of the domestic industry. *Id.* at 13.

[33] As previously discussed, Citrovita is a Brazilian producer of certain orange juice. Citrovita is not covered by the scope of the antidumping duty investigation and thus, its imports are considered non-subject imports. The record does not discuss whether non-subject imports of certain orange juice from Citrovita or other non-subject importers are interchangeable with subject imports, although the parties seem to accept that this is the case.

domestic injury was caused by the subject imports." Caribbean Ispat Ltd. v. United States, 450 F.3d 1336, 1338 (Fed. Cir. 2006).

In Gerald Metals, the Commission determined that Ukranian imports of pure magnesium at LTFV injured the domestic industry without discussing whether non-subject imports would have replaced all or a great part of the subject imports. 132 F.3d at 718–19. This was particularly important given that the non-subject imports were perfect substitutes for the Ukranian subject imports and also frequently undersold the domestic like product. Id. at 718–19. Thus, the Federal Circuit stated that

> While the statute protects domestic magnesium producers from injury caused by LTFV imports, its scope of protection does not reach so far as to support artificially inflated prices when fairly-traded imports are underselling the domestic product and LTFV imports are readily convertible to fairly-traded product by merely changing importers.

Id. at 722.

> The Federal Circuit later confirmed *Gerald Metals* and further stated that:
>
> Where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission *must explain* why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

Bratsk, 444 F.3d at 1373 (emphasis added). Although the existence of competitive non-subject imports of a commodity product does not necessitate a finding of no causation between the subject imports and injury to the domestic industry, the Commission is obligated to address whether non-subject imports would have replaced subject imports "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market." *Id.* at 1375; *see also Sichuan Changhong Elec. Co. v. United States*, 466 F. Supp. 2d 1323, 1333 (CIT 2006) (remanding for the Commission to reexamine its determination in light of *Bratsk*).

Here, the Commission briefly discussed non-subject imports in its determination, noting that the non-subject imports did not gain as much of a share of the domestic market as the subject imports did. *Final Determination*, at 19. The Commission also noted that "while the volume of nonsubject imports rose over the period examined, they grew at a slower rate and represented a smaller share of apparent consumption than Brazilian subject imports." *Id.* at 27–28. This examination may not be sufficient to support the Commission's affirmative determination.

Rather, the Commission may be obligated under *Bratsk* to address further "whether the non-subject imports would have replaced subject imports during the period of investigation." 444 F.3d at 1376. The record suggests that the factors triggering the obligation to make such an inquiry – the commodity nature of the product and the significant presence of price competitive non-subject imports – may exist here. First, the Government does not dispute Tropicana's argument that orange juice is a commodity and that FCOJM futures are traded on the New York Board of Trade, a commodity market. *Final Determination (Dissent)*, at 40. Second, the record indicates that although non-subject imports were priced higher than the subject imports in CY 2001/02 and CY 2002/03, they were priced lower than the subject imports during CY 2003/04 and CY 2004/05. *Final Staff Report*, at Table IV–2.

Further, the non-subject imports may be a significant factor in the U.S. market. In *Bratsk*, the Federal Circuit held that non-subject imports were a significant factor in the U.S. market after noting that non-subject imports' share of the total imports ranged from 73.0% to 82.6% during the POI. 444 F.3d at 1375. In this case, by quantity, non-subject imports comprised 40.8% of total imports in CY 2001/02, 20.8% in CY 2002/03, 29.4% in CY 2003/04, and 34.2% in CY 2004/05.[34] *Final Staff Report*, at Table IV–2. Although the non-subject imports in this case comprised a smaller portion of total imports than the non-subject imports in *Bratsk* did, it is not so small a portion as to be an indisputably insignificant factor in the market. Thus, the issue must be addressed.

The Government argues that non-subject imports would not have replaced the subject imports during the POI, presumably because non-subject imports comprised a smaller portion of the domestic market than subject imports. The non-subject imports did comprise a small portion of the overall domestic market. *Final Determination*, at 19 n.137. The Commission, however, has not discussed, nor does the record address, the production capacity of non-subject importers, other than that of Citrovita. As *Bratsk* stated, "it may well be that non-subject importers lack capacity to replace the subject imports or that the price of the non-subject imports is sufficiently above the subject imports such that the elimination of the subject imports would have benefitted the domestic industry." 444 F.3d at 1376. It is, however, the Commission's job to explain whether non-subject imports would have replaced subject imports if subject imports prices reflected fair value.

Thus, the court remands for the Commission to examine: (1) whether the product at issue is in fact a commodity interchangeable

---

[34] By value, non-subject imports comprised of 51.0% of total imports in CY 2001/02, 24.0% in CY 2002/03, 27.3% in CY 2003/04, and 32.0% in CY 2004/05. *Final Staff Report*, at Table IV–2.

with the subject imports (the parties seem to accept that this is the case, but the Commission should make this finding); (2) whether the non-subject imports are competitively priced and a significant factor in the domestic market; and (3) whether, if the subject imports were sold at fair value, the non-subject imports would replace the subject imports without any beneficial effect on domestic producers.

D. Consideration of Imports of Ultra Low Pulp Orange Juice

Tropicana also argues that the Commission erred by failing to account for the fact that "imports of 'ultra low pulp' FCOJM (ULPOJ) made by Tropicana's corporate parent, PepsiCo, do not compete with the domestic like product." Pl.'s Br. 33. Tropicana claims that the ULPOJ imported by its parent company has no domestic counterpart, is produced using special equipment and a proprietary process available only in Brazil, and is used solely to produce "Mountain Dew" soft drink concentrate. Tropicana argues that ULPOJ is thus non-injurious to the domestic industry and the Commission should have "disregarded [it] in the analysis of whether the subject imports are causing material injury to the domestic injury."[35] *Id.* at 34.

As stated previously, in making its determination, the Commission has a duty "to ensure that it is not attributing injury from other sources to the subject imports," *Taiwan Semiconductor*, 266 F.3d at 1345 (citation and quotation marks omitted) (emphasis removed), and to "analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing that injury." *Hynix*, 431 F. Supp. 2d at 1317. Here, if Tropicana's imports of ULPOJ were not competitive with the domestic like product, then the presence of ULPOJ within the subject imports might undermine the Commission's determination that subject imports played a significant role in causing material injury to the domestic injury.

The record, however, indicates that, if the Commission's determination were otherwise sound, even if imports of ULPOJ were not

---

[35] Apparently based on Tropicana's use of the word "disregarded," the Government argues that Tropicana's argument fails because (1) Tropicana is asking the Commission to act contrary to 19 U.S.C. § 1677(7)(B)(1) by analyzing ULPOJ separately from the rest of the subject imports instead of analyzing the total volume of the subject imports; (2) the issue is not properly before this court because Tropicana did not ask the Commission to segment its analysis of ULPOJ imports; and (3) Tropicana is improperly challenging the Commission's like product determination and Commerce's scope determination. The Government, however, has hinged its argument on hyper-technicalities.

In its reply, Tropicana clarified that its challenge on appeal is the same as its challenge to the Commission: that the Commission should consider whether the non-injurious nature of the ULPOJ and its presence within the volume of subject imports undermines the Commission's affirmative determination that subject imports caused material injury to the domestic industry. Pl.'s Reply Br. 13–14. Tropicana does not appear to request that the Commission segment its analysis of the ULPOJ from the rest of the subject imports, nor does it appear to challenge the Commission's like product determination.

competitive with the domestic like product, the determination would not be significantly undermined because of the low volume of such imports.[36] *See Nat'l Ass'n of Mirror Mfrs v. United States*, 12 CIT 771, 780, 696 F. Supp. 642,649 (CIT) (stating that the Commission need only discuss "material issues of law or fact") (quoting *Jeannette Sheet Glass Corp. v. United States*, 9 CIT 154, 161, 607 F. Supp. 123, 130 (1985)). The Commission is free to reexamine this matter if it becomes significant upon reweighing of other data.

E. Consideration of the Need for Subject Imports for Blending with Domestic Like Products and for Obtaining Drawback Duties

Plaintiff-Intervenor Dreyfus also raises other challenges to the Commission's volume determination regarding the use of subject imports for blending with domestic juice and for obtaining drawback of duties. Dreyfus argues that because subject imports were necessary for blending with domestic juice and for obtaining duty drawbacks, the Commission erred in finding that the volume of subject imports was significant.[37] The court reviews each argument in turn.

