In the Matter of

CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES

Investigation No. 337-TA-143

EXCLUSION ORDER MODIFICATION
Proceedings

USITC PUBLICATION 2036

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United States International Trade Commission / Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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Washington, DC 20436

In the Matter of	
CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES	Investigation No. 337—TA-143

NOTICE OF ISSUANCE OF MODIFIED
GENERAL EXCLUSION ORDER

AGENCY: U.S. International Trade Commission.

ACTION: Modification of general exclusion order issued in the above—captioned investigation.

SUMMARY: Notice is hereby given that the Commision has determined to modify the outstanding exclusion order issued in October 1984 in the above—captioned investigation.

FOR FURTHER INFORMATION CONTACT: Jean H. Jaekson, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street, NW, Washington, DC 20436, telephone 202-523-1693. Hearing—impaired individual may obtain information on this matter by contacting the Commission's TDD terminal at 202-724-0002.

SUPPLEMENTARY INFORMATION: This investigation was originally conducted in 1983 and 1984 to determine whether there was a violation of section 337 of the Tariff Act of 1930 (19 U.S.C,. S 1337) by the importation or sale of certain amorphous metal alloys and amorphous metal articles from Japan and the-Federal Republic of Germany. 48 Fed, Reg. 15g63 (Apr. 13, 1983); 48 Fed. Reg. 43108 (Sept. 21, 1983); 49 Fed. Reg. 404/ (Feb. I, 1984). After finding a violation in the importation of the accused articles, the Commission issued a general exclusion order which prohibited the entry of amorphous metal articles cast abroad by the processes claimed in clams 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257 (the '257 patent) owned by complainant Allied Corporation (Allied). Certain Amorphous Metal Alloys and Amorphous Metal Articles, Investigation No. 337--TA-143, uSITC Publication 1664 (Nov. 1984); 49 Fed. Reg. 42083 (Oct. 24, 1984).

Subsequently, the Commission instituted exclusion order modification proceedings to determine whether the order should be modified, vacated, or left unchanged. Commission Action and Order of July 26, 1985, 50 Fed. Reg. 31260 (Aug. 1, 1985); 19 C.F.R. § 211.57. The Commission ordered that the modification proceedings be presided over by a Commission administrative law judge (ALJ) who would conduct adversary proceedings to the extent necessary to take evidence, make findings of fact and conclusions of law, and issue a recommended determination (RD) as to: (1) whether there are effective and feasible means of enforcing the order without excluding products made by non—infringing processes; (2) what those means are; and (3) the disposition of the order, i.e., whether the order should be modified, limited in scope, vacated, or left unchanged. U.S. Customs Service (Customs) was encouraged to participate in the modification proceedings.

The ALJ's RD was issued on March 3, 1986. The following parties filed exceptions to the RD on March 28, 1986: Allied, Hitachi Metals Limited and Hitachi Metals International, the Commission investigative attorney, and Customs. On June 5, the Commission determined to remand the RD to the ALJ to determine if new evidence submitted by Allied should be admitted and, if admitted, whether the evidence would change the ALJ's recommendation. On August 14, 1986, the ALJ issued additional findings concerning an initial advisory opinion issued concurrently with the RD, but made no changes in the RD.

Having considered the ALJ's RD and the record in this proceeding, the Commission determined to modify the outstanding exclusion order issued in the above—captioned investigation. This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) and Commission rule 211.57 (19 C.F.R. § 211.57).

Copies of the Commission's Action and Order, its Memorandum Opinion in support thereof, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: June 17, 1987

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Washington, DC 20436

In the Matter of

CERTAIN AMORPHOUS METAL ALLOYS
AND AMORPHOUS METAL ARTICLES

Investigation No. 337-TA•143

COMMISSION ACTION AND ORDER

Background

This investigation was originally conducted in 1983 and 1984 to determine whether there was a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. S 1337) by the importation or sale of certain amorphous metal alloys and amorphous metal articles From Japan and the Federal Republic of Germany. 1/ After finding a violation in the importation of the accused articles, the Commission issued a general exclusion order which prohibited the entry of amorphous metal articles cast abroad by the processes claimed in claims 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257 (the '257 patent) owned by complainant Allied Corporation (Allied). 2/

Subsequently, the Commission instituted exclusion order modification proceedings to determine whether the order should be modified, vacated, or

1/ SRe 48 Fed. Reg. 15963 (Apr. 13, 1983); 48 Fed. Reg. 43108 (Sept. 21, 1983); 49 Fed. Reg. 4047 (Feb. 1, 1984).
2/ See Certain Amorphous Metal Alloys and Amorphous Metal Articles, Investigation No. 337-TA-143, USITC Publication 1664 (Nov. 1984); 49 Fed. Req. 42083 (Oct. 24, 1984).

left unchanged. 3/ The Commission ordered that the modification proceedings be presided over by a Commission administrative law judge (ALJ) who would conduct adversary proceedings to the extent necessary to take evidence, make findings of fact and conclusions of law, and issue a recommended determination (RD) as to: (1) whether there are effective and feasible means of enforcing the exclusion order without excluding products made by non-infringing processes; (2) what those means are; and (3) the disposition of the exclusion order, i.e., whether the order should be modified, limited in scope, vacated, or left unchanged. The U.S. Customs Service was encouraged to participate in the modification prodeedings.

The ALJ's RD was issued on March '3, 1986. The following parties filed exceptions to the RD on March 28, 1986: Allied, Hitachi Metals, Ltd. and Hitachi Metals International, Ltd., the Commission investigative attorney, and the U.S. Customs Service. On June 5, 1986, the Commission determined to remand the RD to the ALJ to determine if new evidence submitted by complainant Allied should be admitted and, if admitted, whether the evidence would change the ALJ's recommendation. On August 14, 1986, the ALJ issued additional Findings concerning an initial advisory opinion which was issued concurrently with the RD, but made no changes in the RD.

Action

Having considered the ALJ's recommended determination and the record in this proceeding, the Commission has determined to modify the outstanding exclusion order issued in the above--captioned investigation.

3/ Commission Action and Order of July 26, 1985, 50 Fed. Reg. 31260 (Aug. 1 1985); 19 C.F.R. § 211.57.

Order

Accordingly, it is hereby ORDERED THAT:

1. Amorphous metal articles which are manufactured abroad by a method of forming a continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure in accordance with the processes set forth in claims 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip;

are excluded from entry into the United States for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

The phrase "slotted nozzle" found in claims 1 and 12 of the patent is construed to mean a nozzle having a rectangular,or slotted opening and wide lips on the surface of the nozzle next to this rectangular or slotted opening. Wide lips are such that the width of the back nozzle lip (lip 1, measured in the direction of movement of the chill surface) must have a width that is at least equal to the width of the nozzle slot. The width of the front nozzle lip (lip 2, measured in the direction of movement of the chill surface) must be from "about 1.5" to "about 3" times the width of the nozzle slot. The phrase "about 1.5" is construed to mean that the front lip is from at least 1.45 to 1.55 times the width of the nozzle slot. The phrase "about 3" is not construed by this Order.

2. Any amorphous metal .strip, ribbon, or wire having a width of less than seven (7) millimeters does not fall within the scope of paragraph I of this Order and shall riot be excluded from entry into the United States pursuant to this Order.

3. Persons desiring to import amorphous metal articles covered by paragraph 1 of thi, Order may petition the Commission to institute such Further proceedings as may be appropriate in order to determine whether the amorphous metal articles sought to be imported fall outside the scope of paragraph 1 of this Order, and therefore should be allowed entry into the United States.

4. Persons desiring to import amorphous metal articles covered by this Order shall certify to the U.S. Customs Service that the amorphous metal articles sought to be imported were manufactured by a process that the U.S. International Trade Commission has determined to be outside the scope of paragraph 1 of this Order, such certification to be accompanied by documents which establish to the satisfaction of the U.S. Customs Service that the U.S. International Trade Commission has determined the process to be outside the scope of paragraph 1 of this Order.

5. Persons desiring to import into the United States amorphous metal articles covered by this Order shall maintain and furnish, upon request of the U.S. Customs Service, manufacturers' records, or copies thereof, showing the widths of the nozzle opening and the nozzle lips used in each run in which an imported product was made.

6. Pursuant to 19 U.S.C. § 1337(i), this Order shall not apply to articles imported by and for the use of the United States, or imported for and to be used for, the United States with the authorization or consent of the Government.

7. The Secretary shall serve copies of this Commission Action and Order and the Commission Memorandum Opinion in support thereof upon each party of record to this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury, and shall publish notice thereof in the Federal ke inter.

8. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57).

By order of the Commission.

Kenn t R. Mason
Secr tary

Issued: June 17, 1987

UNITED STATES INTERNATIONAL MADE COMMISSION
Washington, DC 20436

In the Matter of	Investigation No. 33/-1A—L43
CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES	EXCLUSION ORDER MODIFICATION PROCEEDINGS

VIEWS OF THE COMMISSION 1/

This opinion discusses the Commission's determination in the exclusion order modification proceedings in the above—captioned investigation.

BACKGROUND

An investigation was conducted in 1983 and 1984 to dotermine whether there was a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 133/) by the importation or sale of certain amorphous metal alloys and amorphous metal articles from Japan and the Federal. Republic of

1/ This Opinion contains the following abbreviations:

ALJ =	Administrative Law judge
IA =	Commission Investigative Attorney
IA0 =	Initial Advisory Opinion, issued March 3, 1986.
ID =	Unreviewed Initial Determination issued May 14, 1984, by the ALJ and adopted by the Commission on October 24, 1984.
RD =	Recommended Determination in Exclusion Order Modification Proceedings, issued March 3, L986.
RD—FF =	Findings of Fact issued with IAO and RD, March 3, 1986.
RD—TR =	Transcript of Evidentiary Hearing held in Exclusion Order Modification Proceedings, Nov. 15, 1985.

