# Decisions of the United States Court of International Trade

**Slip Op. 05–22**

SHANGHAI TAOEN INTERNATIONAL TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant,

Court No. 04–00125
**Public Version**

[Commerce Department Antidumping Determination Sustained]

Dated: February 17, 2005

*Lee & Xiao* (*Yingchao Xiao*, *Bub-Joo S. Lee*, and *Jay J. Chung*) for plaintiff.

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*David S. Silverbrand*), *Linda S. Chang*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

## OPINION

**RESTANI, Chief Judge:**

Plaintiff Shanghai Taoen International Trading Co. ("Taoen") appears before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the determination issued by the United States Department of Commerce ("Commerce") in the antidumping duty administrative review of freshwater crawfish tail meat ("crawfish tail meat") from the People's Republic of China ("PRC") for the period of review September 1, 2001 through August 31, 2002 (the "POR").

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). In accordance with 19 U.S.C. § 1516a(b)(1)(B) (2000), the court shall hold unlawful any determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law."

## FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 1997, Commerce published in the Federal Register the final determination of its sales-at-less-than-fair-value ("LTFV") investigation of crawfish tail meat from the PRC, covering the period March 1, 1996 through August 31, 1996. *Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 41,347 (Dep't Commerce August 1, 1997) (amended by *Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997)). Based on timely requests from interested parties pursuant to 19 CFR 351.213(b) (2002), Commerce initiated an administrative review of the antidumping duty order on crawfish tail meat from the PRC for the POR, including the initiation of a review of Taoen's exports of crawfish tail meat. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 65,336 (Dep't Commerce Oct. 24, 2002).

In its initial questionnaire response, Taoen stated that it did not produce any of the crawfish tail meat that it exported during the POR. *Questionnaire Response* (Dec. 10, 2002), at 3, Pl.'s App., Tab A. Instead, Taoen indicated that all of the crawfish tail meat was produced by Lianyungang Yuzhu Aquatic Products Processing Co. ("Yuzhu"). *Id.* at 5, Pl.'s App., Tab A. On January 23, 2003, Commerce requested more information about Taoen's producers, to which Taoen affirmed that Yuzhu was the only company that supplied Taoen with crawfish tail meat. *Questionnaire Response* (March 7, 2003), at 22, Pl.'s App., Tab C. Subsequently, Commerce issued a supplemental questionnaire on May 2, 2003, in which it requested that Taoen provide all information as to "Shanghai Taoen's and Yuzhu's relationship(s) with any entities or individuals in any way involved in the production, processing, exportation, shipment, importation, distribution, or sale of crawfish tail meat." *Questionnaire Response* (May 15, 2003), at 45, Pl.'s App., Tab E. Taoen replied that "Shanghai Taoen and Yuzhu have no relationship with any entities or individuals in any way involved in the production, processing, exportation, shipment, importation, distribution, or sale of crawfish tail meat." *Id.* at 45, Pl.'s App., Tab E.

For the purpose of its preliminary results, Commerce relied on these responses, and calculated a preliminary margin of 57.73%, based on factors of production for Taoen's one reported producer, Yuzhu. *Freshwater Crawfish Tail Meat from the People's Republic of China*, 68 Fed. Reg. 58,064 (Dep't Commerce October 8, 2003) (preliminary results). During Commerce's verification research, the U.S. Customs and Border Protection ("Customs") provided Commerce with copies of all entry documents related to Taoen's sales of crawfish tail meat during the POR. Commerce determined that Taoen's questionnaire responses were inconsistent with Customs' entry documents.[1] *Supplemental Request for Information* (Dec. 5, 2003), at 109, Pl.'s App., Tab J. On December 5, 2003, Commerce alerted Taoen to these inconsistencies and asked it to explain and provide documentation demonstrating that Yuzhu was the only producer of Taoen's crawfish tail meat. *Id.* at 110, Pl.'s App., Tab J. In its December 15, 2003 response, Taoen reiterated that Yuzhu was the only producer of the crawfish tail meat and explained that the inconsistency was caused by a backlog for receiving inspection results in Lianyungang.[2] *Response to the Department's Dec. 5, 2003 Letter* (Dec. 15, 2003), at 113, Pl.'s App., Tab K.

On February 13, 2004, Commerce released its administrative determination and accompanying issues and decisions memorandum, in which it determined that Taoen's explanation for the inconsistencies between its questionnaire responses and Customs' entry documents was not credible,[3] and even if it was, Taoen withheld information from Commerce throughout the administrative review. *Id.* at 162, Pl's App., Tab M. To determine the appropriate margin, Commerce applied total facts available pursuant to 19 U.S.C. § 1677e(a), and concluded that an adverse inference was warranted pursuant to 19 U.S.C. § 1677e(b). *Id.* at 162, 164, Pl.'s App., Tab M. As the total adverse facts available rate, Commerce assigned the highest margin from any segment of the proceeding. *Id.* at 164–65, Pl.'s App., Tab M. This resulted in Taoen being assigned a rate of 223.01%–a rate calculated in the 1999–2000 administrative review of the antidumping duty order on crawfish tail meat from the PRC, for the exporter Huaiyin 30. *Id.* at 164–65, Pl.'s App., Tab M.

On appeal to this court, Taoen challenges Commerce's (1) decision to apply total adverse facts available to determine its antidumping duty margin, and (2) assignment of the highest margin from any segment of the proceeding as the total adverse facts available rate.