The Commission here considered testimony that subject imports were necessary for blending with domestic juice to meet quality standards. *Final Determination*, at 16–17. Although the Commission agrees that blending is a common practice in the orange juice industry and serves several purposes,[38] the Commission rejected the argument that U.S. producers need to import Brazilian juice specifically to blend with domestic juice. *Id*. at 17. Rather, the Commission found that the majority of responding U.S. purchasers stated that

---

[36] Here, Tropicana states that from August 2004 through July 2005, PepsiCo's imports totaled [ ] pounds solids, which amounted to only [ ] of subject imports. Pl.'s Br. 35. PepsiCo's questionnaire also indicates that PepsiCo's imports do not consist entirely of ULPOJ. Def.'s Appx. at Tab CR 206 (PepsiCo's Importer Questionnaire at II–4).

[37] The Government argues that Dreyfus is not permitted to raise arguments concerning the use of subject imports for blending with domestic orange juice and for obtaining drawback of duties because neither argument was raised specifically by Tropicana. The Government relies on *Parkdale Int'l v. United States*, 429 F. Supp. 2d 1324, 1337–38 (CIT 2006), and *Torrington Co. v. United States*, 14 CIT at 57, 731 F. Supp. at 1075, to support its argument. In both *Parkdale* and *Torrington*, the plaintiff-intervenors raised arguments that did not merely support the plaintiffs' original claim but were far removed from it. *See Parkdale*, 429 F. Supp. 2d at 1337 (plaintiffs challenged the unlawful retroactive application of the reseller policy while the plaintiff-intervenor presented an additional argument that Commerce did not provide it with practicable assistance under 19 U.S.C. § 1677m(c)); *Torrington*, 14 CIT at 57, 731 F. Supp. at 1075 (plaintiff-intervenor brought a standing argument that was not raised by the plaintiff). In contrast, in this case, Tropicana brought a broad challenge to the Commission's finding that the volume of subject imports was significant. Compl. at ¶ 9. Thus, insofar as Dreyfus argues that the use of subject imports for blending with domestic orange juice and for obtaining drawback duties causes the volume of the subject imports to be insignificant, the arguments merely support the claims made and are within the scope of this case.

[38] Blending allows producers to manufacture juice of a certain quality specification and to satisfy origin labeling requirements at the retail level. *Final Determination*, at 16.

they did not need to blend domestic juice with the subject imports and that the subject imports was comparable in USDA grade and viscosity to, and were actually interchangeable with, the domestic juice. *Id*. The Commission thus held that the domestic like product did not need to be blended with subject imports in order to achieve certain quality specifications. This conclusion of no necessity is supported, but blending is desirable and the domestic industry may benefit from a wider array of imported products. This fact may affect other areas of the determination and should be considered.

The record also indicates that the Commission considered arguments that subject imports were necessary to aid U.S. exports. Respondents had argued that U.S. producers needed Brazilian imports in order to use the duty drawbacks from Brazilian imports to offset the higher prices of their juice. *Final Determination*, at 20 n.142. While the duty drawback program does help facilitate U.S. exports, the Commission found that the domestic industry did not need Brazilian imports in order to export its own like product. *Id.* at 19–20. The Commission found that the fact that the value of drawback credits available significantly exceeded the value of domestic exports demonstrated that there is little correlation between U.S. exports and the availability of drawback credits. *Id.* at 19–20, 20 n.142. The court agrees that the record supports the conclusion that, although duty drawbacks help facilitate U.S. exports, duty drawbacks are not a major factor in spurring U.S. exports.

CONCLUSION

For the foregoing reasons, the court remands the affirmative determination to the Commission. As previously discussed, the Commission's inventory analysis is seriously flawed for failure to consider, among other factors, the residual demand, the inverse correlation between inventory levels of subject imports and domestic production, and the domestic industry's voluntary maintenance of high inventories. Thus, upon remand, the Commission must examine the full effects of a shortage in the supply of domestic round oranges, and how that affects the Commission's volume and price effects analysis. Additionally, the Commission must examine: the opposition to the petition by a large portion of the domestic industry; whether, if prices were adjusted to account for the LTFV margin, non-subject imports would displace subject imports; and its price suppression analysis.

Further, although the Commission's determinations as to the collection of data, the lack of consideration of ULPOJ imports, and the role of blending are not erroneous when viewed in isolation, the weakness of the overall analysis and the relatedness of the issues may cause these matters to be significant in the context of a more comprehensive analysis. Given the relatedness of the issues, upon remand, the Commission must not only examine the four deficien-

cies noted above but must also consider the totality of the evidence anew. In so doing, the Commission must not seize upon bits of evidence to reject what the bulk of the evidence dictates. Additionally, while the court understands that the dissent is not under direct assault here, the dissent's finding of no causation appears to be more logical and supported than the Commission's finding of causation. It would be helpful upon remand for the Commission to engage the dissent.

The Commission's present determination acknowledges that weather and disease caused an increase in the demand for imports but does not offer sufficient evidentiary support, or adequate explanation, for its findings that subject imports were greater than necessary to meet that demand and that the inventory levels of these subject imports over the course of the POI prevented price increases that otherwise would have occurred. In a volatile supply condition, which the Commission acknowledges, not the least by the breadth of the POI here, significant inventory is necessary. If inventory is the key, it needs an in-depth analysis.

If it finds it necessary or efficacious, the Commission may reopen the record. The Commission should render a determination upon remand within 75 days hereof. Objections may be filed 20 days thereafter. Response may be filed within 11 days.

SLIP OP. 07–56

MILLENIUM LUMBER DISTRIBUTION LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 02–00595

OPINION

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment granted.]

Dated: April 16, 2007

Joel R. Junker & Associates (*Joel R. Junker*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jack S. Rockafellow* and *Aimee Lee*), *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel, for the defendant.

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment by plaintiff Millenium Lumber Distribution, Ltd. ("Millenium"), and defendant United States ("Govern-

ment") pursuant to USCIT R. 56. Millenium challenges the classification for tariff purposes of its imported merchandise. The United States Bureau of Customs and Border Protection ("Customs"), formerly the United States Customs Service, classified the merchandise as standard lumber under Harmonized Tariff Schedule of the United States (2000) ("HTSUS") subheading 4407.10.00.[1]1 Millenium asserts that the proper classification is under subheading 4418.90.40,[2] i.e., roof trusses, or alternatively under 4421.90,[3]3 i.e., other articles of wood.

BACKGROUND

Millenium is an importer of wood products from Canada, including the subject merchandise, which it identifies as cut lumber or "truss components" intended for use in completed wood trusses. (Compl. ¶¶ 11–14; Pl.'s Mot. for Summ. J., Attach. 1, Ex. C.) The parties agree that the subject merchandise is comprised of 2 x 3, 2 x 4, and 2 x 6 spruce/pine/fir (S-P-F) lumber, of various grades, cut to lengths of 5′, 6′, 7′, 8′, 10′, 12′, 14′, 16′, 18′, and 20′. (Compl. ¶¶ 11–14; Answer ¶ 11.) One end of each piece of lumber is "square cut," at 90 degrees, and the other end is "angle cut," at angles between 67.4 degrees and 80.5 degrees. (Compl. ¶¶ 10, 12; Answer ¶¶ 10, 12.)

According to Millenium, this lumber was intended for use in wood trusses manufactured in the United States, (Compl. ¶ 11), which are

---

[1] The relevant portion of the HTSUS Chapter 44 reads as follows:

4407	Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm;
4407.10.00	Coniferous
. . .	Other:
. . .	
[4407.10.00]15	Not treated: Mixtures of spruce, pine, and fir ("S-P-F").

It should be noted that the numbering of relevant subheadings varies in subsequent versions of the HTSUS, but will be cited here as used by the parties, and as listed when this dispute arose.

[2] The relevant portion of the HTSUS Chapter 44 reads as follows:

4418	Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes:
. . .	
4418.90	Other:
. . .	
4418.90.40	Other
. . .	
[4418.90.40]20	Roof trusses.
. . .	
[4418.90.40]90	Other.

[3] The relevant portion of the HTSUS Chapter 44 reads as follows:

4421	Other articles of wood:
. . .	
4421.90	Other.

installed to form a triangular framework used in the support of rooftops and floors. *See Webster's Third New International Dictionary* 2456 (1981). The parties agree that completed wood trusses, either assembled or unassembled, would be classified under HTSUS subheading 4418.90.40. The parties disagree, however, as to whether the subject merchandise constitutes complete and/or unassembled wood trusses classifiable under subheading 4418.90.40, or lumber, which requires further processing to be suitable for assembly into a truss and is therefore properly classified under subheading 4407.10.00. (Compl. ¶¶ 18–22; Answer ¶¶ 18–22.)

Between October 1999 and January 2001, Millenium imported approximately 215 entries of the subject merchandise under HTSUS subheading 4418.90.40 through the port of entry in Blaine, Washington. (*See* Summons.) On December 28, 2000, Millenium received from Customs a Notice of Action stating that "[t]he subject angle-cut lumber in condition as imported is not a truss component ready to be assembled into a specific truss," and was therefore classifiable under HTSUS subheading 4407.10.00. (Compl. ¶ 15.) Customs subsequently liquidated the various entries under subheading 4407.10.00 on April 20, 2001, May 4, 2001, May 11, 2001, and August 17, 2001. (*See* Summons.)