Germany. [2/] After finding a violation of section 337 in the importation of the accused articles, the Commission issued a (general exclusion order which prohibited the entry of amorphous metal articles cast abroad by the processes claimed in claims 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,25/ (the '257 patent) owned by complainant Allied Corporation (Allied). [1/] In 1985 respondents Hitachi Metals, Ltd. and Hitachi Metal International, Ltd. (collectively, HML), and respondent Vacuumschmelze GmbH (Vac) requested either modification of the exclusion order or issuance of an advisory opinion to allow or facilitate the importation of articles cast by modified processes, [4/]

On July 26, 1985, the Commission instituted exclusion order modification proceedings pursuant to Commission rule 211.5/ to determine whether the

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2/ See 48 Fed. Reg. 15963 (Apr. 13, 1983); 48 Fed. Reg. 43108 (Sept. 21, 1983); 49 Fed. Reg. 404/ (Feb. 1, 1984).

3/ See Certain Amorphous Metal Alloys and Amorphous Metal Articles, Investigation No. 337-4A-143, USITC Publication 1664 (Nov. 1.984); 49 Fed. Reg. 42083 (Oct. 24, 1984).

4/ See Motion No. 143-86"C", filed February 22, 1985 (HML) and Motion No. 143-89"C" filed May 23, 1985 (Vac). Subsequently, the Commission instituted advisory opinion proceedings to determine whether the modified casting processes of Vac or HML would infringe the '257 patent if those processes were practiced in the United States and authorized the consolidation of the HML and Vac advisory proceedings. Commission Action and Order of July 26, 1985; Commission Action and Order of Sept. 11, 1985; 19 C.F.R. § 211.54(b). The Commission concluded the advisory opinion proceedings on April 15, 1987, (Action Jacket CC-81-026) finding that the modified casting processes of both HML and Vac would not infringe the '257 patent if practiced in the United States.

outstanding order should be modified, vacated, or left unchanged. [5/] The Commission ordered that the modification proceedings be presided over by an administrative law judge (AL.J) who would conduct adversary proceedings to the extent necessary to take evidence, make findings of fact and conclusions of law, and issue a recommended determination (RD) as to: (I) whether there are effective and feasible means of enforcing the order without excluding products made by non—infringing processes; (2) what those means are; and (3) the disposition of the order, i.e., whether the order should be modified, limited in scope, vacated, or left unchanged. The U.S. Customs Service (Customs) was encouraged to participate in the modification proceedings.

The ALJ's RD was issued on March 3, 1986. [b/] On June 5, the Commission determined to remand the RD to the AL.J to determine if new evidence submitted by Allied should be admitted and, if admitted, whether the evidence would change the ALJ's recommendations. On August 14, 1986, the ALJ issued additional findings concerning the initial advisory opinion (IA0) issued concurrently in this investigation, but made no changes in the RD.

DISCUSSION

C. Need For Modification

Although, in the original investigation, the Commission added certain timitatiOns concerning the width of the casting noz.7.10 lips used in the '25/

5/ Commission Action and Order of July 26, 1985, 50 Fed. Rog. 31260 (Aug. 1, 1985); 19 C.F.R. § 211.51.

6/ The following parties filed exceptions to the RD on March 28, 1986: Allied, HML, the Commission investigative attorney (LA), and Customs. Replies to the various exceptions were filed on April. 9, 1986.

process in order to save the claims from a finding of invalidity, [7] the outstanding exclusion order did riot expressly incorporate those limitations. The order recited that

> 1. Amorphous metal articles manufactured abroad in accordance with the process set Forth in claims L, 2, 3, 5, 8, and/or 12 of U.S Letters Patent 4,221,251 are excluded From entry into the United States for the remaining term of said patent. . . .

the order was based on the premise that no processes existed for the manufacture of commercially salable, wide amorphous metal ribbon that would not infringe the '257 patent if practiced in the United States. However, on April 15, 1987, the Commission determined that the modified casting processes of Vac and HML, which can be used 'to manufacture commercially salable wide amorphous metal strip, would not, if practiced in the United States, infringe the '257 patent. [9] In the exclusion order modification proceedings, the AU Found that there was no way to distinguish amorphous metal articles made by the modified non—infringing processes of Vac and HM1 from those made by a process that would infringe the '257 patent. [10] No party has objected to this finding. [11]

At the time of the original exclusion order's issuance, Allied had proposed a four—part testing protocol For use by Customs which Allied claimed

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7/ See e.g., IF) at 44, 48, 64.

8/ Commission Action and Order of October 15, 1.984. 49 Fed. Reg. 42083 (Oct. 24, 1984)

9/ Commission Advisory Joinion, issued May 28, 1987, at 2--3, 32, 34.

JO/ RD at 4; see RD-1F

11/ See g±perakly the p,Irt .os' Fxceptions to the RD.

could distinguish amorphous metal articles made by infringing processes from those made by non-infringing prior art processes. 12/ In view of the Commission's determination that the processes of Vac and HML would not, if practiced in the United States, infringe the '257 patent, and the ALj's uncontested finding that amorphous metal articles made by HML and Vac are indistinguishable from articles made by processes that would, if practiced in the United States, infringe the '257 patent, this protocol is no longer of use in enforcing the exclusion order. As the original order stands, Customs has no means of readily ascertaining which amorphous metal articles should be denied entry.

II. The Modified Order

Having considered the evidentiary record, the RD, and the submissions of the parties and Customs, we have determined to issue a modified general exclusion order in this investigation. 13/

The President allowed the general exclusion order issued at the conclusion of the original **Amorphous_ Metal** investigation to go into effect based on the assumption that a section 337 exclusion order covering a part or

12/ Letter From U.S. Trade Representative Brock to Commission Chairwoman Stern dated April 16, 1985. See Appendix.

13/ Chairman Liebeler notes that the ALj recommended that cease and desist orders be issued because otherwise the Commission's exclusion order could be ineffective. RD at 11. There is no indication that the respondents or the complainant petitioned for review of the RD with respect to issuance of the cease and desist orders. Because there were no objections to the issuance of cease and desist orders, Allied did not brief the issue. The Commission should not reject the ALJ's recommendation without briefing from the parties. Chairman Lieboler would direct respondents to show cause why such orders should not be issued.

component would not be interpreted as a basis For excluding higher value--added products which may incorporate that part or component. [12-/] In this respect, the modified exclusion order does riot change the scope of the articles covered by the original general exclusion order.[15/]

Paragraph 1 of the modified general exclusion order describes the articles barred from entry in terms of the process used to produce them Paragraph 1 also contains the limitations concerning the casting nozzle lips which the Commission determined were necessary to save the validity of the '257 claims. These limitations are drawn from the specification of the '257 patent and provide that--

> [t]he phrase "slotted nozzle ". . . is construed to mean . . . wide lips on the surface of the nozzle. Wide lips are such that the width of the back nozzle lip . . . must have a width that is at least equal to the width of the nozzle slot. The width of the front nozzle lip . . . must be from "about 1.5 to about 3" times the width of the nozzle slot.

In the advisory opinion proceedings, the Commission determined that the word "about" means a range of 0.05 in the context of a number containing two

14/ Letter from U.S. Trade Representative Brock to Commission Chairwoman Stern dated April 16, 1985. Customs has interpreted the 1984 exclusion order as follows:

> Products containing a small amount of amorphous metal in relation to the overall item (e.g., tape recorders with a small amount of amorphous metal as part of the recording head) are beyond the scope of this order.

Customs Information Exchange, paragraph 5, dated July 8, 1985.

Complainant has acquiesced to this interpretation. Allied's Response to Hitachi's Exceptions to the Recommended Exclusion Order at 2--4 (April 9, 1986).

15/ **See** Additional Views of Commissioners Eckes and Rohr.

significant figures such as 1,5, [16] Thus, paragraph :t is .consistent with the advisory opinion in-construing the phrase "about 1.5" to mean from i,45 to 1.55. The Commission, however, has not construed the phrase "about 3", a: number with one significant figure., Given that the.modifted exclusion order requires importers to prove that the process used to manufacture the articles sought to be imported would not, if practiced in the United ,States, infringe the '257 patent, we do not believe it is necessary to construe the term "about 3." The Commission has not determined that slot limitations are necessary to save the validity of the- '257 claims. Therefore, paragraph I. does not include a limitation concerning nozzle slot widths, [17]

Paragraph 2 exempts amorphous metal ribbon of less than 7 millimeters (mm) in width from coverage by the general exclusion order. Neither the original investigation nor the advisory opinion proceedings concerned amorphous metal ribbon of less than 7 mm in width, and Allied does not seek t exclude amorphous metal ribbon,of less than 7 mm in width. We note that the prior art method of amorphous metal casting known as spin jet casting produces amorphous metal ribbon of less than 7 mm, and that this prior art method cannot be used to manufacture wide amorphous' strip. [18]

Under paragraph 3, importers are required to obtain a Commission determination that the process used to produce the amorphous metal products sought to be imported would not, if practiced in the United States, infringe

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16/ See Commission Advisory Opinion at L5.

17/ Of coorse the lot dimension must be known in order to determine the ratio of the lip widths to the slot width.

18/ RD—Th at 848 849.

the '257 patent. [19/] The Commission has implemented similar provisions in Certain Multicellular Plastic Film (Multicellular Film), Cnv. No 33/-1A-54, affirmed, Sealed Air Corporation v. U.S. International Trade Commission, 645 F.2d 976 (CCPA 1981), and in Certain Processes for the Manufacture of Skinless Sausage Casings and Risulting product (Sausage Casings), Inv. No. 337-TA-148/169 This type of provision has been found necessary in investigations where, as here, a process patent is at issue and there is no way to discern by inspection of the imported article whether that article was produced by a process that would infringe a U.S. patent if practiced in the United States. **If** potential importers were not required to prove that their products were produced by a non-infringing process, Allied would be afforded little protection by the general exclusion order, and would be compelled to file new complaintS every time a new importer entered the U.S. market. 20/

19/ If the Commission has previously determined that the process used to manufacture the articles sought to be .imported would not, if practiced in the United States, infringe the '257 patent, the importer would, of course, be exempt from this provision.