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[1] The entry documents provided by Customs included the [ ] for each of Taoen's U.S. sales. *Supplemental Request for Information* (Dec. 5, 2003), at 109, Pl.'s App., Tab J. For [ ] produced the subject merchandise that Taoen exported to the United States. *Id.* at 109, Pl.'s App., Tab J. [ ] *Id.* at 109, Pl.'s App., Tab J. For the [ ] *Id.* at 109, Pl's App., Tab J.

[2] Taoen explained that goods were shipped directly to the United States from Yuzhu's factory, so Yuzhu was responsible for the merchandise to [ ]. *Response to the Department's Dec. 5, 2003 Letter* at 113, Pl.'s App., Tab K. Taoen claims that the reason that [ ] was because [ ] in Lianyungang had too many shipments submitted for inspection. *Id.* at 113, Pl.'s App., Tab K. In order to ship out the goods on time, Yuzhu [ ]. *Id.* at 113, Pl's App., Tab K. As support for this explanation, Taoen attached [ ]. *Id.* at 113, Pl.'s App., Tab K.

[3] Taoen claims that Yuzhu [ ]. In support of this claim, Taoen points to receipts for payments by Yuzhu, however, in each instance, [ ]. Commerce determined that it was not credible that [ ]. *Freshwater Crawfish Tailmeat From the People's Republic of China* (Feb. 5, 2004), at 162, Pl.'s App., Tab M ("*Feb. 5, 2004 Memorandum*").

## DISCUSSION

### I. Commerce's Application of Total Adverse Facts Available is Supported by Substantial Evidence and is Otherwise in Accordance with the Law.

Taoen contests the application of total adverse facts available to determine its dumping margin, arguing that (1) Taoen did not withhold information, (2) even if information was initially withheld, it was supplied within the relevant deadlines, and (3) any information not submitted was neither significant nor fundamental to Commerce's calculation of an accurate dumping margin. Taoen contends that it initially misunderstood Commerce's questions about its business relationships, and that it accurately answered Commerce's questions about its producer relationships at every stage of Commerce's review. Taoen asserts that before Commerce applies facts otherwise available, 19 U.S.C. § 1677m(d) requires that Commerce provide Taoen with an opportunity to remedy or explain deficiencies in its submission.[4]

Commerce provided an opportunity to explain in its December 5, 2003, questionnaire, and Taoen contends that it responded with credible information showing that the inconsistencies between its questionnaire responses and Customs' entry documents merely reflect undisclosed, insubstantial business relationships that would have had little bearing on the calculation of Taoen's antidumping margin.[5] Therefore, Taoen argues that, even if its initial failure to respond warrants the application of facts otherwise available, 19 U.S.C. § 1677m(e) requires Commerce to apply partial facts avail-

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[4] The application of facts otherwise available is subject to the limitations of 19 U.S.C. § 1677m(d), which provides in relevant part,

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d).

Commerce responds that facts otherwise available is applicable because Taoen withheld business relationship information until Commerce discovered the inconsistencies through verification. Here, Taoen and Yuzhu could have reported their business relationships with [ ]. Commerce asserts that Taoen's explanation, at the very least, indicates that it willfully ignored the plain meaning of Commerce's questions and overreached in providing answers to those questions.

[5] Taoen explains that during the POR it sometimes took weeks to obtain inspection results from [ ] in Lianyungang. The reason [ ], was that in order to ship the goods on time, Yuzhu [ ]. As evidence of this arrangement, Taoen submitted [ ]. If Taoen's explanation is credible, [ ], and the absence of information regarding these business relationships is not clearly significant to calculating Taoen's dumping margin.

able regarding the specific information that Taoen allegedly failed to report.[6] Moreover, Taoen argues that Commerce failed to adequately explain its rationale for using an adverse inference in selecting among facts otherwise available.

Pursuant to 19 U.S.C. § 1677e(a), Commerce may use facts otherwise available to determine an antidumping duty if,

> (1) necessary information is not available on the record, or
> (2) an interested party or any other person –
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a). If the use of facts otherwise available is warranted, Commerce may draw adverse inferences in selecting among such facts:

> If the administering authority . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . , the administering authority . . . , in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

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[6] The statutory scheme clearly provides Commerce with wide discretion to disregard information that is not deemed credible. The statute specifies, if the respondent "submits further information in response to such deficiency and either (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then . . . Commerce may disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). Commerce may not, however, decline to consider necessary information submitted by an interested party if,

> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). In these cases, Commerce must utilize the information provided and fill in the gaps with partial facts available.

19 U.S.C. § 1677e(b). The statute does not provide an express definition of "the best of its ability," although the Federal Circuit has determined that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). To meet this standard, Commerce "needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance. . . ." *Mannesmannrohen-Werke AG v. United States*, 23 CIT 826, 839, 77 F. Supp. 2d 1302, 1313–14 (1999).

In the instant case, Commerce made extensive efforts to request complete responses regarding all of Taoen's producer and business relationships. *See supra* pp. 2–4. In response to each of Commerce's inquiries, Taoen responded that its sole producer was Yuzhu. Commerce relied on Taoen's responses to calculate an antidumping margin based on factors of production for the only disclosed producer of Taoen's exports of the crawfish tail meat. Through Commerce's own efforts, it discovered substantial, previously unreported evidence of additional business relationships in entry documents provided by Customs, and raised verification questions about those relationships. In response to Commerce's final questionnaire, Taoen provided an explanation for the inconsistencies between the entry records and its previous questionnaire responses and attempted to cure the deficiencies in its prior answers. Commerce argues that Taoen's explanation is not credible, and even if it is credible, Taoen purposefully withheld fundamental information until Commerce's verification discovery. Therefore, Commerce asserts that application of total adverse facts available to determine Taoen's antidumping margin is based on substantial evidence.