Millenium timely filed protest numbers 3004–01–100052 on July 18, 2001, and 3004–01–100070 on August 29, 2001.[4] (*Id.* at 1.) Millenium's protests sought review of Customs' classification, arguing that the merchandise should be properly classified as roof trusses under subheading 4418.90.40, or alternatively under subheading 4421.90, as other articles of wood. (*Id.* at 2.) The protests were deemed denied on April 8, 2002, and Millenium timely commenced the present action. (*Id.*) Both parties then moved for summary judgment pursuant to USCIT R. 56.[5]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000) (protest denial jurisdiction). The proper construction of a tariff provision is an issue of law. *Carl Zeiss, Inc. v. United States*, 195 F.3d

---

[4] The Government disputes the court's jurisdiction over Entry No. 144–7025313–0, because the entry was liquidated under subheading 4418.90.40. *See* Entry Summ. No. 144–7025313–0. Because this single entry was liquidated under the subheading requested by Millenium, no relief can be granted as to the entry. The current dispute as to Entry No. 144–7025313–0 is therefore moot.

[5] Following submission of the briefs on the parties' Motion and Cross-Motion for Summary Judgment, Millenium moved to strike evidence submitted in support of the Government's position, including that found in various websites cited in the Government's brief, on the grounds that these materials constituted unauthenticated hearsay. Because the court was not required to and did not consider any of the challenged materials in determining the proper classification of the subject merchandise, the court need not resolve the issues raised in Millenium's Motion to Strike. The motion therefore will be denied as moot.

1375, 1378 (Fed. Cir. 1999). Determination of the nature of a good in order to place it in the proper tariff category is an issue of fact. *Id.* Both determinations are made *de novo. Metchem, Inc. v. United States*, 441 F. Supp. 2d 1269, 1271 (CIT 2006).

DISCUSSION

The issue before the court is the correct tariff classification of angle-cut lumber that, as imported, does not constitute assembled or fabricated articles and that is unidentifiable as pieces of any particular wood truss or trusses. Customs refused to classify the subject merchandise as builders' joinery or carpentry of wood under HTSUS heading 4418, treating it as general sawn lumber under heading 4407. Millenium challenges the classification on the grounds that the merchandise was specifically cut and intended for use in wood trusses and should therefore be classified under heading 4418.[6] In the alternative, Millenium contends that the angle cut lumber constitutes "wooden parts of the [preceding] articles" classifiable as "other" under heading 4421.

To determine the proper classification of imported goods, the court follows the General Rules of Interpretation ("GRIs") of the HTSUS. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs set forth the order in which the elements of classification are considered. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999). Under GRI 1, the court must determine the appropriate classification "according to the terms of the headings and any relative section or chapter notes," and may refer to subsequent GRI provisions only where the headings and notes "do not otherwise require" a particular classification. In so doing, the terms of the HTSUS must be construed "according to their common and commercial meanings." *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Therefore, in this case, the court must consider whether the subject merchandise is classifiable under HTSUS heading 4407, 4418, or 4421.[7]

---

[6] Millenium also claimed in its Complaint that Customs' classification and liquidation of the entries under heading 4407 had "the effect of modifying or revoking prior interpretive rulings. . . . [without] the process of publication, opportunity for final comment, and final notice." (Compl. ¶¶ 30–32.) Millenium has abandoned this claim by not developing it for purposes of summary judgment.

[7] It is clear that the headings at issue in this case are mutually exclusive. Items classifiable as builders' carpentry or joinery under heading 4418 are excluded from classification as general sawn lumber under heading 4407. Explanatory Note 44.07 ("The heading also excludes . . . [b]uilders' joinery and carpentry (*heading 44.18*)."). Similarly, heading 44.21 covers items "*other than* those specified or included in the preceding headings and *other than* articles of a kind classified elsewhere." *Id.* at 44.21. Therefore, the decision here must be made under GRI 1. If viewed as a GRI 3 specificity inquiry, here the result would be the

A. The Subject Merchandise is Classifiable Under Heading 4407

Heading 4407 covers "[w]ood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm." This heading serves as a general category, which "[w]ith few exceptions . . . covers all wood and timber." World Customs Organizatio, *Harmonized Commodity Description & Coding System Explanatory Notes*, Explanatory Note 44.07, 676 (2d ed. 1996) ("Explanatory Note(s)").[8] The heading includes products such as "sawn beams, planks, flitches, boards, laths, etc.," and the wood "need not necessarily be of rectangular (including square) section nor of uniform section along the length." *Id.* Here, the parties agree that the subject merchandise was comprised of cut lumber, of various lengths and grades. (Compl. ¶ 11; Answer ¶ 11.) The parties also do not dispute that the merchandise was unassembled upon entry, and that each board was of the appropriate thickness for classification under 4407, exceeding 6 mm. For these reasons, the imported merchandise at issue is described by the terms of heading 4407. Therefore, the court next considers whether the merchandise is also described by the terms of heading 4418 and therefore is excluded from 4407, and finally, whether it is described by the terms of heading 4421.

B. The Subject Merchandise is Not Classifiable Under Heading 4418

Millenium argues that 4407 was incorrectly applied because the merchandise must be classified under heading 4418, and is therefore not within 4407. Heading 4418 covers "[b]uilders' joinery and carpentry of wood." Explanatory Note 44.18 states that "[heading 4418] applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognisable unassembled pieces." "Carpentry" of wood is defined as "woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc." *Id.*

Millenium asserts that the imported boards constitute wood trusses or unassembled pieces of wood trusses based on the fact that each board contained an angle cut at one end, and on its claim that the merchandise was specifically cut and intended for use in trusses.

---

same. *Contrast BASF Corp. v. United States*, ____ F.3d ____ , 2007 WL 949717 (Fed. Cir. Mar. 29, 2007) (majority analysis under GRI 3 reached differing outcome from dissent in part under GRI 1).

[8] "Although the Explanatory Notes are not legally binding or dispositive, they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

(*See* Compl. ¶ 11.) This is not enough to satisfy the requirements for classification under heading 4418. Although 4418 is not limited to assembled goods and includes relatively advanced recognizable unassembled pieces, they must be carpentry, or joinery, i.e., "prepared with tenons, mortises, dovetails or other similar joints for assembly."[9] Explanatory Note 44.18. This heading does not include a subheading for basic or relatively unprocessed parts. In order to be classifiable under heading 4418, therefore, the merchandise as imported must constitute either identifiable truss pieces ready for assembly, in other words, "carpentry of wood" according to the terms of 4418.

The parties have not focused on definitions of carpentry but have relied on the law regarding parts of products, here, of wood roof trusses. As indicated, 4418 does not cover parts per se. But if Millenium cannot satisfy the tests for classification as parts, in view of the type of product at issue here, it will not be able to demonstrate that this product is carpentry. The product is either so unidentifiable as something other than lumber that it must be classified as lumber, or it is something more, i.e. carpentry. If it is recognizable as a component of a truss, it will have passed an important step for classification under 4418. If it cannot reach that hurdle, there is no reason to further explore any potential additional requirements of 4418. Accordingly, the court turns to the body of law addressed by the parties.

"It is well settled law that merchandise is classified according to its condition when imported." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). To determine whether imported merchandise is sufficiently advanced and recognizable at the time of importation, the court must consider whether the merchandise is: 1) identifiable and "fix[ed] with certainty" as part of the final product at the time of importation, *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1339 (Fed. Cir. 1999); 2) so far advanced as to be "dedicated solely or principally for use" in the final product, *id.* at 1338; *see also Heraeus-Amersil, Inc. v. United States*, 10 CIT 258, 261, 640 F. Supp. 1331, 1333 (1986); and 3) discernable as pieces of specific product structures, not just "the making of [the products] in the abstract," *Bendix Mouldings, Inc. v. United States*, 73 Cust. Ct. 204, 206, 388 F. Supp. 1193, 1194 (1974). These may simply be different ways of saying the same thing, but the court will address each. "[P]roof of use is not sufficient" to overcome these requirements. *Benteler Indus., Inc. v. United States*, 17 CIT 1349, 1355, 840 F. Supp. 912, 917 (1993).

---

[9] It is clear that the merchandise at issue is not joinery.

1. The Subject Merchandise Was Not Identifiable or Fixed With Certainty atthe Time of Importation

In the instant case, the merchandise as imported was not identifiable or fixed with certainty as unassembled pieces of wood trusses at the time of importation. Although Millenium argues that the existence of the angle cuts and end user statements indicates that the wood was to be used in trusses, Millenium's assertion that the imported merchandise was identifiable with certainty at the time of importation on the basis of these items does not stand.