20/ In Sealed Air, the U.S. Court of Customs and Patent Appeals (CCPA) upheld a provision requiring that prospective importers obtain a determiriation from the Commission that the articles sought to be imported are **made** by processes that would not, if practiced in the United States, infringe the U.S. patent at issue. the CCPA stated:

> Having determined the existence of a violation of the law, the ITC was faced with two alternatives.
>
> The ITC could exclude all such products from entering the U.S., contingent upon Unipak's or other foreign manufacturer's or the importer's petition for an LTC proceeding to determine whether entry should be allowed. That remedy risked unfairness to a foreign manufacturer entitled to entry, for example, one

(Footnote continued on next page)

Under paragraph 4, potential importers must certify that the articles sought to be imported were manufactured using a process that the Commission has determined would not, if practiced in the United States, infringe the '257 patent. Given the evidentiary record in this investigation, we believe that; importation under certification is the only feasible means by which Customs can enforce a general exclusion order.

(Footnote continued from previous page)
whose process might be found non-infringing, the unfairness being denial of importation for the period necessary to make that Finding.

Alternatively, the ITC could allow Unipak and other foreign manufacturers to continue to ship, and importers continue to import, all such products into the U.S. until Scaled Air could file another complaint against Unipak and new complaints against each other such Foreign manufacturer or importer, the 11C could institute investigations in each case, and violations could be found. that alternative risked unfairness to American industry injured by importation during the period necessary to reach those determinations.

Sealed Air Corporation v. U.S. International Trade Commission, 645 F.2d 976, 989.

The CCPA held that in view of the Commission's expertise in evaluating the likelihood of injury to American business, and absent a showing of loss of protectable rights, it is not the function of a court to substitute a different remedy of its own design for that chosen by the Commission or to substitute its view of the public interest for that of the Commission. Id.

In Viscofan S.A. v U.S. International Trade CoMmission, 787 F.2d 544, 548 (Fed. Cir. 1986), the U.S. Court of Appeals for the Federal Circuit, reaffirmed the Commission's wide discretion in selecting the form, scope, and extont of remedy, and stated that judicial review of the Commission's choice or remedy is necessarily limited. Viscofan concerned the appeal or the C,i.mission's remedial order in Sausage Casings. We note that a provisian ,imiiar to that contained in Muiticellular Film was contained in the ';.1,1..;,10 casings exclusion order. that particular provision, however, ...a, •ot at issue in the Vi scofan appeal.

All parties agree that there is no way to distinguish amorphous metal articles made by the non—infringing processes of Vac and HML from articles made by processes that would, if practiced in the United States, infringe the '257 patent. The Commission has determined that Vac and HML have non—infringing processes for casting amorphous metal. However, the record in this investigation also indicates that it would be Fairly easy for tho respondents to revert to infringing processes. In addition, the record indicates that the '257 process is more economical than the non•infringing processes of HML and Vac. Thus, Vac and HML have an economic incentive for reverting to the infringing processes. 21/

In addition to certification, paragraph 4 requires importers of amorphous metal products to present documents to Customs that prove to Custom's satisfaction that the amorphous metal in question has been produced by a .method determined to be non—infringing by the Commission. We anticipate that acceptable certification and documentation may include, but is not limited to: certification by Vac or HML that the articles sought to be imported were made by the processes found to be non—infringing in the recently concluded advisory opinion proceedings; certification that the amorphous metal articles have .won made, under license, by a process that has been determined to be non—infringing by the Commission, accompanied by.proof of that determination; certification that the articles sought to be imported have been purchased from

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21/ We note that both Vac and HML have stated that their processes are superior to the '257 process and they have no intention of reverting to the processes Found to be infringing by the Commission. See Responses of Vac and HML to Allied's Petition for Review of the Initial Advisory Opinion (April. 9, 1986).

a Firm that has used a process determined to he non-infringing by the Commission, along with proof of that determination.

his modified exclusion order provides uncomplicated certification provisions that allow Customs some discretion in enforcing the order. Under this order, any disputes concerning False certification or documentation may be resolved by an action brought by Customs under 19 U.S.C. § 1.592, which provides civil penalties for fraud, gross negligence and negligence in entering or attempting to enter merchandise into the commerce of the United States by means of False and material documentation, statements, or acts. Criminal penalties for entry of goods by means of false certifications are provided for in 18 U.S.C. § 1542.

Under paragraph 5, importers of amorphous metal articles are required to maintain, and produce upon request, records (or (opies thereof, in the case (d' non—manufacturer importers) of the nozzle opening and I.ip widths of the casting nozzles used to produce the articles. This provision servos to keep importers and foreign manufacturers aware of the conditions for importation of amorphous metal articles and ensures the existence of records that would be relevant in any proceedings concerning violation of the general exclusion order.

Paragraph 6 contains a provision exempting imports destined For use by the U.S. Government pursuant to 19 U.S.C. 51337(i). We note that, in the original investigation, Lawrence Livermore Laboratories, a U.S. Government facility, was found to have amorphous metal requirements that were not met by Allied.

Additional Views of Commissioners Eckes and Rohr

A Commission majority in this exclusion order modification proceeding has apparently decided to change the course of Commission precedent adopted in Certain Aramid Fibers, 1/ without explanation to the parties, the President or the public. This departure is disturbing and raises concerns about the nature of Commission decision-making.

In Aramid Fibers the Commission determined:

> For the Commission to issue an exclusion order complainant must establish that each of the products to be excluded, individually or collectively, can have the effect or tendency to substantially injure or destroy the domestic industry. 2/

The Commission further stated in Aramid Fiber:

> Consideration of the public interest factors also leads us to the conclusion that the issuance of the broader exclusion order [sought by complainant] would not be in the public interest. In this investigation, issuance of a broader order, covering processed products, would be unduly burdensome on legitimate trade and difficult to enforce. The requested order [by complainant] could cover articles in which the aramid fiber content is minimal and the attempt to establish exclusions based on the value or volume of the aramid fiber content of particular products that may be imported in the future would be too uncertain and speculative. 2/

1/ Certain Aramid Fibers, Inv. No. 337-TA-194, U.S.I.T.C. Pub. No. 1824 (March 1986).
2/ Id. at 11.
2/ Id. at 14.

Contrary to Commission precedent in the Aramid Fiber exclusion order, contrary to what respondent HML requested, and **contrary to what the General Counsel recommended in this instance,** A/ **a Commission majority has determined not to enumerate "specific articles which are subject to the exclusion order." / It is troublesome then that the rationale for not listing specific articles may not be found in the Views of the Commission. The reasoning of one Commissioner constituting** the majority's **unexplained break with precedent in this proceeding remains a mystery, but some indication for the remaining Commissioners' rationale may be traced back to C063-K-29.** That **memorandum states that the complainants should not bear the burden of demonstrating that the importation of individual products containing infringing articles have the effect or tendency to substantially injure the domestic industry. Moreover, they argue that imports of downstream products can only add to the substantial injury caused by upstream products and thus, that downstream products must be excluded unless** the **public interest factors dictate otherwise.**

These novel arguments clearly fly in the face of the Aramid **Fibers precedent and demand a full explanation in the** views of the majority in this proceeding. In Aramid Fibers the Commission reasoned that Section 337 provides that unfair **methods of competition and unfair acts in the importation or sale of articles must have the effect or tendency to destroy** or

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A/ GC Memorandum 87-036 at pp. 24-28, dated April 16, 1987.
5/ See "Action Jacket Approval Record" GC-87-036 and accompanying memoranda C062-K-052 dated May 29, 1987 and C063-K-29 dated May 13, 1987.

substantially injure a domestic industry. We further cited the Court of Appeals for the Federal Circuit decision in Textron that specifically rejected the argument that any amount of injury is sufficient to satisfy the injury requirement. 6 Moreover, Textron held, and we argued, that the patent holder must normally establish that the infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles. 2/ Thus, the Commission concluded that it was clear that it cannot assume the existence of substantial injury. 2/

The fact that the original exclusion order issued in Amorphous Metals prior to the Commission determination in Aramid Fibers is of no consequence here. Modification of a pre-existing exclusion order, while incorporating the record of a prior investigation, constitutes a de novo proceeding measuring the present and future effects on trade. Thus, Commission precedent, i.e., Aramid Fibers is controlling in the extant modification proceeding.

An argument that the makeup of the Commission has changed and thus, that altering the course of Commission precedent does

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6/ Textron, Inc. v. U.S. Intern. Trade Commission, 753 F. 2d 1019, 1028 (1985).

2/ Id. at 1028-29.

2/ Aramid Fibers at 11.

2/ Additionally, in Corning Glassworks v. U.S. International Trade Commission et al., Appeal No. 85-2632 (August 27, 1986), at 15, the Court of Appeals for the Federal Circuit held that "Congress has directed that the remedy of section 337, involving as it does the act of the sovereign in closing our borders to certain imports, be exercised only in those instances, where at least there is proof of tendency to substantially injure the subject industry." The Court, at 7, also stated that "while a lower quantum of proof of injury or tendency to injure is permitted in a patent-based section 337 case, per the Commission, mere speculation is not permitted."

not require a complete explanation would be equally frivolous. The Commission is a continuing institution, regardless of changes in its membership and decisions by this body, particularly those that alter its course, require an institutional explanation. 101/

It has been the understanding of the Commission and the U.S. Trade Representative who acts on behalf of the President, that our exclusion orders do not apply to "higher value added products which may incorporate that [infringing] part or component." 11/ The unwillingness of a majority of the Commission to clarify the scope of the outstanding exclusion order by enumerating the articles subject to it also raises a question about the enforceability of the Commission's order. The original exclusion order issued in this case referred only to amorphous metal articles. HML's request for an enumeration of the articles subject to the order arose from a specific concern that the order might be interpreted to apply to higher value added products which incorporate amorphous metal parts or components. The fact that the majority of the Commission will rot specify the scope of the exclusion order gives credence to HML's concern that, at least, the majority of the Commission may interpret its modified order to apply to at least some higher value products.