The court agrees with Commerce that Taoen has failed to provide a satisfactory explanation for the inconsistencies between its questionnaire responses and the entry documents provided by Customs.[7] The court has several bases for its decision. First, the entry documents themselves establish a presumption that Taoen's questionnaire responses were inaccurate because they show that Taoen failed to provide Commerce with complete information. Second, it was appropriate for Commerce to skeptically consider Taoen's explanation because it was only provided after Commerce discovered the entry document inconsistencies, through its own investigation. Third, Commerce cited ample evidence in support of its conclusion that

[7] Since the court finds that Taoen failed to provide a credible explanation for the inconsistencies between its questionnaire responses and Customs' entry documents, it is unnecessary for the court to address whether Taoen's initial failure to disclose its business relationships is sufficient to support Commerce's application of total adverse facts available.

Taoen's explanation does not make "economic or logistical sense."[8] Finally, Taoen failed to provide a complete explanation for Customs' entry documents.[9] In total, these findings amount to substantial evidence that Taoen continues to withhold producer information necessary to accurately calculate Taoen's antidumping margin.[10]

As the court sustains Commerce's determination that Taoen failed to provide accurate producer information, Commerce was justified in applying total facts otherwise available under § 1677e. Although separate determinations are required for application of facts otherwise available under § 1677e(a), and adverse inferences under § 1677e(b), both standards are met where a respondent purposefully withholds, and provides misleading, information. Here, the discovery of Customs' entry documents raised a presumption that Taoen failed to accurately respond to Commerce's producer questions. Thus, Commerce could reasonably infer from Taoen's subsequent failure to credibly explain the inconsistencies between its questionnaire responses and Customs' entry documents, that Taoen purposefully withheld producer information to avoid a higher dumping margin. Under such circumstances the adverse inference of lack of best efforts is warranted. Accordingly, Commerce's application of an adverse inference is based on substantial evidence and in accordance with the law.

## II. Commerce's Decision to Apply the 223.01% Antidumping Margin is Supported by Substantial Evidence and Otherwise in Accordance with the Law

Taoen argues that Commerce's choice of a rate of 223.01% is impermissibly punitive and has no probative value. According to Taoen, it was punitive for Commerce to apply the highest rate determined in the current or any previous segment of the proceeding–a difference of 168.28% compared to the dumping margin of 57.73% calculated at the preliminary stage.[11] Instead, Taoen asserts that Com-

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[8] The evidence includes the following: (1) if Taoen's explanation is accepted, Yuzhu [ ] prior to shipment to Taoen. Producers [ ] and [ ] both are over [ ], where Yuzhu is located; and (2) Taoen claims that Yuzhu [ ], and provides copies of receipts for payments made by Yuzhu [ ]. In each instance, however, Commerce concluded that [ ]. It is not credible that [ ].

[9] Taoen provided no evidence demonstrating that Yuzhu was the supplier for [ ].

[10] There is no evidence to support Taoen's argument that it had no motivation to lie. There is no evidence of the factors of production for other "suppliers". Further, there may be many explanations why a company must sometimes resort to higher cost suppliers. The court may not speculate about such matters.

[11] Taoen argues that the imposition of a rate that is 168.28% higher than the antidumping margin calculated in the preliminary stage is facially punitive. The court has suggested that the magnitude of a rate increase alone can indicate that Commerce's selection of an antidumping rate may have been punitive. *Shandong Huarong Gen. Group Corp. v. United States*, No. 01–00858, Slip Op. 04–117, at 14 n.9 (Ct. Int'l Trade Sept. 13, 2004) (finding a rate increase from 47.88% to 139.31% may have been punitive, although rejecting the rate

merce should have applied a partial facts available rate, and calculated the dumping margin based on the information submitted by Yuzhu, with the addition of extra transportation costs inadvertently not disclosed.

"Commerce has broad, but not unrestricted, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found uncooperative." *Reiner Brach GmbH & Co. v. United States*, 206 F. Supp. 2d 1323, 1339 (Ct. Int'l Trade 2002). In determining an adverse inference, Commerce may rely on information derived from "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record." 19 U.S.C. § 1677e(b). Commerce must not, however, impose "punitive, aberrational, or uncorroborated margins." *F. lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). The Federal Circuit has recognized that a rational relationship must exist between the margin chosen by Commerce and the party to whom it is applied:

> It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

*Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002) (citing *de Cecco*, 216 F.3d at 1032).

Nonetheless, both this court and the Federal Circuit have determined that in cases in which the respondent fails to provide Commerce with information necessary to calculate an accurate antidumping margin, "it is within Commerce's discretion to presume

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on the grounds that it was aberrational). Here, Taoen's preliminary rate has been discredited by Customs' entry documents, whereas in *Shandong* the 47.88% rate was an alternative supported by competent evidence. The percentage increase over Taoen's discredited preliminary rate is not a valid measure of whether Taoen's new rate is punitive.

that the highest prior margin reflects the current margins." *Id.* 298 F.3d at 1339 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)); *see also NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (Ct. Int'l Trade 2004) (upholding a 73.55% total adverse facts available rate, the highest available antidumping margin from a different respondent in an LTFV investigation); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding a 51.16% total adverse facts available rate, the highest available antidumping margin from a different, fully cooperative respondent in an LTFV investigation). The purposes of using the highest prior antidumping duty rate are to offer assurance that the exporter will not benefit from refusing to provide information, and to produce an antidumping duty rate that bears some relationship to past practices in the industry in question. *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997). In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's commercial activity, the highest prior margin presumption "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." *Rhone Poulenc*, 899 F.2d at 1190. Commerce must not, however, assume the highest previous margin applies simply because it is the one most prejudicial to the respondent. *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999).