In order to be considered recognizable unassembled pieces of a final product, the imported items must have reached the point where they are "too developed in form and detail and too close to the final product to be considered mere material." *Lee Enter., Inc. v. United States*, 84 Cust. Ct. 208, 215, C.D. 4680 (1980). Here, the evidence on the record demonstrates that there is no genuine issue as to the fact that some or all of the imported lumber would require significant additional processing in order to be assembled into completed wood trusses. Millenium has failed to present plausible evidence that the merchandise as imported could be assembled into one or more completed trusses without additional cuts or recutting. *Acme Venetian Blind & Window Shade Corp. v. United States* explains that "wood products not processed beyond sawing and planing, etc., do not lose their character as lumber . . . unless they are a new and different article, having a specific name and function." 56 Cust. Ct. 563, 570, C.D. 2704 (1966). Here, the need for additional cuts or recutting renders the subject merchandise unidentifiable as unassembled pieces of trusses under 4418.

The evidence presented by both parties demonstrates that the need for recutting resulted from several factors existing at the time of importation, including standard truss design requirements, unpredictable shrinkage and swelling that commonly occurs during transport, the lengths of the imported boards, and the potential for the merchandise to be efficiently used in truss designs after additional processing.[10] In particular, the square cuts on one end of each board, although potentially useful in occasional square cut overhangs or splicing, (*see* Woeste Report 7, Pl.'s Mot. for Summ. J., Attach. 5, Tab 1 ("Woeste Report"); *see also* Garretto Dep. 145:24–146:4, Jan. 27, 2004, Pl.'s Mot. for Summ. J., Attach. 2 ("Garretto Dep.")), would almost certainly require recutting to achieve neces-

---

[10] Millenium also admits that, due to pricing distortions resulting from the Softwood Lumber Agreement between the United States and Canada, there was a significant possibility that "the purchase of advanced wood products classified under 4418 could be utilized as a cheaper source of fiber [than standard lumber] through re-cutting." (Pl.'s Mot. for Summ. J. 37–38.) Although this does not affect the condition of the merchandise at the time of importation, it also indicates an increased likelihood that the imported lumber would be recut subsequent to importation, for use as truss lumber or otherwise.

sary angles in the top and bottom chords. (Woeste Report 8–9 ("[N]one of the imported lumber would fit into the bottom chord of a US truss without additional cuts." (emphasis omitted)).) Moreover, even if the original cuts produced the required angles for portions of a truss design, a substantial number of the boards would likely require trimming or recutting to account for shrinkage or swelling that results from exposure to heat and/or moisture during transport. (*See, e.g.*, Garretto Dep. 173:10—25, 221:2–18; *see also* Woeste Report 9; Woeste Dep. 122:13–19, Jan 25, 2005, Pl.'s Mot. for Summ. J., Attach. 5 ("Woeste Dep.") ("If the intent is for them to somehow be installed directly into a truss without additional cuts [given the possibility of shrinkage and swelling], that doesn't make sense.").)

In addition, the length of the boards combined with the square cut ends indicates the need for additional cuts in order to construct a completed truss. Although Millenium claims that the boards were imported at standard lengths ready for assembly, mere assertion of such a conclusion is insufficient to create a genuine issue of fact. Instead, the evidence on the record indicates an overwhelming improbability that an actual truss design would require all component pieces cut to the exact foot, and each piece square cut at one end. (Woeste Report 9 (stating that it is "a near zero [ ] probability that a set of building plans would require roof trusses with a square cut overhang and require top chord members to have an overall length falling on the exact even foot, with no inches or sixteenths.").) Moreover, "[w]hile an exact foot [total] 'truss span' has a reasonable chance of occurrence in US production, it is extremely unlikely for the design to also have a top chord overall length falling on the exact foot." (*Id.* at 5 (emphasis omitted).) While Millenium has produced a hypothetical design in which exact-footage lengths may occur, (Pl.'s Mot. for Summ. J., Attach. 1, Ex. D (design submitted by Millenium); Woeste Report 1–2, 4, 8 (stating that the design is hypothetical)), it has not presented actual designs representative of or intended for the construction of the imported merchandise. In addition, Millenium has failed to present any plausible evidence that the materials as imported constituted realistic or ready-to-assemble pieces of any identifiable truss or trusses. Based on a description of the physical characteristics of the merchandise at the time of importation, "at the border, [an expert] would not recognize it as a truss member. . . . [Y]ou would recognize it—in the context of being used . . . as something that had to be processed." (Woeste Dep. 30:21–31:8.) Upon further processing, however, the imported lumber would be "nearly 100% useful in US truss production by the addition of one or more cuts to each piece." (Woeste Report 9.)

Therefore, the evidence presented regarding the condition of the merchandise at the time of importation, as well as the likelihood of alteration subsequent to importation, demonstrates that no reasonable fact-finder could find that the merchandise as imported was

identifiable as unassembled wood truss pieces, or that the materials were fixed with certainty as such pieces at the time of importation.

2. The Merchandise is Not Sufficiently Advanced as to be Dedicated Solely or Principally for Use in Completed Wood Trusses

Even if the merchandise were identifiable as intended for use in wood trusses, Millenium has not presented evidence to suggest that the imported merchandise was so far advanced as to be considered "carpentry" under heading 4418, or to be "dedicated solely or principally for use" as pieces of wood trusses at the time of importation. *See Baxter*, 182 F.3d at 1338. Statements of intended use or even "proof of use" are not sufficient to overcome this requirement. *See Benteler*, 17 CIT at 1355, 840 F. Supp. at 917.

Millenium argues that the imported boards, cut to an angle other than ninety degrees at one end, are sufficiently advanced to be considered recognizable truss pieces, or even complete trusses, for the purposes of tariff classification. It is clear, however, that the boards were not sufficiently advanced to be dedicated to the single use of constructing wood trusses. (*See* Billows Dep. 209:7–210:9, Jan. 28, 2004, Pl.'s Mot. for Summ. J., Attach. 1.) In addition, although it asserts that the merchandise was solely intended for use in wood trusses, Millenium admits that the wood could be used by purchasers as an alternate source of raw lumber through recutting for other purposes subsequent to importation. (Pl.'s Mot. for Summ. J. 38.) Because the merchandise maintained its identity and usefulness as general sawn lumber for potentially numerous purposes, it was not sufficiently advanced at the time of importation to be classified under 4418. The subject merchandise is neither "too developed" nor "too close to the final product" to be considered "mere material" under this portion of the analysis. *Lee Enter., Inc.*, 84 Cust. Ct. at 214.

3. The Merchandise Was Not Discernable as Parts of Specific Product Structures at the Time of Importation

Finally, the merchandise must be recognizable as unassembled pieces of specific product structures when imported, and not just "the making of [the products] in the abstract," in order to be classified under the heading for the final product. *Bendix*, 73 Cust. Ct. at 206, 388 F. Supp. at 1194. Millenium itself acknowledged that the subject merchandise was not identifiable as pieces of any particular truss at the time of importation, stating that each board "may be used either as a stand alone chord or attached to another truss component. . . . Truss manufacturersorder and maintain an inventory of available truss components. . . . [and] may not know whichspecific truss design a truss component will go into." (Pl.'s Mot. for Summ. J. 5.) Millenium asserts that the merchandise is relatively interchangeable between designs, but also admits that the intended designs did

not exist when the merchandise was imported. (*See id*.) Millenium suggests that individual truss designs would be generated subsequent to importation according to "a variety of truss designs produced by recognized and accepted computer software systems." (*Id*. at 61.) This is not sufficient to establish the identity of the imported materials as ready-to-use truss components.

In addition, Millenium has not presented evidence that the individual wood pieces were dedicated to use as any particular truss elements. As mentioned previously, many of the boards would have to be further cut in order to serve as either top or bottom chords in a standard truss design. (*See* Woeste Report 8–9.) In addition, the merchandise as imported was neither bundled as "truss kits" ready for assembly, nor labeled as specific components of completed trusses.[11]

The evidence as presented demonstrates that no reasonable fact-finder could find that the merchandise was imported as recognizable unassembled pieces of specific trusses, or even that the merchandise was designated pieces for specific truss designs that existed at the time of importation. Because the subject merchandise was not identifiable or fixed with certainty as wood trusses or pieces thereof at the time of importation, and was not sufficiently advanced to be dedicated for use in wood trusses, but was instead simply lumber, it is not classifiable as carpentry of wood under heading 4418.