The uncertainty as to how the majority of the Commission may interpret the modified exclusion order also calls into question whether the order, as modified, is subject to the

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12/ See SCM Corp. v. United States, 519 F. Supp. 911 (1981).
11/ Letter to the Commission from USTR (April 16, 1985).

prior approval by the President of the exclusion order. Under Section 337(g) of the Trade Act of 1930, Commission exclusion orders are subject to a 60-day Presidential review process. The President's assumption regarding the Commission's interpretation of whether the exclusion order applies to higher value added products incorporating amorphous metal parts or components may be misplaced.

Finally, it may be difficult for Customs to enforce an exclusion order that is left as open-ended as complainant proposes and the majority adopts. If the exclusion order were to provide a specific list of articles, which have already been found to have a tendency to cause substantial injury to the domestic industry, viz., strip or ribbon, brazing foil, security strip, tape wound cores, and pulse power cores, this language would more clearly exclude higher-value added articles from the scope of the order. Moreover, any Customs' fears of personal liability in enforcement could be allayed if a specific list were to accompany the proposed certification procedure.

In the interests of open government proceedings and determinations, the parties, the President and the public should be accorded a full explanation for this break in precedent. The public interest is not served by contradictory and illusory decision-making.

THE 1,,h ED STATES TRA.2e RIEPRESENTATive
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20,00

April 16, 1985

The honorable Paula Stern
Chairwoman
U.S. International Trade Commission
701E Street, N.W.
Washington, D.C. 20436

Dear Chairwoman Stern:

Ian writing with respect to the Commission's general •ldTbsion order in Certain Amorphous Metal Alloys and Amorphous Metal A.ticles, Inv. No. 337-TA-143. The order prohibits the WRITilon of articles which infringe U.S. Letters Patent 4,221,257.

She President has asked me to advise you that he has decided tó take no action with respect to the exclusion order, theist(permitting the order to go into effect.

Doting our review of the order, a number of questions wers4rWed with respect to the feasibility of determining whttht; email:44u. setal strip was produced by the infringing ?recess. :Ahisolle.ii technical-scientific question which was impossible tsi.resfi.ve, definitively during the brief period permitted for Prgisidwhtrill review. / note that Allied has proposed a test to delsratiteC1 whether imported amorphous metal strip was in fact producA# by known non-infringing processes. I have asked the Customs Service toteview Allied's proposed test and to work with the Commission to develop appropriate procedures for enforcing the exclusion glider, since unless an appropriate testing procedure can be developed, Customs will.have no basis for enforcing the order. I also hope that if questions arise with respect to whether ceitain imported amphorous metal alloy strips infringe the patent, the Commission could resolve such questions to the extent fair and practicable through an expedited advisory opinion procedure to avoid undue blockages of possibly legitimate trade.

I also understand that, even assuming an appropriate test can be developed, the Customs Service remains concerned about situations where, despite the test, a potential new manufacturer alleges that the imported article was produced by a non-infringing Itocess. The Customs Service believes that the procedure adopted In the Certain Processes for the Manufacture of Skinless Sausage Casin s and Resultin Product, Inv. Nos. 337-TA-146 i 169, would be appropr ate in t QSO c rcumstances. This would clarify the

Customs Service's rrthority to erciude the prom-cts of. new nufacturets. 'ear .>hat•reason, the Customs Service recommends that the Commission amend the exclusion order to adopt the Skinless Sausage Casings procedure in this situation.

?Willy, it is my assumption, based on the Certain klkaline Satteries case, trot the ITC does not interpret a section 337 MMirrFrt order covering a part or component as a basis for excluding higher value-added products which may incorporate that part or component. It is also my assumption that the extension of an order to such pcolucts would require a modification of the *()flay,* which would be subject to review by the President. It is on the basis of these assumptions that the order was permitte3 to go into effect. Thank you for your kind attention to this tatter.

Very truly yours,

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Certificate of Service

I, Kenn R. Mason, hereby certify that the attached NOTICE OF ISSUANCE OF MODIFIED GENERAL EXCLUSION ORDER, was served upon Steven Schwartz, Esq., and Stephen Sulzer, Esq., and upon the following parties via first class mail, and air mail where necessary, on June 17, 1987.

Kenneth R. Mason, Secretary
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PUBLIC VERSION /)
[Identical to previ sly filed confidential_Airersion; nothing deleted]

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
CERTAIN AMORPHOUS METAL ALLOYS	)	**Investigation No.** 337-TA-143
AND AMORPHOUS METAL ARTICLES	)	
	)	
	)	

RECOMMENDED DETERMINATION

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FISH & NEAVE

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For **United States International Trade Commission:**

Stephen L. Sulzer
Steven H. Schwartz

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1. **The Commission's Exclusion Order Should Be Modified**

On July 26, 1985, the Commission initiated modification proceedings in the above matter, and ordered that these proceedings initially be presided over by an administrative law judge who would conduct adversary proceedings to the extent necessary to take evidence, make findings of fact and conclusions of law, and issue a recommended determination as to:

1. Whether the order should be modified, vacated, or left unchanged.

2. Whether there are effective and feasible means of enforcing the general exclusion order without excluding products made by non-infringing processes, and

3. What those means are.

The procedural history of the case is set forth in the initial advisory opinion, issued on the same date as this recommended determination.

There are effective means for enforcing a general exclusion order without excluding products made by non-infringing processes, but this cannot be done by having Customs test the imported products. If the Commission finds that the Hitachi and Vacuumschmelze respondents have non-infringing processes, as recommended, there is no known test at this time to distinguish between infringing products and certain non-infringing products.

The test protocol prepared by Allied for the use of the Customs Service would use Allied's profilometer, supplemented by a few other tests. This procedure could distinguish amorphous metal ribbon made by Allied's process from amorphous metal ribbon made by certain prior art processes (such as single jet casting, multiple jet casting, or double roll casting). (TR 830, Allied Ex. 20, and Staff Ex. 112.) This procedure, however, cannot

distinguish amorphous metal ribbon that can be made by respondents Hitachi and Vacuumschmelze using a non-infringing process from that made by Allied under the '257 patent process. It also cannot distinguish between products made by infringing and non-infringing processes of Hitachi or Vacuumschmelze. Current technology does not provide a reliable method to make such a distinction. (TR 827, 862, and 1007.)

Allied and the staff argue that the new Vacuumschmelze and Hitachi processes infringe the '257 patent, and that a reliable method of distinguishing among these processes is not needed. If they are correct, Customs could use the testing procedure suggested by Allied, and permit the importation of only amorphous metal strip made by completely different processes.

If the Commission finds that Vacuumschmelze and Hitachi now are capable of casting amorphous metal strip by non-infringing processes, then a different order would be required that would allow non-infringing products to go through Customs. An opportunity should be offered to importers to determine whether products made by processes that have not been litigated here infringe the '257 patent. Allied and the staff should be given a means to bring an importer to trial if either can show that it has reason to believe that the importer is infringing the '257 patent process. Customs should have clear steps to follow to determine what products can come in and what products should be excluded. The proposed changes in the exclusion order provide for all of these things.

Paragraph 1 of the proposed exclusion order defines the products covered by the order, and the definition is taken from claim 1 of the '257 patent. The Commission should not be trying to exclude products made by any process that does not infringe the '257 patent, so the order starts out with this

definition. Provision *is* made later for a hearing for anyone wishing to argue that the doctrine of equivalents should change the scope of the patent.

Under paragraph 1, all amorphous metal articles made by the infringing process are included in the scope of the order. It is not expected, however, that Customs will attempt to exclude high value-added products containing relatively small amounts of amorphous metals (such as a tape recorder having a tape head composed in part of amorphous metal). It would be an unreasonable burden on Customs to determine whether such products incorporated small amounts of amorphous metal made by infringing processes or even whether they contained amorphous metal. Under the cease and desist order discussed below, Allied or the Commission investigative attorney could seek a civil penalty on the *basis* of the importation of such products. In a civil penalty action, the Commission would have to prove that a respondent intended that the product be exported to the United States or that the respondent was aware that products made by an infringing process were being sold to others outside the United States with the likelihood that they would be incorporated into another product that would be imported into the United States.

In paragraph 1, the dimensions of the widths of the lips and the slot of the nozzle *are* expressly stated in the order because they do not appear in the claims themselves. The Commission's orders should be drafted, where possible, in a manner *that avoids* the need for later interpretation by the Commission or a court. See FTC v. Morton Salt Co., 334 U.S. 37 (1950); FTC v. Henry Broch & Co., 368 U.S. 360, 367-368 (1962); FTC v. Cement Institute, 333 U.S. 683, 726 (1948). **An order should state as clearly as possible what conduct is prohibited. In this case, an unfair act based on patent infringement was**

found only when nozzles having certain dimensions were used. These dimensions are found in the patent specification. When a product is made using nozzles with lips wider than those specified, the importer still may argue that the process falls outside of the '257 patent under the reverse doctrine of equivalents, under one of the procedures outlined in paragraphs 8-10 of the order.

Paragraph 2 excludes narrow amorphous metal strip from the order. This is required because Allied does not seek to exclude amorphous metal products having a width less than 7 millimeters, although the '257 patent, read literally, covers such products.

Paragraph 3 is the standard paragraph exempting sales to the U.S Government.