Here, Commerce assigned Taoen the 223.01% rate, stating that "[i]t is the Department's practice to assign the highest rate from any segment of a proceeding as total adverse facts available when a respondent fails to cooperate to the best of its ability." *Feb. 5, 2004 Memorandum* at 164, Pl's App., Tab M (for support Commerce cited *Certain Forged Stainless Steel Flanges From India*, 67 Fed. Reg. 10,358 (Dep't Commerce March 7, 2002) (preliminary results) (assigning a 210% rate to four uncooperative respondents, which represented the highest margin from any segment of the proceeding)). Commerce examined the rate calculated for Huaiyin 30 in the 1999–2000 review and determined that the rate is both reliable and relevant. Commerce stated that the rate is relevant because it is "based on sales and production data of a respondent in a prior review," it is "subject to comment from interested parties in the proceeding," and there is "no information on the record of this review that demonstrates that this rate is not appropriately used as adverse facts available." *Feb. 5, 2004 Memorandum* at 165–66, Pl.'s App., Tab M.

The court has stated that "[i]n order to satisfy substantial evidence, Commerce must go beyond simply stating that the [highest available rate] is 'reasonable' and has 'some basis in reality.' *Shandong*, Slip. Op. at 16; *see also Am. Silicon Techs. v. United States*, 24 CIT 612, 626, 110 F. Supp. 2d 992, 1004 (2000) (rejecting a 93.20% surrogate margin because the only reason Commerce gave for selecting the margin was that the rate would be sufficiently adverse to induce full cooperation in future reviews). Commerce's burden is greater where information on the record demonstrates that an alternative rate may be appropriate. *See Shandong*, Slip. Op. at 16 (requiring an explanation for Commerce's choice of the highest available antidumping margin calculated for the companies in the prior administrative review);[12] *Ferro Union*, 23 CIT at 204–205, 44 F. Supp. 2d at 1335 (requiring an explanation for applying a margin calculated for another producer eight years prior to the period of review, in spite of the fact that Commerce had margins for respondents in prior administrative reviews). Where the highest available rate is the most probative rate on the record, Commerce's burden is satisfied. *See Ta Chen*, 298 F.3d at 1339 (upholding the use of the highest dumping margin, where the methodology chosen by Commerce was the only way to apply an adverse inference while still using respondent's own information); *D & L Supply Co.*, 113 F.3d at 1223 ("While the highest prior margin is obviously not a precise indicator of current dumping practices, it provides at least some guidance as to the probable dumping margin in the period for which the exporter is not providing information, and it is preferable in that respect to an arbitrarily selected figure that has no pretension to accuracy."); *Rhone Poulenc*, 899 F.2d at 1190 (upholding the use of the highest prior margin where the respondent offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin). Here, the court concludes that the 223.01% dumping margin is rationally related to Taoen because (1) the rate reflects recent commercial activity by a crawfish tail meat exporter from the PRC, and (2) Taoen's failure to accurately respond to Commerce's producer questions has resulted in an egregious lack of evidence on the record to suggest an alternative rate.

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[12] In *Shandong*, the court rejected a 139.31% rate, assigned as the total adverse facts available rate for the respondents Huarong and LMC, using the highest available rate calculated in a preceding administrative review for another company under investigation. The court determined that Commerce failed to show how this rate bore a rational relationship to Huarong and LMC. First, Commerce used sales information for a different respondent in the previous administrative review even though actual sales information for both Huarong and LMC was available for that same review. Second, in the same administrative review Huarong and LMC had rates significantly lower than the 139.31% rate–Huarong's rate was 28.96% and LMC's rate was 29.10%. Finally, Commerce gave no explanation for why rates for Huarong and LMC increased so dramatically over rates calculated while Huarong and LMC were cooperating in the previous review.

Unlike in *Shandong* and *Ferro Union*, Commerce had no probative alternatives to the highest available margin. This is the first administrative review of Taoen's exports of crawfish tail meat, so there is no prior Taoen antidumping margin for Commerce to select. Moreover, Taoen's preliminary margin of 57.73% was based on Yuzhu's factors of production; this rate has no validity after Commerce's credibility conclusion. Taoen's only proposed alternative is a partial facts available rate that would build on Taoen's preliminary 57.73% rate, with an upward adjustment for Yuzhu's undisclosed transportation costs. This rate is inappropriate because the underlying basis for the preliminary rate has been discredited.[13] Therefore, Taoen has failed to provide, and the record fails to disclose, a justification for applying an antidumping margin that falls below the 223.01% chosen by Commerce. Accordingly, Commerce's application of the highest margin from any segment of the antidumping proceeding is based on substantial evidence and otherwise in accordance with the law.

## CONCLUSION

In light of the foregoing, the court finds that Commerce's application of the total adverse facts available rate of 223.01% is appropriate. Accordingly, plaintiff's motion for a judgment on the agency record is denied and judgment shall enter for defendant.