C. The Subject Merchandise is Not Classifiable Under Heading 4421

Heading 4421 covers "[o]ther articles of wood," including relatively advanced wood parts that are not classifiable under previous headings. *See* Explanatory Note 44.21. The court has established that the subject merchandise is classifiable as general sawn lumber under heading 4407, and is not classifiable as unassembled pieces of builders' carpentry of wood under heading 4418. The merchandise therefore does not fall within the "other" category, and is not classifiable under heading 4421. Accordingly, under GRI 1, the merchandise is classified under heading 4407, as imported.

CONCLUSION

For the foregoing reasons, Millenium's Motion for Summary Judgment is denied, and the Government's Cross-Motion for Summary Judgment is granted. Millenium's Motion to Strike Evidence is de-

---

[11] In contrast, Customs' New York Ruling C89668 allowed for a tariff classification under 4418 where all wood components necessary for each truss were shipped together. The components were "marked consistent with [their] unique configuration to ensure an accurate assembly of the truss. . . . [and] no cutting [was] necessary at the time of assembly." NY C89668 (Aug. 17, 1998).

nied as moot. Millenium's challenge as to Entry No. 144–7025313–0 is dismissed as moot. Customs' classification of the subject merchandise as to all remaining entries under subheading 4407.10.00 is sustained.

MILLENIUM LUMBER DISTRIBUTION LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 02–00595

JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that Plaintiff Millenium Lumber Distribution, Ltd.'s Motion for Summary Judgment is denied, and Defendant United States' Cross-Motion for Summary Judgment is granted. Plaintiff's Motion to Strike Evidence is denied as moot. Plaintiff's challenge as to Entry No. 144–7025313–0 is dismissed as moot. Customs' classification of the subject merchandise as to all remaining entries under subheading 4407.10.00 is sustained.

Slip Op. 07–57

NATIVE FEDERATION OF THE MADRE DE DIOS RIVER AND TRIBUTARIES; RACIMOS DEUNGURAHUI WORKING GROUP; and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. BOZOVICH TIMBER PRODUCTS, INC.; TBM HARDWOODS, INC.; T. BAIRD MCILVAIN INTERNATIONAL CO.; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; SECRETARY OF THE INTERIOR; DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE; SECRETARY OF AGRICULTURE; ADMINISTRATOR OF ANIMAL AND PLANT HEALTH INSPECTION SERVICE; SECRETARY OF HOMELAND SECURITY; and COMMISSIONER OF UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.

Before: Richard K. Eaton, Judge
Court No. 06–0018

[Plaintiffs' amended motion for preliminary injunction is denied; Defendants' motions to dismiss are granted.]

Dated: April 16, 2007

Simpson Thacher & Bartlett LLP (*Robert A. Bourque, Kyle A. Lonergan* and *Scott D. Laton*); *Natural Resources Defense Council, Inc.* (*Mitchell S. Bernard* and *Thomas Cmar*); *Schonbrun DeSimone Seplow Harris & Hoffman LLP* (*Paul Hoffman*), of counsel, for plaintiffs Native Federation of the Madre de Dios River and Tributaries; Racimos de Ungurahui Working Group; and the Natural Resources Defense Council, Inc.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*), for defendants U.S. Department of the Interior; U.S. Fish and Wildlife Service; U.S. Department of Agriculture; Animal and Plant Health Inspection Service; U.S. Department of Homeland Security; U.S. Customs and Border Protection; Secretary of the Interior; Director of the U.S. Fish and Wildlife Service; Secretary of Agriculture; Administrator of Animal and Plant Health Inspection Service; Secretary of Homeland Security; and Commissioner of the U.S. Customs and Border Protection.

Hogan & Hartson LLP (*Patrick D. Traylor and Jonathan T. Stoel*), for defendants Bozovich Timber Products, Inc., TBM Hardwoods, Inc.; and T. Baird McIlvain International Company.

OPINION

Eaton, Judge: Before the court are the amended motion for a preliminary injunction of plaintiffs Native Federation of the Madre de Dios River and Tributaries; Racimos de Ungurahui Working Group; and the Natural Resources Defense Council, Inc. ("plaintiffs") and the motions to dismiss of the U.S. Department of the Interior; the U.S. Fish and Wildlife Service ("FWS"); the U.S. Department of Agriculture; the Animal and Plant Health Inspection Service; the U.S. Department of Homeland Security; the U.S. Customs and Border Protection; the Secretary of the Interior; the Director of the FWS; the Secretary of Agriculture; the Administrator of the Animal and Plant Health Inspection Service; the Secretary of Homeland Security; and the Commissioner of U.S. Customs and Border Protection ("Government Defendants"); and Bozovich Timber Products, Inc.; TBM Hardwoods, Inc.; and T. Baird McIlvain International Company ("Private Defendants") (collectively, "defendants").

By their complaint and motion for a preliminary injunction, plaintiffs allege that defendants have violated, and continue to violate, Section 9(c) of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000) ("ESA"), which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("Convention" or "CITES"). CITES, Convention done at Washington, D.C., Aug. 3, 1973, T.I.A.S. No. 8249, 27 U.S.T. 1087. Specifically, plaintiffs complain that the Private Defendants trade in, and the Government Defendants authorize trade in, *Swietenia macrophylla*, a species of mahogany tree ("bigleaf mahogany") from Peru without valid export permits. *See* Am. Compl. ¶ 3.

Plaintiffs seek declaratory relief and an injunction directing the Government Defendants to "refrain from permitting the importation into the United States of bigleaf mahogany from Peru;" and directing

the Private Defendants to "refrain from the importation into the United States of . . . bigleaf mahogany . . . from Peru." Pls.' Proposed Prelim. Inj. 1–2; *see also* Am. Compl. 29 (seeking, *inter alia*, to "[e]njoin[ ] Government Defendants from permitting import, trade, and possession of Peruvian bigleaf mahogany unless and until bigleaf mahogany specimens from Peru comply with CITES"). In their respective motions to dismiss, defendants assert a number of defenses, among them that the court lacks subject matter jurisdiction to entertain plaintiffs' claims.

For the following reasons, the court finds that it does not have jurisdiction over plaintiffs' claims under 28 U.S.C. § 1581(i)(3) or (4) (2000). The court therefore denies plaintiffs' motion for a preliminary injunction and grants defendants' motions to dismiss.

BACKGROUND

I. Factual Summary

Plaintiffs bring this action on behalf of native communities and inhabitants of the Madre de Dios region of the Peruvian Amazon, where bigleaf mahogany is found. Am. Compl. ¶¶ 8–16; *see also* 16 U.S.C. § 1540(g)(1) (providing for citizen suits). International demand for bigleaf mahogany timber is high, due to the dense, hard, high–value quality of the wood.[1] Am. Compl. ¶ 1. Plaintiffs allege that to meet demand, illegal logging of bigleaf mahogany trees takes place in Peru, which threatens the species with extinction and in turn results in injury to plaintiffs. Am. Compl. ¶ 16. It is further alleged that Peru's Scientific Authority, the National Agrarian University of La Molina ("La Molina"), and Peru's Management Authority, the National Institute of Natural Resources ("INRENA"), are aware of this illegal activity, and have nonetheless granted permits to export bigleaf mahogany without determining, as CITES requires, whether the wood to be exported was obtained in contravention of Peruvian law and whether the exports would be detrimental to the survival of bigleaf mahogany. Am. Compl. ¶ 3.

Private Defendants are importers of Peruvian bigleaf mahogany into the United States. There is no dispute that their shipments were accompanied by facially valid export permits. Even so, plaintiffs allege that the Private Defendants and the Government Defendants have violated the Convention and Section 9 of the ESA by, respectively, trading in and allowing trade in, bigleaf mahogany, because La Molina and INRENA have not made "legitimate non–

---

[1] According to plaintiffs' amended complaint, bigleaf mahogany trees "can grow to more than 150 feet tall and six feet wide over the course of hundreds of years. Its slow growth rate creates a dense, hard, high–value wood that has been coveted by traders for centuries. At more than $1,500 per cubic meter of imported sawn wood, the timber from a single tree can yield more than $100,000 when fashioned into luxury furniture." Am. Compl. ¶ 41.

detriment and lawful acquisition determinations" in connection with exports of bigleaf mahogany. Am. Compl. ¶ 3.

II. Legal Framework

A. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention is an international agreement to which the United States and Peru are parties. It has as its purpose the "protection of certain species of wild fauna and flora against over-exploitation through international trade." CITES Proclamation of the Contracting States, 27 U.S.T. at 1090 (recognizing that "international cooperation is essential" to achieving this goal).

The species covered by the Convention are listed in three appendices. Species listed in Appendix I are those "threatened with extinction which are or may be affected by trade." CITES, art. II ¶ 1, 27 U.S.T. at 1092. Trade in Appendix I species "must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." *Id*., 27 U.S.T. at 1092.