Paragraph 4 provides that Customs can permit entry of the product if the importer certifies certain facts. The importer, regardless of whether he was a respondent in the original proceeding, must state that the process did not infringe the '257 patent, and state what the process was. If the process was similar to the '257 process, in that it forces molten metal through a nozzle located close to the chill surface onto a moving chill surface, then the importer must state the widths of the nozzle slot and nozzle lips. If the front lip is more narrow than 1.45 times the width of the nozzle opening, or if the back lip is more narrow than the width of the nozzle opening, then the amorphous metal product can be imported. If the front nozzle lips are between 1-1/2 and 3 times the width of the nozzle opening, and the back lip is wider than the nozzle opening, the product cannot be imported, but the importer may still petition for a hearing under paragraph 9 or 10 of the order.

If the importer identifies a completely different type of process by which the product was made (for example, jet casting or multiple jet casting, or double roll casting or multiple roll casting), the product can be imported. Enforcement of the exclusion order cannot depend entirely on physical inspection or testing of the products, since those made by non-infringing processes may be indistinguishable from those made by infringing processes. Although the protocol proposed by Allied for the use of Customs can distinguish some prior art non-infringing processes from the '257 patent process, it is recommended that the order not require Customs to use any part of the protocol. Customs may want to use some of the tests suggested by Allied to determine that some products do not infringe the patent, but the tests will not show that a particular product infringes the patent. Customs should have the option of relying upon the certification alone, and let Allied or the staff bring a proceeding either in district court or at the Commission if either believes that the certification is false.

In paragraph 4 the Commission does not reserve the right to verify the accuracy of the certifications by foreign importers. Inspections of the factories of foreign companies would prove little, and appear unduly intrusive on foreign soil.

Paragraph 5 provides that copies of the certifications shall be filed with the Commission.

Paragraph 6 requires the importer to keep records showing the measurements of the nozzle lips and the width of the nozzle opening for each run in which an imported product was made. Failure to keep such records will be deemed to be prima facie evidence that the product was made by a process infringing the

'257 patent in any APA proceeding brought at the Commission or in any civil penalty action brought in district court for violation of the order to cease and desist (also recommended herein). This is fair because it may be impossible to tell whether the product infringes, without these records. Someone wishing to import these products into the United States can easily learn of the requirements, and companies capable of making this product probably will be aware of this proceeding. It is not burdensome to keep such records on the products intended for export to the United States.

Under paragraph 7, in addition to any other available remedies, if Allied or the staff has reason to believe that an importer is not using the process it describes in its certification, then Allied or the staff can ask the Commission to start a civil penalty action in district court alleging violation of the *cease* and desist order accompanying this exclusion order (against any respondent over whom the Commission had personal jurisdiction in the original proceeding), or for an APA hearing at the Commission if the importer is not subject to the order to cease and desist.

If the product has not yet been imported, a respondent who wants to import a product made by a new process can request an advisory opinion from the Commission under paragraph 8.

Under paragraph 9, if a respondent already has imported a product *made* by a new process, he can request an APA hearing at the Commission to determine whether the new process infringes, but the Commission can decline to give him the hearing if a civil penalty action has been commenced or is about to be commenced in district court.

Under paragraph 10, if someone who is not a respondent under the order to cease and desist *is* using a new process not previously litigated here, but the process is similar to the '257 patent process, he can request an APA hearing at the Commission and argue that he is not using the Narasimhan invention, under the reverse doctrine of equivalents. Since the doctrine of equivalents involves a factual finding, the importer, the staff, and Allied are entitled to a hearing to resolve this issue, if this *issue* is raised.

Unless this person can file a certification under which Customs would allow the product to be imported, the product would be excluded from importation unless and until the Commission finds the process to be non-infringing.

2. **An Order To Cease And Desist Also Should Be Issued**

It is recommended that the Commission also include in the modified order a separate order to cease and desist against all respondents over whom the Commission had personal jurisdiction in the original proceeding. These respondents are:

TDK Corporation,
TDK Electronics Corporation,
MH&W International Corporation,
Vacuumschmelze GmbH,
Siemens Corporation,
Hitachi Metals, Ltd.,
Hitachi Metals International, Ltd.,
Nippon Steel Corporation
and Nippon Steel, Inc.

A cease and desist order would give Allied or the Commission investigative attorney the option to bring a civil penalty action in federal district court without an additional proceeding at the Commission, if either believes that a respondent subject to the cease and desist order has imported a product that was **made by a process that would infringe the '257 patent** (if the process were **used in the United States).**

This situation might arise if Customs inadvertently fails to stop the importation of a product identical to a product litigated in this proceeding and found to be infringing. It might also arise if one of the respondents imports into the United States a product made by a new process not previously litigated here, a process that the respondent certifies to be non-infringing. If the Commission investigative attorney or Allied has reason to believe that the product was **in** fact **made by a process that infringes, either under the doctrine of equivalents or otherwise, it can request the Commission to** bring a civil penalty action in district court, alleging violation of the order to cease and desist.

Allied or the staff may ask the Commission to hold an APA hearing on the process of any importer who certifies that his process is non-infringing, and his product is allowed to be imported, if Allied or the staff has reason to believe that the process in fact infringes the '257 patent, under the doctrine of equivalents or otherwise. Meanwhile, this product is allowed to be imported until this question is resolved.

If a respondent in the original proceeding has not yet tried to import a product made under a new process, he can seek an advisory opinion from the Commission as to whether the new process infringes the '257 patent.

If a respondent were given the opportunity to have the question of whether each slightly different process infringes the '257 patent litigated and decided by the Commission before importation will be stopped, the respondent would get a second bite of the apple each time he brings in a product made by a new process and certifies that it does not infringe the '257 patent. This would be unfair to the complainant. One of the most effective ways to stop the importation of a continuous stream of products, each made by a process that has been changed in only an insignificant way, is to issue an order to cease and desist, so that the Commission (through its trial staff) can bring a civil penalty action. A civil penalty action might result in a substantial monetary penalty based on an importation that already has occurred. This would have a far greater deterrent effect than making the complainant seek a new exclusion order from the Commission relating to each minor change made by a respondent in his process.

Without an order to cease and desist, the Commission's exclusion order could be ineffective. A respondent could delay any action excluding its amorphous metal pioducts for substantial periods of time merely by filing appropriate certifications with Customs, after which Allied or the staff would have to take affirmative action to seek a ruling from the Commission on each new process.

Without a cease and desist order, a respondent could keep importing products made by slightly revised processes for a considerable amount of time before each new product was excluded from importation.

The issuance of a cease and desist order at this time also could avoid a potentially troublesome situation that raises a question of whether the parties are being given their statutory rights under Section 337. Under the exclusion order, a respondent in the original proceeding could request a ruling as to whether new processes not previously litigated here infringed the '257 patent. If the importation already has taken place, an advisory opinion cannot be given. The Commission, calling the proceeding an "enforcement proceeding," could delegate the ruling to the Commission investigative attorney. The Commission investigative attorney, who is one of the parties, then would make an initial decision resolving disputed issues of fact between the other parties. One of the issues to be decided would be whether there has been infringement of a patent by a new imported product not previously litigated in this proceeding. This is the same issue as whether a practice is an unfair act under Section 337. Because this determination is called an "enforcement proceeding," the Commission in some other cases has been delegating this issue to the staff. The decision of whether a practice is an

unfair act under Section 337 is made without affording the other parties a full hearing under the Administrative Procedure Act. Even though the staff's initial determination on the infringement issues is reviewed by the Commission, this procedure may violate the statute. It does not matter whether the other parties agree to let the Commission's staff decide the issues. The staff, as a party, is biased, and it is not independent of the Commission. It is inappropriate for the staff to arbitrate disputed issues of fact among the other parties, although the staff clearly could encourage settlement negotiations. Section 337 requires that all parties be given an opportunity for an APA hearing on the issue of whether a practice is an unfair act under that statute.

If an order to cease and desist were issued, the question of whether the respondent had violated the order could be raised in district court. The district court does not decide what is an "unfair act" under Section 337. Before going to district court, the trial staff informally would recommend to the Commission that a civil penalty action be brought. This informal recommendation would not violate the Section 337 requirement that each party be given an opportunity for an APA hearing on the issue of whether a practice is an unfair act under Section 337. The staff would not be deciding whether a practice was an unfair act under Section 337 without the safeguards of a hearing under the Administrative Procedure Act, nor would the staff be deciding that a practice violated an order without going to district court for a determination of that disputed fact. This procedure would not interfere with the Commission's right to advise Customs to exclude a particular product from importation under the existing exclusion order when no dispute of factual issues is raised.

If a company was not subject to the Commission's personal jurisdiction in the original proceeding, no order to cease and desist could be issued, and such a person importing a new product for the first time would be entitled to a full APA hearing before an administrative law judge if either that company or complainant raises the issue of whether the new product infringes the patent.

Any respondent, before importing a product, also could seek an advisory opinion from the Commission based on what he represents to the Commission that he intends to do. Proposed courses of action do not involve disputed *issues* of fact, and can be decided by an advisory opinion.

If the importer is not a respondent subject to the order to cease and desist, the importer or Allied or the staff could ask the Commission to try the issue of infringement with respect to the new product, and a hearing on the disputed issues of fact should be held before an administrative law judge. This is provided for in paragraph 10 of the exclusion order.

3. Recommended Modification Of The Order

The entire proposed order, as modified, reads as follows;

EXCLUSION ORDER

IT IS ORDERED THAT:

1. Amorphous metal articles manufactured abroad by a method of forming continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip; in accordance with a process set forth in claim 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, be excluded from entry into the United States for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

The phrase "slotted nozzle" in claim 1 is construed as meaning that there must be a nozzle with a rectangular or slotted opening, and there must be wide lips on the surface of the nozzle next to this opening. *Wide* lips mean that the width of the back lip (lip 1), measured in the direction of movement of the chill surface, must have a width at least equal to the width of the slot.