[13] Commerce's resort to total, as opposed to partial, facts available in determining the dumping margin for Taoen is appropriate given its credibility determination. "Generally, Commerce uses partial facts available only to fill 'gaps in the record due to deficient submissions or other causes.' " *Am. Silicon Techs.*, 240 F. Supp. 2d at 1308 n.1 (quoting Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–826, at 656, 869 (1994)). This is not a case of partial gaps in the record. Commerce determined that Taoen failed to provide a credible explanation for the inconsistencies between Customs' entry documents and Taoen's questionnaire responses which concerned the identity of suppliers. Such information is core, not tangential, and there is little room for substitution of partial facts. Total facts available is therefore appropriate because Commerce has no reliable factors of production information with which to calculate Taoen's antidumping margin. Whether another substitute margin would be more rationally related to the "actual" margin is not before the court because plaintiff has not suggested one, and one is not readily apparent in the record.

## Slip Op. 05–23

**Before: Judge Judith M. Barzilay**

Slater Steels Corporation, *et al.*, Plaintiffs, v. United States, Defendant. Viraj Group, Plaintiff, v. United States, Defendants, and Slater Steels Corporation, *et al.*, Defendant-Intervenors.

**Consol. Ct. No. 02–00551**

[Case remanded to the United States Department of Commerce.]

Decided: February 17, 2005

*Collier Shannon Scott, PLLC,* (*Robin H. Gilbert*), for Plaintiffs and Defendant-Intervenors Slater Steels Corp., *et al.*

*John M. Gloninger and William H. Crow II*, Economic Consultants for Plaintiffs and Defendant-Intervenors.

*Miller & Chevalier Chartered*, (*Peter Koenig*), for Plaintiff Viraj Group.

*Peter D. Keisler*, Assistant Attorney General, United States Department of Justice, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, (*Jeanne E. Davidson*), Deputy Director, (*Stephen C. Tosini*), Attorney, Commercial Litigation Branch, Civil Division, *Christine J. Sohar*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

## OPINION

**BARZILAY, JUDGE:**

### INTRODUCTION

The court has twice remanded this case, directing Defendant, the United States Department of Commerce ("The Department," "Commerce" or "government"), to explain its interpretation and application of 19 C.F.R. § 351.401(f) (2000)[1] in collapsing three companies of the Viraj Group, an Indian importer. *See Slater Steels Corp. v. United States*, 27 CIT ____ , 279 F. Supp. 2d 1370 (2003) ("*Slater I*"); *Slater Steels Corp. v. United States*, Slip Op. 04–22, 28 CIT ____ , 316 F. Supp. 2d 1368 (2004) ("*Slater II*"). Commerce timely filed its Final Results of Redetermination ("*Remand Results II*"). Following the filing of *Remand Results II*, Plaintiffs requested that the court con-

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[1] The regulation provides:

> (f) Treatment of affiliated producers in antidumping proceedings.
> (1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that *would not require substantial retooling of either facility in order to restructure manufacturing priorities* and the Secretary concludes that there is a significant potential for the manipulation of price and production.

19 C.F.R. § 351.401(f)(1) (emphasis added).

sider and apply its recent decision in *Carpenter Tech. Corp. v. United States*, Slip Op. 04–103 (Aquilino, Judge) (Aug. 16, 2004) ("*Carpenter*"), a related litigation concerning the same companies of the Viraj Group, but addressing a challenge to a different period of review and involving different merchandise – stainless steel wire rod. Finding the *Carpenter* analysis persuasive, the court instructed Commerce to indicate what factual changes had occurred prior to the review at issue in this case, such that its decision to collapse the Viraj Group companies should not be remanded as it was in *Carpenter*. Defendant has submitted its answer to the court's inquiry, *see Mem. in Response to the Court's Letter*, Nov. 12, 2004 ("*Def.'s Response Mem.*"), and Plaintiffs and Defendant-Intervenors have submitted their response, *see Pls.'s Reply to Def.'s Mem. in Response to the Court's Letter*, Dec. 2, 2004 ("*Pls. Reply*").[2]

## BACKGROUND

In this consolidated action, Plaintiffs and Defendant-Intervenors, certain domestic companies, challenge Commerce's administrative decision to collapse the affiliated companies of the Viraj Group for the purpose of calculating a dumping margin against the imports of certain subject merchandise entered during the period of review ("POR") from February 1, 2000 through January 31, 2001 ("the 2000–2001 review"). Commerce determined to collapse the following affiliated companies of the Viraj Group: Viraj Alloys, Ltd. ("VAL"), Viraj Impoexpo, Ltd. ("VIL"), and Viraj Forgings, Ltd. ("VFL"). *See Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 45,956 (July 11, 2002), *amended by* 67 Fed. Reg. 53,336 (Aug. 15, 2002) ("*Final Results*"); *Issues and Decision Memorandum for the Final Results of the Administrative Review of Stainless Steel Bar from India* (July 5, 2002) ("*Decision Mem.*"). Commerce concluded that VAL, VIL, and VFL met the collapsing requirements of 19 C.F.R. § 351.401(f), finding that "VAL and VIL can produce subject merchandise[3] (*i.e.*, similar or identical products) and can continue to do so, independently or under existing leasing agreements, without substantial retooling of their production facilities." *Decision Mem.*, cmt. 1. Commerce also found "a significant potential for the manipulation of price and production among VIL, VAL, and VFL." *Id.* As a collapsed entity, the Viraj Group received a *de minimis* dumping margin in the *Final Results*. Plaintiffs and Defendant-Intervenors,

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[2] Viraj Group did not submit a response to the court's letter.

[3] The subject merchandise in the POR at issue in this case is stainless steel bar, which included "articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other polygons." *Final Results*, 67 Fed. Reg. at 45,957.