Appendix II species include

> all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival. . . .

CITES, art. II ¶ 2(a), 27 U.S.T. at 1092.

Appendix III species include

> all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other parties in the control of trade.

CITES, art. II ¶ 3, 27 U.S.T. at 1092.[2]

The Convention sets forth a detailed framework for regulating trade through permitting processes that are carried out by government agencies in the exporting and importing countries. The permit requirements for trade in Appendix I species and Appendix II species are different. Trade in Appendix I species requires both an export permit, issued by the exporting country, and an import permit, is-

---

[2] Amendments to the lists of species in Appendices I and II are considered and, where appropriate, adopted by the parties to the Convention at meetings held biennially. *See* CITES, arts. XI, XV, 27 U.S.T. at 1104–05, 1110–12; *see also* http://www.cites. org/eng/disc/CoP.shtml (last visited Apr. 16, 2007). The CITES Secretariat maintains the official list of species contained in each appendix, which is available on the CITES Web site. *See* http://www.cites.org/eng/app/index.shtml (last visited Apr. 16, 2007).

sued by the importing country. *See* CITES, art. III ¶ 3, 27 U.S.T. 1093–94. Trade in Appendix II species, on the other hand, does not require that an import permit be obtained, but only that the exporting country issue a permit for the outgoing shipments. *Compare* CITES, art. III, 27 U.S.T. 1093–94, *with* art. IV, 27 U.S.T. at 1095–96.[3]

Bigleaf mahogany from Peru is a species of plant listed in Appendix II. By the Convention's terms, "[a]ll trade in specimens of species included in Appendix II shall be in accordance with the provisions of [Article IV of the Convention]." CITES, art. IV ¶ 1, 27 U.S.T. at 1095. In pertinent part, Article IV[53] provides:

> The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of theState of export has advised that such export will not be detrimental to the survival of that species; [and]
>
> (b) a Management Authority of theState of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora. . . .
>
> The import of any specimen of a species included in Appendix II shall require the prior presentation of . . . an export permit. . . .

---

[3] U.S. regulations echo this distinction between requirements for trade in Appendix I and Appendix II species. *See* 50 C.F.R. § 23.12(a)(1)(i) (requiring both "a United States import permit, issued pursuant to § 23.15, and a valid foreign export permit issued by the country of origin" in order to import Appendix I species) & § 23.12(a)(2)(i) (2005) (requiring only "a valid foreign export permit issued by the country of origin" in order to import Appendix II species).

[4] As previously noted, trade in Appendix I species requires both an export permit, issued by the exporting country, and an import permit, issued by the importing country. Thus, Article III of the Convention contains the same language found in Article IV subparagraphs (a), (b) and (c), with respect to the conditions that must be met before an export permit shall be granted, but also states an additional condition, namely "(d) a Management Authority of the State of export is satisfied that an import permit has been granted for the [Appendix I] specimen." CITES, art. III ¶ 2(d), 27 U.S.T. at 1093. With respect to the required import permit, it states:

> An import permit shall only be granted when the following conditions have been met:
> (a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
> (b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
> (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

CITES, art. III ¶ 3(a)–(c), 27 U.S.T. at 1093–94.

CITES, art. IV ¶¶ 2, 4, 27 U.S.T. at 1095–96. Thus, in order for Peru to export bigleaf mahogany its Scientific Authority (La Molina) and Management Authority (INRENA) must be satisfied that certain enumerated preconditions have been met. The only express obligation that Article IV places on a country importing bigleaf mahogany is to "require the prior presentation of" an export permit. CITES, art. IV ¶ 4, 27 U.S.T. at 1096.

B. The Endangered Species Act

Congress enacted the ESA to conserve endangered and threatened species[5] and the ecosystems on which they depend, and "to take such steps as may be appropriate to achieve the purposes of," *inter alia*, CITES. 16 U.S.C. § 1531(b). Section 9(c) of the ESA implements the Convention into U.S. law:

> It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade[6] in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

16 U.S.C. § 1538(c)(1). Plaintiffs assert their claims under Section 9(c).

III. Plaintiffs' Claims

In their complaint, plaintiffs allege that La Molina and INRENA have acknowledged having insufficient information to make the non-detriment and lawful acquisition findings required for export under Article IV of the Convention.[7] *See* Am. Compl. ¶¶ 58–72, 90–104. Plaintiffs further allege that by honoring the facially valid export permits, the Government Defendants have violated U.S. law. Am. Compl. ¶¶ 3, 90–109. Thus, plaintiffs have brought suit to enjoin defendants from importing bigleaf mahogany into the United States "unless and until bigleaf mahogany specimens from Peru comply with CITES." Am. Compl. 29.

---

[5] An "endangered species" is one "in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6). A "threatened species" is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(20).

[6] Under Article I of the Convention, " '[t]rade' means export, re-export, import and introduction from the sea." CITES, art. I(c), 27 U.S.T. at 1090. The ESA does not define "trade."

[7] *See, e.g.*, Appendix to Pls.' Am. Mot. Prelim. Inj., Exs. M (Letter from Ignacio Lombardi Indacochea (La Molina) to Rosario Acero Villanes (INRENA) of Nov. 12, 2004); N (Letter from Peter O. Thomas (FWS) to Leoncio Alvarez Vasquez (INRENA) of Dec. 14, 2004); Q (La Molina, Summary of Activities Performed by CITES Scientific Authority in Regard to *Swietenia macrophylla* Species (Feb. 11, 2005)); and R (Letter from Leoncio Alvarez Vasquez (INRENA) to Peter O. Thomas (FWS) of Feb. 9, 2005).

STANDARD OF REVIEW

By their motion for a preliminary injunction, plaintiffs ask the court "to enjoin the importation of Peruvian bigleaf mahogany pending the outcome of this lawsuit." Mem. Supp. Pls.' Am. Mot. Prelim. Inj. 44. Plaintiffs bear the burden of establishing a right to the relief they seek in light of four factors: (1) the likelihood that plaintiffs will succeed on the merits of their claims; (2) that plaintiffs will suffer irreparable harm without the requested injunctive relief; (3) that the balance of hardships tips in plaintiffs' favor; and (4) that granting the requested relief would not be contrary to the public interest. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)).

In considering plaintiffs' motion for a preliminary injunction and defendants' motions to dismiss, the court accepts as true the well-pled factual allegations made in plaintiffs' first amended complaint and construes "all reasonable inferences in favor of [plaintiffs]." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

As to defendants' motions to dismiss for lack of subject matter jurisdiction, plaintiffs bear the burden of establishing the Court's jurisdiction. *See United States v. Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982) (citing, *inter alia*, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936)).

DISCUSSION

The Court of Appeals for the Federal Circuit has said that, when ruling on a motion for a preliminary injunction, this Court must consider whether it has subject matter jurisdiction to hear the plaintiff's claims. *See U.S. Ass'n of Imps. of Textiles and Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005) ("The question of jurisdiction closely affects the [plaintiff's] likelihood of success on its motion for a preliminary injunction. Failing to consider it [is] legal error."). Where subject matter jurisdiction is lacking, denial of a motion for a preliminary injunction is required. *Id.* at 1350 (reversing grant of preliminary injunction on ground that plaintiff could not show even a "fair chance" of success on the merits because plaintiff's claims were not ripe).

In their complaint, plaintiffs assert that the Court has subject matter jurisdiction under 28 U.S.C. § 1581(i)(3) and (4). Am. Compl. ¶ 5. Section 1581(i)(3) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . ., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States,

> its agencies, or its officers, that arises out of any law of the United States providing for . . .
>
> (3) embargoes or other quantitativerestrictions on the importation of merchandise for reasons other than the protection of the public health or safety. . . .

28 U.S.C. § 1581(i)(3). Plaintiffs argue that Section 1581(i)(3)'s requirement that the claims they assert "arise[ ] out of any law of the United States providing for . . . [an] embargo[ ]" is satisfied by Section 9(c) of the ESA. *See* Pls.' Mem. Opp'n Defs.' Mots. Dismiss 8 ("Plaintiffs' claims arise under ESA § 9(c), which makes it 'unlawful . . . to engage in any trade in any specimens contrary to the provisions of the Convention.' Accordingly, because it prohibits all imports in contravention of CITES, ESA § 9(c) provides for an embargo.") (quoting 16 U.S.C. § 1538(c)(1); emphasis in original). Therefore, plaintiffs argue that their claims fall within the Court's exclusive jurisdiction.