The slot, or nozzle opening, measured in the direction of movement of the chill surface, must have a width of from "about" 0.3 to "about" 1 millimeter. The word "about" is construed as requiring the slot to be between 0.25 and 1 .05 millimeters wide.

The width of the front lip (lip 2), measured in the direction of movement of the chill surface, must be from "about 1.5" to "about 3" times the width of the slot. The word "about" is construed as requiring the front lip to have a width of from 1,45 to 3.05 times the width of the slot.

2. Any amorphous metal strip, ribbon or wire having a width of less than seven (7) millimeters shall not fall within the scope of paragraph 1 of this Order and shall not be excluded from entry into the United States pursuant to this Order.

3. Pursuant to 19 U.S.C. § 1337(i), this Order shall not apply to articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. Any person, including any respondent in the original proceeding or any other person, desiring to import into the United States amorphous metal in any of the forms covered by this Order shall submit certifications to Customs in accordance with 19 U.S.C. § 1482 and 19 U.S.C. § 1484, certifying:

(a) that the amorphous metal was not made by a process that would infringe the '257 patent if the product were made in'the United States, and identify the process by which it was made,

(b) the identity of the manufacturer of the amorphous metal,

(c) whether the manufacturing process includes forcing the molten metal from a slotted nozzle located in close proximity to a chill surface, and if not, what method is used, and if so,

(d) stating the widths of the nozzle slot or nozzle opening and the nozzle lips.

If such certification is otherwise complete, and if it shows that the widths of the nozzle lips are narrower than the dimensions given in paragraph 1 of this Order, or if other dimensions are outside the dimensions given in paragraph 1 of this Order, then the amorphous metal produced by such manufacturing process shall not be excluded from entry into the United States pursuant to this Order.

If such certification is otherwise complete, and if it shows that the process used does not fall within the description of the process found in paragraph 1 (a), (b), or (c) of this Order, and it shows what process was used, then the amorphous metal produced by such manufacturing process shall not be excluded from entry into the United States pursuant to this Order.

5. Copies of all certifications required by paragraph 4 of this Order shall be filed with the Commission pursuant to Rule 201.8 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.8.

6. Any person desiring to import into the United States amorphous metal covered by this Order shall keep records showing the widths of the nozzle opening and the nozzle lips used in each run in which an imported product was made. Failure to keep such records will be deemed to be prima facie evidence

that a product was made by a process that infringes the '257 patent in any proceeding brought at the Commission in which the issue of whether a product infringes the '257 patent process or whether importation of a product constitutes an unfair act under Section 337 is raised.

7. If either Allied or the Commission investigative attorney has reason to believe that amorphous metal products have entered the United States pursuant to a false certification under paragraph 4 of this Order, either may, in addition to any other remedy that may be available, request the Commission to institute such further proceedings as may be appropriate to assure compliance with this Order.

8. Any respondent in the original proceeding who proposes to import into the United States, but has not yet imported, amorphous metal covered by this Order and manufactured by a new process (not previously litigated at the Commission) similar to the process set forth in paragraph 1 hereof, but in the opinion of the respondent not infringing the '257 patent, may petition the Commission for an advisory opinion proceeding pursuant to 19 C.F.R. § 211.54(b) in order to determine whether the amorphous metal sought to be imported is within the scope of paragraph 1 of this Order, if this product has not yet been imported into the United States.

9. If such product already has been imported, any respondent may request that the Commission commence a proceeding under the Administrative Procedure Act to determine whether said product was made by a process that is covered by the '257 patent, provided that no such proceeding will be instituted if the Commission commences or has commenced a civil penalty action in district court based on the importation of the same product by this respondent or based on the importation by another of the same product manufactured by this respondent.

10. Any person who was not a respondent in the original proceeding who proposes to import into the United States or has tried to import into the United States but has had the product stopped by Customs, or has imported into the United States successfully because of the certification filed with Customs or because Customs failed to stop the importation, may request that the Commission commence a proceeding under the Administrative Procedure Act to determine whether said product was made by a process that is covered by the the '257 patent, provided that no such proceeding will be instituted if the Commission commences or has commenced a civil penalty action in district court based on the importation by another of the same product manufactured by this person.

CEASE AND DESIST ORDER

IT IS ORDERED THAT:

1. TDK Corporation, TDK Electronics Corporation, MH&W International Corporation, Vacuumschmelze GmbH, Siemens Corporation, Hitachi Metals, Ltd., Hitachi Metals International, Ltd., Nippon Steel Corporation and Nippon Steel, Inc., their successors and assigns, acting through their officers, agents, representatives or employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation of amorphous metal products into the United States or the subsequent sale of such products, do forthwith cease and desist from:

importing into the United States amorphous metal articles, or subsequently selling in the United States imported amorphous metal articles manufactured abroad by a method of forming continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip; in accordance with a process set forth in claim 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

The phrase "slotted nozzle" in claim 1 is construed as meaning that there must be a nozzle with a rectangular or slotted opening, and there must be wide lips on the surface of the nozzle next to this opening. Wide lips mean that the width of the back lip (lip 1), measured in the direction of movement of the chill surface, must have a width at least equal to the width of the slot.

The slot, or nozzle opening, measured in the direction of movement of the chill surface, must have a width of from "about" 0.3 to "about" 1 millimeter. The word "about" is construed as requiring the slot to be between 0.25 and 1 .05 millimeters wide.

The width of the front lip (lip 2), measured in the direction of movement of the chill surface, must be from "about 1.5" to "about 3" times the width of the slot. The word "about" is construed as requiring the front lip to have a width of from 1.45 to 3.05 times the width of the slot.

2. Any amorphous metal strip, ribbon or wire having a width of less than seven (7) millimeters shall not fall within the scope of paragraph 1 of this Order.

3. Pursuant to 19 U.S.C. § 1337(i), this Order shall not apply to articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. If any respondent violates this Order To Cease And Desist, the Commission may bring a civil penalty action in a United States district court pursuant to 19 U.S.C. § 1337(f)(2), seeking civil penalties or a mandatory injunction, or both.

5. Each respondent subject to this Order To Cease and Desist who wants to import into the United States amorphous metal covered by this Order shall keep records showing the widths of the nozzle opening and the nozzle lips used in each run in which a product intended for importation into the United States is made. Failure to keep such records will be deemed to be prima facie evidence that a product was made by a process that infringes the '257 patent in any proceeding brought in a United States district court in which the issue of whether a practice violates this Order to Cease and Desist is raised, or at the Commission in which the issue of whether a product is made by a process that infringes the '257 patent or whether importation of a product constitutes an unfair act under Section 337 is raised.

IT IS FURTHER ORDERED THAT:

1. Notice of this Action and Order be published in the Federal Register.

2. A copy of this Action and Order, and of the Commission Opinions in support thereof, be served upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury.

The Commission may amend this Order in accordance with the procedure described in 19 C.F.R. § 211.57 or such other procedures as the Commission may adopt.

BY ORDER OF THE COMMISSION:

_____
Kenneth R. Mason
Secretary

Issued:

(END OF MODIFIED ORDER)

RECOMMENDATION

It is recommended that the Commission issue the modified order.

The record is the same as the record certified to the Commission in the **initial advisory opinion accompanying this recommended determination.**

b' Ci-2540 ^

Janet D. Saxon
Administrative Law Judge

Issued: March 3, 1986

PUBLIC VERSION

U.S. INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES	)	Investigation No. 337-TA-143
	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The '257 Patent

1. United States Letters Patent No. 4,221,257 relates to a casting method for making continuous amorphous metal strip from melt. (Ex. P-258, Col. 3, lines 18-24.)

2. Claim 1 of the '257 patent claims:

> 1. A method of forming continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure comprising:
>
> a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;
>
> b. advancing the chill surface, at a predetermined speed; and
>
> c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip.

3. The dimensions of the "slotted nozzle" referred to in claim 1 are not set forth expressly in claim 1.

4. If claim 1 were read literally, it would be so broad in scope that it would be invalid under Section 103 of the Patent Act.

5. The word "nozzle" in claim 1 is ambiguous, and it can be construed in the context of the patent specification. The word "nozzle" in claim 1 is construed in the context of the part of the patent specification describing the summary of the invention. The dimensions of the width of the nozzle opening and the relationship of that width to the width of each nozzle lip as described in the patent specification are read into claim 1 as limitations.

6. Claim 1 as so construed is not invalid under Section 103 of the Patent Act.

7. In the '257 patent specification, the nozzle opening or slot is described as defined by a pair of generally parallel lips, a first lip (or back lip) and a second lip (or front lip) numbered in the direction of movement of the chill surface. (Ex. P-258, Col. 3, lines 37-40.)

8. In the '257 patent specification, the nozzle opening or slot must have a width, measured in the direction of movement of the chill surface, of from "about" 0.3 to "about" 1 mm. (Ex. P-258, Col. 3, lines 40-42.)

9. In the '257 patent specification, the dimensions of the width of the lips of the nozzle are described as "critical."

10. In the '257 patent specification, the first lip (or back lip) is described as having a width at least equal to the width of the slot.

11. In the '257 patent specification, the second lip (or front lip) is described as having a width of from "about" 1.5 to "about" three times the width of the slot. (Ex. P-258, Col. 3, lines 52-53.)

12. All other claims in the '257 patent are dependent upon claim 1.

13. Although the patent specification refers to supporting the melt, claim 1 does not expressly refer to "supporting the melt." No ambiguous word or phrase in claim 1 can be construed by reference to the patent specification as including a limitation of "supporting the melt" as part of claim 1. Claim 1 cannot be construed as including a limitation of "supporting the melt".

14. Under the doctrine of equivalents, it may be possible under certain circumstances to expand claim 1 to include a process that uses the Narasimhan invention, as long as the process was not already in the public domain.