Slater Steels Corporation, Carpenter Technology Corporation, Electralloy Corporation, and Crucible Specialty Metals Division of Crucible Materials Corporation[4], challenged this determination as a misapplication of the collapsing regulation before the court.

In *Slater I* and *Slater II*, the court held that Commerce's decision to collapse the Viraj Group was not supported by substantial evidence on the record, remanding the Department's final results on both occasions.[5] Following Commerce's filing of *Remand Results II*, Plaintiffs requested that the court consider *Carpenter*, a related litigation concerning the same companies of the Viraj Group, but addressing a challenge to a different POR (from 1999 to 2000) and involving different merchandise – stainless steel wire rod. *See* Slip Op. 04–103. In *Carpenter*, the Court reviewed whether Commerce's decision to collapse the Viraj Group was supported by substantial evidence where Commerce, at a prior review (from 1997 to 1998)[6] involving the same subject merchandise, did not collapse the same companies. *See id.* at 9–10. Notably, that prior review was affirmed on appeal in *Viraj I*. *See Viraj I*, 25 CIT at 1031–32 (holding that Commerce's decision to value steel billets purchased by VIL from VAL based on the inter-company transfer price (paid by VIL to VAL) was supported by substantial evidence). The *Carpenter* decision relied on its finding in *Viraj I* that VAL and VIL had production facilities sufficiently different as to require substantial retooling of either facility in order to restructure manufacturing priorities. *See Carpenter*, Slip Op. 04–103, at 9. The Court found that the same difference between production facilities remained during the period under its review, even though Commerce was able to show that in the previous period of review VAL did not produce subject merchandise and VFL neither produced nor exported the merchandise. *Id.* The Court held that these changes were insufficient to support Commerce's reversal of its initial decision not to collapse, and the Court remanded to the agency for calculation and imposition of individual antidumping-duty margin upon VIL and VFL. *Id.* at 10.

In light of *Carpenter*, the court directed Commerce to indicate what, if any, factual changes have occurred prior to the period of review at issue in this action, such that its decision to collapse the Viraj Group companies should not be remanded as it was in *Carpenter*. Defendant filed its *Memorandum in Response to Court's Letter* and Plaintiffs filed their *Reply to Defendant's Memorandum*.

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[4] In this consolidated action, these companies appear as both Plaintiffs and Defendant-Intervenors and will be referred to in this opinion as "Plaintiffs."

[5] Familiarity with *Slater I*, *Slater II* and *Carpenter* is presumed.

[6] *Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review*, 65 Red. Reg. 31,302 (May 17, 2000).

## STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2004). The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). "In applying this standard, the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). The court may not reweigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989). Additionally, "absent a showing to the contrary, [the agency] is presumed to have considered all of the evidence in the record." *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988).

## DISCUSSION

### I. History of Viraj's Participation in the Administrative Reviews

VIL first participated in an antidumping duty review as a new shipper of stainless steel bar in 1995. *See, e.g., Notice of Initiation of New Shipper Antidumping Duty Administrative Review*, 60 Fed. Reg. 58,598 (Nov. 28, 1995) (concerning the POR from February 1, 1995 through July 31, 1995) (hereinafter "the new shipper review"). The new shipper review included the following information about the Viraj Group: (1) VAL possessed production facilities to produce stainless steel billets/rounds; (2) VIL possessed production facilities to produce bright bar; and (3) VFL did not produce stainless steel bar during the period of review. *See VIL's Responses to the Department of Commerce's Questionnaire for* ARP 2/1/95–7/31/95 (Public Version) (hereinafter "New Shipper Questionnaire"). VIL specified that its own manufacturing facilities included "bar manufacturing unit facilities for solution annealing, pickling, drawing, turning, grinding, cutting, polishing and packing." *Id.* at 3. VIL's response described VAL as "a steel manufacturing unit, including of stainless steel rounds and billets." *Id.* at 3. VIL stated that "[t]he raw material used for the manufacture of bars [was] being received from [its] affiliated sister company [VAL]." *Id.* at 26. The input materials from VAL were identified as "stainless steel bars" and "stainless steel wire rods." *Id.* at 114–115. VIL noted that VFL produced and sold stainless steel flanges and no other product. *Id.* at 4. VIL explained that the cost for input raw materials obtained domestically was based on the "direct material cost of purchase plus transportation costs." *Id.* at 29. Furthermore, the petitioners in the new shipper review asked Commerce to consider VAL as a respondent in the review pinpointing VIL's reported purchases of stainless steel bars from VAL. *See Letter to the Secretary of Commerce from Viraj Impoexpo Ltd*, Mar. 27, 1996.

In the 1998–1999 administrative review that followed the first shipper review, VIL's responses identified the same principal facts:

1) VAL produces raw materials (i.e., stainless steel bars for stainless steel bright bars, *VIL's Questionnaire Responses*, June 4, 1999, at 8 ("1998–1999 *Questionnaire*");

2) VIL manufactures stainless steel bright bars, *id.* at 118, purchasing hot rolled bars from VAL, *VIL's Responses to Supplemental Questionnaire*, Feb. 10, 2000, para. [15];

3) VFL manufactures stainless steel pipe fittings, i.e. flanges, 1998–1999 *Questionnaire*, at 118.