By their motions to dismiss, defendants dispute plaintiffs' jurisdictional claim. In doing so, they distinguish Section 9(a) of the ESA[8] from Section 9(c) and argue that Section 9(c) does not provide for an embargo on trade in species listed in Appendix II of CITES. According to defendants, by adopting Section 9(a), Congress expressly banned imports of certain named species that the Secretary of Commerce or the Secretary of the Interior has determined are "endangered." *See* 16 U.S.C. § 1533(a). Here, however, because the imported species has not been found by the Secretary to be endangered, but is rather listed in Appendix II of the Convention, defendants insist that there is no embargo under the ESA. See Gov't Defs.' Mot. Dismiss Pls.' First Am. Compl. ("Gov't Defs.' Mot.") 9–10. Rather, defendants insist that "ESA Section 9(c), the provision that addresses the regulation of CITES listed species, simply requires parties to follow CITES procedures. . . ." Gov't Defs.' Mot. 9.

Thus, the question for the court is whether CITES and the ESA provide for an embargo on the importation of bigleaf mahogany or for the regulation of trade in the species. For the reasons that follow, the court concludes that Section 9(c) of the ESA does not provide for an embargo on the importation of Appendix II species into the United States and that therefore Section 1581(i)(3) does not provide a basis for hearing plaintiffs' claims.

---

[8] Section 9(a) is codified at 16 U.S.C. § 1538(a), which provides in pertinent part:

> Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to- [*inter alia*,] (A) import any such species into, or export any such species from, the United States. . . .

16 U.S.C. § 1538(a)(2).

To determine what constitutes an embargo, a review of *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 173 (1988), is necessary. In *K Mart*, the United States Supreme Court was presented with the question of whether Section 526(a) of the Tariff Act of 1930, 19 U.S.C. § 1526(a),[9] imposed an embargo within the meaning of 28 U.S.C. § 1581(i)(3). The Court found that the word embargo, as it appears in Section 1581(i)(3), is to be given its ordinary meaning, i.e., "a governmentally imposed quantitative restriction – of zero – on the importation of merchandise." *Id*. at 185.[10] In the course of its analysis, the Court made clear that "not every governmental importation prohibition is an embargo":

> To hold otherwise would yield applications of the term "embargo" that are unnatural, to say the least. For example, the prohibitory nature of regulations providing that the "*importation* into the United States of milk and cream is *prohibited*"[11] except by a permitholder, and that "Customs officers *shall not permit the importation* of any milk or cream that is not tagged in accordance with [applicable] regulations," would convert licensing and tagging requirements into embargoes on unlicensed or improperly tagged dairy products. Similarly, a requirement that certain meat products be inspected prior to importation would magically become an embargo of uninspected (but not necessarily tainted) meat when Congress uses a formulation like, "meat . . . products *shall not be released from Customs* custody prior to inspection[.]"

Id. at 187 (citing 19 C.F.R. §§ 12.7(a) & (b), 12.8 (1987)) (emphasis, first alteration and ellipsis in original). Thus, by choosing the word "embargoes" over the phrase "importation prohibitions" in Section 1581(i)(3), Congress created a circumscribed sub-class of importation prohibitions that falls within the Court's jurisdiction. *Id*. at 189; *see*

---

[9] The version of Section 1526(a) in force at the time provided:

(a) *Importation prohibited*

Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States . . . unless written consent of the owner of such trademark is produced at the time of making entry.

19 U.S.C. § 1526(a) (emphasis added) (quoted in *K Mart Corp.*, 485 U.S. at 179 n.1).

[10] Ultimately, the Court held that § 1526(a) did not impose an embargo because it "does not set a *governmentally determined* quantitative limit on the entry of, or foreign trafficking in, any particular product. . . ." *K Mart Corp.*, 485 U.S. at 186 (emphasis added).

[11] It is worth noting that the *K Mart* Court recognized that the presence of the word "prohibited" in a statute does not necessarily mean it constitutes an embargo. *K Mart* Corp., 485 U.S. at 187.

also Earth Island Inst. v. Brown, 28 F.3d 76, 77 (9th Cir. 1994) ("[T]he [*K Mart*] Court made it clear that the term 'embargo' does not, for purposes of § 1581(i), encompass all importation prohibitions, but rather names a subclass of importation prohibitions."). In so choosing, Congress declined to grant this Court jurisdiction to review challenges to "conditions of importation" as distinct from those involving embargoes. *K Mart Corp.*, 485 U.S. at 189.

The court finds that Section 9(c) does not forbid trade in species protected under the Convention. Rather, it mandates compliance with the Convention, which "regulates international trade in wild species . . . through the requirement that certain forms of documents must accompany shipments of protected species." *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 130 (D.D.C. 1979). "The degree of trade *regulation* under CITES depends on the appendix in which a specimen is listed." *United States v. Norris*, 452 F.3d 1275, 1278 (11th Cir. 2006) (emphasis added).

That it does not forbid trade in species listed in the appendices is evident from the language of CITES itself. The Convention expressly states that the agreement does not infringe on the ability of the parties to adopt stricter measures than are provided in the Convention, including "complete prohibition" of trade in CITES-listed species, or any other species. *See* CITES, art. XIV ¶ 1(a), 27 U.S.T. at 1108 (providing that parties may adopt "stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof") and (b) (providing same with respect to non-CITES-listed species). If the Convention were intended to ban trade, this language would not be necessary.

Next, in implementing the Convention, the United States elected to track the Convention's permit requirements in the regulations promulgated by the FWS and to take "stricter measures" only insofar as requiring that an export permit must be "valid." *Compare* CITES, art. IV ¶ 4, 27 U.S.T. at 1096 (requiring "an export permit") *with* 50 C.F.R. § 23.12(a)(2)(i) (requiring "a valid foreign export permit issued by the country of origin"). The regulations provide in pertinent part:

> (a) *Unless the requirements in this part 23 are met*, . . . it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, solicit another to commit, or cause to be committed any of the acts described in paragraph[ ] (b) . . . of this section.
>
> (b) Import. (1) It is unlawful to import intothe United States any . . . plant listed in appendix I, II or III . . . from any foreign country.

50 C.F.R. § 23.11(a) & (b) (emphasis added). The "requirements in this part 23" referenced in § 23.11(a) above are contained in § 23.12(a)(2)(i), which provides:

> In order to import into the United States any wildlife or plant listed in appendix II from any foreign country, a valid foreign export permit issued by the country of origin . . . must be obtained prior to such importation.

50 C.F.R. § 23.12(a)(2)(i). The regulations further provide that "[o]nly export permits . . . issued and signed by a management authority will be accepted as a valid foreign document from a country that is a party to the Convention."[12] 50 C.F.R. § 23.14(a). A Customs inspector must validate documentation accompanying Appendix II species at the time of import by endorsing the documentation. *See* 7 C.F.R. § 355.22(a) & (c). "Validation" is defined as "[a]n original stamp, signature, and date of inspection placed upon documentation required by 50 CFR . . . part 23 [pertaining to CITES-listed species] by an inspector at the port where the terrestrial plants are to be imported . . . ." *Id*. § 355.2. Thus, like the Convention itself, the regulations do not completely ban trade in Appendix II species but rather regulate it.

It is clear that Congress anticipated that lines would be drawn between laws that provide for the regulation of trade and those that provide for embargoes in order to avoid the "unnatural" results the Supreme Court cautioned against in *K Mart*. *See K Mart Corp*., 485 U.S. at 187. An examination of the conditions of importation cited in *K Mart* as insufficient to constitute embargoes reveals that the permit requirements in the Convention and the U.S. regulations do not amount to a ban on trade. For instance, health-related restrictions on importation, such as the "prohibition" against the importation of

---

[12] The regulations do not specify any criteria to determine whether a foreign export permit is "valid." *See Castlewood Prods., LLC v. Norton*, 365 F.3d 1076, 1083 (D.C. Cir. 2004) (noting 50 C.F.R. § 23.12(a)(3)(i) "does not specify the conditions that a foreign export permit must meet in order for U.S. officials to regard the permit as valid, i.e., to conclude that the exporting Management Authority was 'satisfied that the specimen was not obtained in contravention of the laws of that State'"). In the past, when a Customs inspector or other U.S. official has found reason to believe the export permit may not be valid, U.S. officials have "looked behind" the permit to ensure the export permit was issued in compliance with CITES. *See, e.g., id*. at 1084 (where Brazilian authorities notified the United States that issuance of export permits with respect to bigleaf mahogany shipments was not the result of an independent judgment made by the Management Authority in Brazil, the court upheld the seizure of such shipments as reasonable); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1120 (S.D. Fla. 1988) (probable cause to institute forfeiture action was found to exist where Peruvian authorities informed the United States that export permits accompanying shipments of parakeets were invalid and requested that the United States take appropriate action); *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281, 1285 (S.D. Fla. 1986) (probable cause for instituting forfeiture action was found to exist where export permits were deemed suspicious in that shipments contained thousands more crocodile hides than reported on the permit and the permit was a copy, not an original).

milk and cream "unless the person by whom such milk or cream is shipped or transported into the United States holds a valid permit," 19 C.F.R. § 12.7(a) (1987); or the restriction on release of meatproducts without prior inspection, 19 C.F.R. § 12.8 ("Such meat, meat-food products, horse meat and horse meat-food products shall not be released from Customs custody prior to inspection by an inspector . . . , except when authority is given by such inspector for inspection at the importer's premises or other place not under Customs supervision.") are not embargoes. *See K Mart Corp.*, 485 U.S. at 187. Similarly, the regulation concerning the importation of Appendix II species anticipates trade in those species, on the condition that "the requirements in . . . [50 C.F.R. § 23.12(a)(2)(i)] are met," i.e., the presentation of avalid foreign export permit. 50 C.F.R. § 23.11(a).