15. The Narasimhan invention that is the subject of the '257 patent is a process for casting amorphous metal strip in which a nozzle with relatively wide lips (lips that are of a certain minimum width relative to the width of the nozzle opening) is brought down close to a rapidly moving chill wheel surface, and the melt is pushed out of the nozzle opening where it is then supported between the bottom of a wide nozzle lip and the wheel surface or between the bottom of a wide nozzle lip and the solidification front, allowing wide amorphous metal strip to be cast without the melt puddle becoming unstable and the melt spattering.

16. A novel part of the process was the use of the wide lips that enabled Dr. Narasimhan to cast wide amorphous strip without the melt spattering.

17. [C]

18. [C]

[C]

II. The Vacuumschmelze Process

19. Dr. Rainer Hilzinger is responsible at Vacuumschmelze for the production of amorphous materials. (TR 141.)

20. Vacuumschmelze has [C] casting machines in its facility, [C] (TR 141.) Machines [C] are used for production of amorphous metal products. (TR 142.)

21. Slotted nozzles are used for the purpose of casting amorphous metals on [C] machines [C . (TR 143.)

22. (C] machines (C] now use only [C] nozzles. (TR 143.)

23. Vacuumschmelze Physical Exhibits VC and VD were used in the casting runs which were demonstrated for Allied's counsel at the facility inspection at Vacuumschmelze in Hanau, West Germany, in October 1985. (TR 149.)

24. Two such runs were made for Allied representatives, and both runs were successful. (TR 149.)

25. Both nozzles had lips that were less wide than the nozzle opening.

26. Every nozzle is ground by personnel in Dr. Hilzinger's laboratory to its final [C] . (TR 151-152.)

27. Three people in Dr. Hilzinger's laboratory grind the [C] machine nozzles. They are instructed by Dr. Hilzinger to grind the nozzle to a [C] so that the lips are [C] and still maintain the mechanical stability of the lip. (TR 152.)

28. Dr. Hilzinger advises his workers to make the nozzle lips at least [C] , and they can grind the nozzle lips [C] . (TR 153.)

29. If the nozzle lips are ground more [C] than that, the material breaks away. (TR 153.)

30. Vacuumschmelze does not grind the lips of the nozzle after the [C] has been made.

31. Dr. Hilzinger sometimes looks at the nozzles for [C] machines [C] immediately after grinding is finished. He frequently looks at the nozzles after the run is completed. (TR 159.)

32. Dr. Hilzinger looks at about three, four or five nozzles in a week for machine [C] . Between [C] casting runs are made on machine [C] in an ordinary week. (TR 159-160.)

33. Vacuumschmelze has about [C] per day on machine [C] , and Dr. Hilzinger inspects the machine [C] nozzles used in about every other run. (TR 160.)

34. Vacuumschmelze can use its nozzles for several runs. (TR 162.)

35. For machine [C], the grinding of the nozzle is done each time a casting run is made. Once the nozzle is removed from machine [C], the nozzle is ground again to be sure that the nozzle is parallel to the wheel. (TR 162, 163.)

36. Dr. Hilzinger has instructed his workers to grind the nozzle lips to be **at least as narrow** as half of the width of the nozzle opening. (TR 163.)

37. Dr. Hilzinger has confirmed that his workers have followed his instructions and each nozzle lip is narrower than 1/2 of the width of the nozzle opening. Dr. Hilzinger determines that the lip is narrower than 1/2 of the width of the nozzle opening by looking at it with the naked *eye.* (TR 163.)

38. After the experimental period had been completed with machine F, the nozzles which Dr. Hilzinger inspected for that machine were almost as narrow as half of the width of the nozzle opening, and at least more narrow than the width of the opening. (TR 164.)

39. Dr. Hilzinger sometimes measured the [C] machine nozzles with an instrument. (TR 166.) The instrument measurements confirmed Dr. Hilzinger's observations with the naked eye as to the lip dimensions. (TR 167.)

40. Dr. Hilzinger did not record his observations or measurements of lip width for the nozzles used on [C] machine (C] (TR 167.)

41. The width of the nozzle opening used at Vacuumschmelze varies depending upon the thickness of the ribbon to be cast. A typical nozzle opening is from about [C] millimeters. In the Vacuumschmelze process, the nozzle opening is typically wider than 0.3 to 1 millimeter. (TR 203.)

42. The lip dimensions are not important for the functioning of the Vacuumschmelze process. Dr. Hilzinger regularly observed the lip dimensions in order to be sure that Vacuumschmelze was able to cast amorphous ribbon with very narrow nozzle edges. (TR 206.)

43. In the Vacuumschmelze process, there is some melt present during casting on the lower surface of the lip of each nozzle, even though the amount of melt may be small. This melt is found on the bottom of the front nozzle lip where the melt comes out of the nozzle opening and turns the corner at the nozzle lip, moving in the direction in which the chill wheel is turning. A minute amount of melt also is found at the corner of the back nozzle lip. (TR 746, 748-749.)

44. The amount of melt under the lower surface of the lips of the nozzle depends upon other factors, such as the size of the gap between the lips of

the nozzle and the wheel surface, the speed of the wheel, the amount of pressure on the melt, the size of the nozzle opening, and to a lesser extent, the consistency of the melt, and the texture of the surface of the nozzle lips. (Dr. Mehrabian, TR 557-558, 583-588, 596-598, and passim, and Dr. Hilzinger, TR 269-279.)

45. The Vacuumschmelze process supports or constrains the melt between the corner of the front lip of the nozzle and the surface of the chill wheel at the point where the melt comes out of the nozzle opening and turns the corner in the direction of movement of the chill wheel surface.

46. The Vacuumschmelze process supports or constrains the melt between the corner of the back lip of the nozzle and the surface of the wheel.

47. Dr. Mehrabian, Allied's expert witness, was able to look at Vacuumschmelze nozzles VC, VF, VH, and VB and determine with the naked *eye* that the nozzle lips were narrower than the nozzle opening. (TR 603-606.)

48. Dr. Mehrabian was able to tell with the naked eye that the nozzle lips in Vacuumschmelze Physical Ex. VD were less than 1.5 times the width of the nozzle opening. (TR 605.)

49. Vacuumschmelze is capable of casting good quality wide amorphous metal strip in commercial quantities using nozzle lips that are more narrow than the nozzle opening.

50. Vacuumschmelze now uses a process that does not infringe the '257 patent.

51. The new Vacuumschmelze process is now used regularly for the production of all commercial wide amorphous metal products. If the Commission permits Vacuumschmelze to import into the United States wide amorphous metal products in the future, this process will be used.. (TR 184.)

III. The Hitachi Process

52. Hitachi's motion for amendment of the Commission's Exclusion Order was filed with the ITC on February 22, 1985.

53. One of the papers submitted in support of the motion was an affidavit dated February 15, 1985. (Allied Ex. 705.) Hitachi stated that [C]

54. Hitachi did not tell the Commission that in actual practice [C]

55. Hitachi represented that the [C]

56. Some of the Hitachi factual evidence lacked credibility. **This** raises a serious question as to the weight to be given to some of Hitachi's other factual evidence. Rather than reach this question, all findings relied upon herein with respect to Hitachi's ability to make amorphous metal by a

non-infringing process are based upon facts verified by Allied representatives at the inspection of the Hitachi facilities in Japan.

57. After the issuance of the Initial Determination, Hitachi began to use a new nozzle in its process to make wide amorphous metal strip. [C]

58. [C]

59. [C]

60. Hitachi is capable of using a new process that does not infringe claim 1 of the '257 patent because it can make amorphous metal strip [C]

61. The evidence does not establish that this process is [C]

62. The new Hitachi process [C

63. In the new Hitachi process, [C]

64. Hitachi's engineering specification permits [C

65. [C]

66. [C]

67. [C]

68. Hitachi made a film to prove that its new process was capable of casting good quality wide amorphous metal strip while using nozzle lips that were narrower [C]

69. The nozzle used in the film demonstration had the [C] nozzle lips permitted by Hitachi's engineering specification.

70. [C]

71. In the film showing the casting of amorphous metal strip using this nozzle, Hitachi also showed [C]

72. In the film showing the new Hitachi nozzle, [C]

73. [C]

74. [C]

75. [C]

76. [C]

77. Production runs 900, 901 and 902, conducted during the Hitachi facility inspection, were made under conditions specified and verified by Allied.

78. In the second run, production run 901, [C]

79. The production run sheets for run 901 show (C]

80. The production run sheets for production runs 900 and 902 show [C]

81. (C]

82. (C

83. [C]

84. Hitachi Runs 900, 901 and 902 used processes that do not infringe the '257 patent under the doctrine of equivalents.

85. Hitachi is capable of making good quality wide amorphous metal strip in commercial quantities using a process that does not infringe the '257 patent because the nozzle lips are more narrow [C]

86. The record does not show that Hitachi has [C]

87. The record does not show that it would be [C]

IV. Means of Enforcing an Exclusion Order

88. Both Hitachi and Vacuumschmelze have the capability of making wide amorphous metal strip by a process that does not infringe the '257 patent.

89. There is no procedure known at the present time to any of the parties that would enable Customs to distinguish between an amorphous metal product made by Hitachi or Vacuumschmelze by an infringing process as opposed to a non-infringing process, so that only products infringing the patent could be excluded on the basis of testing alone.

90. The profilometer test proposed by Allied would not distinguish between a process using nozzle lips narrower than those covered by the '257 patent and a process infringing the '257 patent.

.91. Under the Allied profilometer test, a product made by a process identical to that described in claim 1 of the '257 patent, with the sole exception that a gap of 1.5 millimeters is used between the nozzle and the chill surface (making the process non-infringing), would be identified as being made by an infringing process. (TR 910-912.)