During the 1998–1999 review, VIL initially reported only its sales of bright bar to the United States. *Stainless Steel Bar from India; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Recession of Administrative Review*, 65 Fed. Reg. 12209, at 12210–11 (Mar. 8, 2000). Upon Commerce's request to update its database, VIL reported that its affiliate VAL also had home market sales of stainless steel bar, which were sales of black bar, during the period of review. *Def. Response Mem.*, at 7 (citing 65 Fed. Reg. at 12210–11.) The narrative description of this information was submitted after an administrative deadline and was therefore rejected by Commerce. *See* 65 Fed. Reg. at 12210. As a result, Commerce found that all the information submitted by VIL was incomplete and preliminarily decided to apply adverse facts available assigning a margin of 21.02 to VIL. *Id.* Ultimately, however, Commerce revised its decision and applied "partial facts" submitted by VIL to calculate VIL's margin. *See Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review*, 65 Fed. Reg. 48965, 48966–67 (Aug. 10, 2000) (calculating normal value based on the company's sales to a third country market as facts available); *see also Issues and Decision Memorandum for the Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India February 1, 1998 through January 31, 1999*, cmt. 4 (explaining that VIL's "responses are sufficiently complete to serve as a reliable basis for reaching a determination without creating undue difficulties" and deciding to use facts otherwise available only "with respect to choosing the appropriate comparison market as a basis for normal value and when determining margins for U.S. sales that do not have identical matches.").

## II. The Current Administrative Review

In light of the *Carpenter* decision, the court's inquiry is whether Commerce's decision to collapse the Viraj Group companies, VAL, VIL and VFL for the POR from February 1, 2000 to January 31, 2001, is consistent with its previous determinations, in which Commerce did not collapse the same companies involving the entry of the same subject merchandise.

Consistency is a cornerstone of administrative action. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (The level of deference afforded an agency's action "will depend upon . . . its consistency with earlier and later pronouncements.") The Court has recognized the "importance of consistency across [antidumping] reviews [as] inferred from the rationale outlined in the promulgating regulations pursuant to the Uruguay Round Agreements Act." *See Hynix Semiconductors, Inc. v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1297, 1304 (2003). Commerce may reach different determinations in separate administrative reviews, but it must either employ the same methodology or give reasons for changing its practice. *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) (involving a challenge to Commerce's method of calculation of cost of production and constructed value). "It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure. . . .' " *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (citations omitted). When Commerce departs from its prior decision, it must provide a reasoned explanation for its departure in order for the court to judge the consistency of the administrative action. *Id.* at 998, 834 F. Supp. at 419; *see RHP Bearings Ltd. v. United States*, 24 CIT 1218, 120 F. Supp. 2d 1116, 1124 (2000) *aff'd in part and vacated in part*, 288 F. 3d 1334, 1337 (Fed. Cir. 2002) (vacating the CIT decision sustaining Commerce's calculation of the profit component of constructed value and remanding the case for further proceedings) ("Commerce is under an obligation to explain the apparent inconsistency of its approach in [the present] review and the two preceding reviews.")

The period of review at issue in this action is not the first instance where Commerce had the information to consider the applicability of the collapsing regulation to the Viraj Group's stainless steel bar production. Commerce claims that VIL was only reviewed once before the review at issue in this case and that collapsing the Viraj Group companies was not an issue previously. *Def.'s Response Mem.*, at 7. Notably, Commerce claims that during the 2000–2001 review, it established for the first time that:

> (1) VAL possessed production facilities to produce stainless steel bar (black bar) that was sold in the home market during the period of review; (2) VIL possessed production facilities to

> produce bright bar that was sold in the United States market during the period of review; and (3) VFL had production facilities that were similar to VIL's production facilities that could be used to produce stainless steel bar, but VFL itself did not produce stainless steel bar during the period of review.

*Id.* at 8. This contention is misleading. In its *Final Determination, Remand Results I*, and *Remand Results II*, Commerce focused on the following facts as forming the basis of its decision to collapse: (1) VAL has production facilities for making steel billets and black bar[7]; (2) VIL has the capabilities to further process the black bar into bright bar (cold-finished bar), but VIL cannot produce black bar on its own; (3) VFL's primary production operation relates to producing stainless steel flanges, and VFL's production facilities are similar to those of VIL, but not VAL. *See e.g.*, *Remand Results II*, at 12–13. The same principal facts could be gleaned from the information supplied by VIL in the previous two administrative reviews. *See infra* Part I, *History of Viraj's Participation in the Administrative Reviews.* Thus, Commerce had the same principal information during the previous administrative reviews that established that the production facilities of each Viraj Group company possessed the capability to produce stainless steel bar. The additional findings identified by Commerce in the 2000–2001 review are that VAL sold black bar in the home market and that VFL had production facilities that were similar to VIL's production facilities that could be used to produce stainless steel bar. Commerce did not explain how these additional findings were material or decisive in establishing a sufficient basis for collapsing that did not exist during the previous administrative reviews.

Furthermore, as argued by Plaintiffs, Commerce made an affirmative decision not to collapse VAL, VIL, and VFL during the first shipper review and the 1998–1999 review. *Pls. Reply*, at 5–6. Thus, Commerce's acceptance of the cost of production data for the subject merchandise based on the price VAL charged VIL for hot-rolled stainless steel bar reveals the agency's decision to treat VAL and VIL as separate entities and to accept the prices paid by VIL to VAL for raw materials as an accurate representation of costs incurred in producing the subject merchandise. *See, e.g.*, *New Shipper Questionnaire*, at 29. In other words, Commerce's treatment of VAL as a supplier of raw materials independent of VIL indicated that Commerce at that time affirmatively chose not to collapse VAL and VIL.