Finally, CITES, Section 9(c) of the ESA and the implementing regulations are qualitatively different from laws that this Court has found to provide for embargoes. Absent from those laws is a simple permitting scheme like the one present here. Rather, the laws found to provide for embargoes prohibit trade outright albeit with limited exceptions. *See, e.g., Int'l Labor Rights Fund v. United States*, 29 CIT ___, ___, 391 F. Supp. 2d 1370, 1371 (2005) (Section 307 of the Tariff Act of 1930, codified as amended at 19 U.S.C. § 1307 (2002),[13] prohibited importation of merchandise produced by forced labor, except where domestic consumption is greater than domestic production); *Florsheim Shoe Co. v. United States*, 19 CIT 295, 297, 880 F. Supp. 848, 850 (1995) (Presidential proclamation issued under Pelly Amendment to Fishermen's Protective Act of 1967, codified as amended at 22 U.S.C. § 1978 (Supp. V 1993),[63] prohibited "the importation of fish or wildlife . . . and their parts and products, of Tai-

---

[13] Title 19 U.S.C. § 1307 provides:

> All goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, . . . ; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.
>
> "Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor" includes forced or indentured child labor.

19 U.S.C. § 1307.

[14] Section 1978 provided, in pertinent part:

> Upon receipt of any certification made [Secretary of Commerce or the Secretary of the Interior] under paragraph [(a)](1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariff and Trade.

wan . . . ."); *Humane Soc'y of the United States v. Brown*, 19 CIT 1104, 901 F. Supp. 338 (1995) (High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a (Supp. V 1993) ("Driftnet Act")[15] prohibited the importation of "fish and fish products and sport fishing equipment . . . from [a] nation" identified by the Secretary of Commerce to be "conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation . . . ."); *Earth Island Inst. v. Christopher*, 19 CIT 812, 813–14, 890 F. Supp. 1085, 1087–88 (1995) (Note to 16 U.S.C. § 1537[65] prohibited "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely [certain] species of sea turtles," except where a finding is made under 16 U.S.C.

---

22 U.S.C. § 1978(a)(4).

[15] In pertinent part, the Driftnet Act provided:

(b) Sanctions

(1) Identifications
(A) Initial identifications
Not later than January 10, 1993, the Secretary of Commerce shall-
(i) identify each nation whosenationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation; and
(ii) notify the President and that nation of the identification under clause (i) . . .
(3) Prohibition on imports of fish and fish products and sport fishing equipment
(A) Prohibition
The President-
(i) upon receipt of notification of the identification of a nation under paragraph (1)(A) . . .
shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish and fish products and sport fishing equipment . . . from that nation.

16 U.S.C. § 1826a(b). The stated congressional policy underlying the Driftnet Act was to implement a United Nations General Assembly resolution, which called for, among other things, "an *immediate cessation* to further expansion of large-scale driftnet fishing," "a *moratorium* on fishing in the Central Bering Sea" and "a *permanent ban* on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation." 16 U.S.C. § 1826a (emphasis added).

[16] The note to Section 1537 of the ESA provided, in pertinent part:

(b)(1) In General.-The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
(2) Certification Procedure.-The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that-
(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. § 1537 note.

§ 1537(b)(2)). In contrast to the stringent statutory requirements that must be satisfied before merchandise subject to an embargo may enter the country, e.g., the certification procedure in 16 U.S.C. § 1537(b)(2),[17] an importer of an Appendix II species, such as bigleaf mahogany from Peru, may enter the merchandise upon presenting a valid export permit obtained from the Peruvian authorities. *See supra* Part II A at 9.

By entering into the Convention, the United States did not agree to end trade in CITES-listed species, nor did it elect to do so by enacting Section 9(c) to implement the Convention. On the contrary, the aim of CITES and the provisions of the ESA that implement it is to permit trade in certain species in a controlled, sustainable manner. *See* CITES Proclamation of the Contracting States, 27 U.S.T. at 1090 (recognizing that "international cooperation is essential for the protection of certain species of wild fauna and flora against *over-exploitation* through international trade") (emphasis added); 16 U.S.C. § 1531(a)(4)(F) (stating that "the United States has pledged itself as a sovereign state in the international community to conserve to the *extent practicable* the various species of fish or wildlife and plants facing extinction, pursuant to . . . [the Convention]") (emphasis added).

In sum, CITES provides for the regulation of trade in bigleaf mahogany. The regulations that implement Section 9(c), and in turn, the Convention, while restricting trade, do not restrict the quantity of imports to zero. *K Mart Corp.*, 485 U.S. at 185. Thus, plaintiffs' Section 9(c) claims do not arise under a U.S. law that provides for an embargo under 28 U.S.C. § 1581(i)(3).

Since plaintiffs have failed to establish jurisdiction under Section 1581(i)(3), Section 1581(i)(4) cannot provide a jurisdictional basis. The latter provision applies where the law pursuant to which a claim is brought provides for the "administration and enforcement with respect to the matters referred to in [*inter alia*] paragraph[] . . . (3) of this subsection . . . ." 28 U.S.C. § 1581(i)(4). Since Section 9(c) does not provide for an embargo, Section 1581(i)(4) does not provide an independent basis for jurisdiction. *See Retamal v. United States Customs & Border Prot.*, 439 F.3d 1372, 1375 (Fed.

---

[17] Notably absent from Section 9(c), the regulations and Article IV of CITES is any requirement that the U.S. Government make a finding with respect to foreign countries based on an investigation of those countries' activities. *Compare, e.g., Florsheim Shoe Co.*, 19 CIT at 297, 880 F. Supp. at 849 (noting that the Secretary of the Interior "certified Taiwan under 22 U.S.C. § 1978 . . . as a country whose activities were diminishing the effectiveness of international conservation measures"); *Earth Island Inst.*, 19 CIT at 814, 890 F. Supp. at 1088 (quoting 16 U.S.C. § 1537(b)(2), which provides for certification to Congress that a "harvesting nation" has a regulatory program governing the incidental taking of sea turtles that is comparable to that of the United States); *Humane Soc'y of the United States*, 19 CIT at 1109, 901 F. Supp. at 344 (quoting 16 U.S.C. § 1826a(b)(1)(A), which provides that the Secretary of Commerce "shall identify each nation . . . conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation . . . .").

Cir. 2006) ("[The plaintiff's] claims do not relate to the 'administration and enforcement' of a matter referred to in subsections 1581(a)–(h) or in 1581(i)(1)–(3). Therefore, section 1581(i)(4) does not provide an independent ground for jurisdiction in this case.").

CONCLUSION

For the forgoing reasons, the court does not have subject matter jurisdiction over plaintiffs' claims. Therefore, plaintiffs have not met their burden of showing a likelihood that they will succeed on the merits, and their motion for a preliminary injunction must be denied. *See U.S. Ass'n of Imps.*, 413 F.3d at 1350. Further, because the Court lacks subject matter jurisdiction in this case, defendants' motions to dismiss are granted. Judgment shall enter accordingly.

Slip Op. 07–57

NATIVE FEDERATION OF THE MADRE DE DIOS RIVER AND TRIBUTARIES; RACIMOS DEUNGURAHUI WORKING GROUP; and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. BOZOVICH TIMBER PRODUCTS, INC.; TBM HARDWOODS, INC.; T. BAIRD MCILVAIN INTERNATIONAL CO.; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES FISHAND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; SECRETARY OF THE INTERIOR; DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE; SECRETARY OF AGRICULTURE; ADMINISTRATOR OF ANIMAL AND PLANT HEALTH INSPECTION SERVICE; SECRETARY OF HOMELAND SECURITY; and COMMISSIONER OF UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.

Before: Richard K. Eaton, Judge
Court No. 06–0018

JUDGMENT

This case having been submitted for decision; and the court, after due deliberation, having issued the decision herein; Now therefore, in conformity with said decision, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' motions to dismiss are granted.