92. A product made by the process described in the '257 patent, except that the widths of the nozzle lips are more narrow than the width of the [C] , would be identified by the Allied profilometer test as being made by an infringing process. (TR 914.)

93. The new Hitachi and Vacuumschmelze processes do not infringe the '257 patent, but the profilometer test of products made by these processes would show that these processes infringe the patent. (TR 1007.)

94. Even if it were determined that amorphous metal strip failing the profilometer test should be kept out of the United States as made by an

infringing process, Customs would be unable to determine from that test **whether certain kinds of wide amorphous metal strip made by different processes were infringing or non-infringing or whether they should** be excluded or **allowed to be imported.**

95. Mr. Crain, Chief of the Technical Section of the Operations Branch of the Technical Services Division of Customs at the Customs Service Headquarters in Washington, D.C., when viewing the profilometer tracings of Nippon Steel Exhibit 15, could not determine from those tracings whether the product should be excluded or allowed to be imported. (TR 1043-53.) The tracings were of amorphous metal strip produced on Allied experimental and commercial casting machines and of one strip produced by Hitachi.

96. Profilometer tracings made on experimental equipment are not necessarily like the tracings of a commercial product. (TR 1072.)

97. The tracings of Nippon Steel Exhibit 15 were made on amorphous metal strips more than 7 millimeters wide. (TR 1078.)

98. It is in the public interest to modify the exclusion order in this case to enable certain products made by a non-infringing process to be imported into the United States, while still excluding infringing products. It is also in the public interest to add an order to cease and desist to the exclusion order.

99. The modified order should read as follows:

EXCLUSION ORDER

IT IS ORDERED THAT:

1. Amorphous metal articles manufactured abroad by a method of forming continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip; in accordance with a process set forth in claim 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, be excluded from entry into the United States for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

The phrase "slotted nozzle" in claim 1 is construed as meaning that there must be a nozzle with a rectangular or slotted opening, and there must be wide lips on the surface of the nozzle next to this opening. Wide lips mean that the width of the back lip (lip 1), measured in the direction of movement of the chill surface, must have a width at least equal to the width of the slot.

The slot, or nozzle opening, measured in the direction of movement of the chill surface, must have a width of from "about" 0.3 to "about" 1 millimeter. The word "about" is construed as requiring the slot to be between 0.25 **and 1** .05 millimeters wide.

The width of the front lip (lip 2), measured in the direction of movement of **the chill** surface, must be from "about 1.5" to "about 3" times the width of the slot. The word "about" is construed as requiring the front lip to have a width of from 1.45 to 3.05 times the width of the slot.

2. Any amorphous metal strip, ribbon or wire having a width of less than seven (7) millimeters shall not fall within the scope of paragraph 1 of this Order and shall not be excluded from entry into the United States pursuant to this Order.

3. Pursuant to 19 U.S.C. § 1337(i), this Order shall not apply to articles imported by and for the *use* of the United States, or imported for, and to be *used* for, the United States with the authorization or consent of the Government.

4. Any person, including any respondent in the original proceeding or any other person, desiring to import into the United States amorphous metal covered by this Order shall submit certifications to Customs in accordance with 19 U.S.C. § 1482 and 19 U.S.C. § 1484, certifying:

(a) that the amorphous metal was not made by a process that would infringe the '257 patent if the product were made in the United States, and identify the process by which it was made,

(b) the identity of the manufacturer of the amorphous metal,

(c) whether the manufacturing process includes forcing the molten metal from a slotted nozzle located in close proximity to a chill surface, and if not, what method is used, and if so,

(d) stating the widths of the nozzle slot or nozzle opening and the nozzle lips.

If such certification is otherwise complete, and if it shows that the widths of the nozzle lips are narrower than the dimensions given in paragraph 1 of this Order, or if other dimensions are outside the dimensions given in paragraph 1 of this Order, then the amorphous metal produced by such manufacturing process shall not be excluded from entry into the United States pursuant to this Order.

If such certification is otherwise complete, and if it shows that the process used does not fall within the description of the process found in paragraph 1 (a), (b), or (c) of this Order, and it shows what process was used, then the amorphous metal produced by such manufacturing process shall not be excluded from entry into the United States pursuant to this Order.

5. Copies of all certifications required by paragraph 4 of this Order shall be filed with the Commission pursuant to Rule 201.8 of. the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.8.

6. Any person desiring to import into the United States amorphous metal covered by this Order shall keep records showing the widths of the nozzle opening and the nozzle lips used in each run in which an imported product was made. Failure to keep such records will be deemed to be prima facie evidence that a product was made by a process that infringes the '257 patent in any proceeding brought at the Commission in which the issue of whether a product infringes the '257 patent process or whether importation of a product constitutes an unfair act under Section 337 is raised.

7. If either Allied or the Commission investigative attorney has reason to believe that amorphous metal products have entered the United States pursuant to a false certification under paragraph 4 of this Order, either may, in addition to any other remedy that may be available, request the Commission to institute such further proceedings as may be appropriate to assure compliance with this Order.

8. Any respondent in the original proceeding who proposes to import into the United States, but has not yet imported, amorphous metal covered by this Order and manufactured by a new process not previously litigated at the Commission) similar to the process set forth in paragraph 1 hereof, but in the opinion of the respondent not infringing the '257 patent, may petition the Commission for an advisory opinion proceeding pursuant to 19 C.F.R. § 211.54(b) in order to determine whether the amorphous metal sought to be imported is within the scope of paragraph 1 of this Order, if this product has not yet been imported into the United States.

9. If such product already has been imported, any respondent may request that the Commission commence a proceeding under the Administrative Procedure Act to determine whether said product was made by a process that is covered by the '257 patent, provided that no such proceeding will be instituted if the Commission commences or has commenced a civil penalty action in district court based on the importation of the same product by this respondent or based on the importation by another of the same product manufactured by this respondent.

10. Any person who was not a respondent in the original proceeding who proposes to import into the United States or has tried to import into the United States but has had the product stopped by Customs, or has imported into the United States successfully because of the certification filed with Customs or because Customs failed to stop the importation, may request that the Commission commence a proceeding under the Administrative Procedure Act to determine whether said product was made by a process that is covered by the the '257 patent, provided that no such proceeding will be instituted if the Commission commences or has commenced a civil penalty action in district court based on the importation by another of the same product manufactured by this person.

CEASE AND DESIST ORDER

IT IS ORDERED THAT:

1. **TDK Corporation, TDK Electronics Corporation, MH&W International Corporation, Vacuumschmelze GmbH, Siemens Corporation, Hitachi Metals, Ltd., Hitachi Metals International, Ltd., Nippon Steel Corporation and Nippon Steel, Inc., their successors and assigns, acting through their officers, agents, representatives or employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation of amorphous metal products into the United States or the subsequent sale of such products, do forthwith cease and desist from:**

importing into the United States amorphous metal articles, or subsequently selling in the United States imported amorphous metal articles manufactured abroad by a method of forming continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip; in accordance with a process set forth in claim 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

The phrase "slotted nozzle" in claim 1 is construed as meaning that there must be a nozzle with a rectangular or slotted opening, and there must be wide lips on the surface of the nozzle next to this opening. Wide lips mean that the width of the back lip (lip 1), measured in the direction of movement of the chill surface, must have a width at least equal to the width of the slot.

The slot, or nozzle opening, measured in the direction of movement of the chill surface, must have a width of from "about" 0.3 to "about" 1 millimeter. The word "about" is construed as requiring the slot to be between 0.25 and 1 .05 millimeters wide.

The width of the front lip (lip 2), measured in the direction of movement of the chill surface, must be from "about 1.55" to "about 3" times the width of the slot. The word "about" is construed as equiring the front lip to have a width of from 1.45 to 3.05 times the width of the slot.

2. Any amorphous metal strip, ribbon or wire having a width of less than seven (7) millimeters shall not fall within the scope of paragraph 1 of this Order.

3. Pursuant to 19 U.S.C. § 1337(i), this Order shall not apply to articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. If any respondent violates this Order To Cease And Desist, the Commission may bring a civil penalty action in a United States district court pursuant to 19 U.S.C. § 1337(f)(2), seeking civil penalties or a mandatory injunction, or both.

5. Each respondent subject to this Order To Cease and Desist who wants to import into the United States amorphous metal covered by this Order shall keep records showing the widths of the nozzle opening and the nozzle lips used in each run in which a product intended for importation into the United States is made. Failure to keep such records will be deemed to be prima facie evidence that a product was made by a process that infringes the '257 patent in any proceeding brought in a United States district court in which the issue of whether a practice violates this Order to Cease and Desist is raised, or at the Commission in which the issue of whether a product is made by a process that infringes the '257 patent or whether importation of a product constitutes an unfair act under Section 337 is raised.

IT IS FURTHER ORDERED THAT:

1. Notice of this Action and Order be published in the Federal Register.

2. A copy of this Action and Order, and of the Commission Opinions in support thereof, be served upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury.

The Commission may amend this Order in accordance with the procedure described in 19 C.F.R. § 211.57 or such other procedures as the Commission may adopt.

BY ORDER OF THE COMMISSION:

Kenneth R. Mason
Secretary

Issued:

(END OF MODIFIED ORDER)

100. To the extent that these findings add to or vary from the original findings in this proceeding, this is a result of the new record made in the reopened proceeding, and the new findings take precedence over the original findings.

i CAPCf S ct o,',

Janet D. Saxon
Administrative Law Judge

Issued: March 3, 1986

CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES - Inv. No. 337-TA-143

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Public Version Initial Advisory Opinion, Findings of Fact and Conclusions of Law and Recommended Determination were served by hand upon Stephen Sulzer, and upon the following parties via first class mail, and air mail where necessary, on March 11, 1986.

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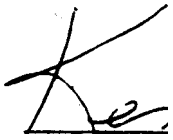

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