Aside from a more developed record of its factual findings, Commerce did not present evidence of material factual changes relevant

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[7] These bar production facilities are the production facilities that Commerce found to overlap with VIL and VFL's production operations "because they are related to bar production and *not* billet making." *Remand Results II*, at 18.

to the collapsing issue since the 1998–1999 review. Whereas the principal facts have remained the same since the previous two administrative reviews, Commerce's analysis of the Viraj Group companies in the 2000–2001 review differed from its previous determinations. When the Department collapsed the companies in the 2000–2001 review, it departed from its previous application of the antidumping regulations. Although Commerce provided some explanation for its different determination, it is not adequate to support the imposition of an inconsistent result in this case. Commerce argues that the current review differs from the 1998–1999 review in that Commerce considered the issue of collapsing the Viraj Group companies from the beginning of this review since VIL reported sales information for the entire Viraj Group. *Def. Response Mem.*, at 8. Commerce buttresses its argument pinpointing that in the 1998–1999 review Commerce applied only partial facts available to Viraj's margin calculation because VIL failed to timely submit the narrative description of the home market sales of black bar sold by VAL during that period of review. *Id.* at 7. Commerce, however, failed to explain how VIL's reporting of sales information for the *entire* Viraj Group was necessary for Commerce's consideration of collapsing in the current review. Likewise, Commerce failed to explain how the lack of a narrative description regarding the home market sales of black bar precluded consideration of the collapsing issue. Without an adequate explanation, Commerce cannot reverse its prior practice. *See, e.g., Cinsa, S.A. de C.V.*, 21 CIT at 349. Therefore, Commerce's departure from its prior decision not to collapse VAL, VIL and VFL is not warranted in this case.

It should be noted that this case is distinguishable from *Carpenter* because the *Carpenter* decision was informed by the Court's previous holding affirming Commerce's determination not to collapse the Viraj Group companies in an earlier period of review. This distinction, however, does not vitiate the essential basis for the court's decision in this case: that Commerce may not depart from its prior practice without a change in material facts or a reasoned explanation for its departure. *Cf. Carpenter*, Slip. Op. 04–103, at 9. While there is no preceding CIT decision involving the collapsing issue in the 1998–1999 review, the record provides sufficient information to distill the principal facts that informed Commerce's decision not to collapse the companies in the previous administrative reviews.

This conclusion obviates the need to address the merits of Commerce's *Remand Results II*, especially since they do not bring to light significant facts or findings establishing a basis for a change in Commerce's approach in this case. It should be noted, however, that the government's latest explanation of its methodology further supports the above conclusion. Collapsing involves treating a group of affiliated producers as a single entity for the calculation of dumping margins. *See* 19 U.S.C. § 1677(33) (2004). In pertinent part, the collapsing regulation requires Commerce to determine that the companies "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities," and that "there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). Essentially, Commerce interprets the substantial retooling prong of this regulation as merely requiring a unilateral analysis of a potential shift in manufacturing priorities[8] as long as there is a certain overlap in the production of similar or identical merchandise by the companies.[9] *Remand Results II*, at 10–13. Thus, Commerce argues that the Viraj Group companies have production facilities for production of stainless steel bar, and that there is an overlap in their production of stainless steel bar as their production facilities "converge with respect to the [stainless steel bar]." *See Remand Results II*, at 10–11. Commerce, however, does not provide an explanation regarding its method of determining the sufficiency of such an overlap in the production of similar or identical merchandise, and it does not appear from the record that a greater overlap sprang into existence in the 2000–2001 review since the first shipper review and the 1998–1999 review. The court notes that the government had an opportunity to demonstrate any factual changes in the production overlap from the prior administrative review, and that the government instead insisted that the 2000–2001 review was the first instance where Commerce had enough information to make its decision to collapse the companies.

[8] In other words, Commerce explains that it is sufficient to determine whether VAL can produce bright bar without substantial retooling, but not necessary to also determine that VIL can produce stainless steel black bars. *Remand Results II*. In *Slater II*, the court instructed Commerce to explain why it need not examine the production facilities of each company involved in collapsing and why it need not address the possibility of shifting production among companies in either direction. Slip Op. 04–22, at 11.

[9] The court also notes inconsistency in Commerce's interpretation and application of 19 C.F.R. § 351.401(f)(1). While Commerce contends that the unilateral analysis of the substantial retooling prong is a reasonable interpretation of its regulation, in another stainless steel bar case, for example, involving the German companies EWK and KEP, Commerce noted the companies had production facilities that could produce similar and identical merchandise in a certain limited range of sizes without requiring substantial retooling. *Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany*, 67 Fed. Reg. 3159 (Jan. 23, 2002). In addition, Commerce took into account that either of the two companies could outsource a portion of the production process to the other company for some sizes outside that limited range. *Id*. Nonetheless, Commerce concluded that the limited overlap of the companies' production capabilities for identical products and "the significant impediments to expanding this overlap, in concert with . . . the lack of any significant intertwining of the operations of the two firms," were insufficient reasons to collapse the companies. *Id*. This reasoning deviates from the Department's interpretation that "its regulation does not require that each affiliated company produce the products that the other company produces before finding the potential for manipulation of shifting production priorities." *Remand Results II*, at 15.

## CONCLUSION

Commerce cannot, without an adequate explanation or a material change in facts, impose an inconsistent result. Commerce has neither demonstrated how certain additional findings during the 2000–2001 review were material or decisive to its determination to collapse nor furnished adequate explanation for departing from its previous decision not to collapse VAL, VIL and VFL to warrant its decision to collapse the Viraj Group companies in the 2000–2001 review. In this case, Commerce's reversal of its prior practice is inconsistent with core administrative law principles. Consequently, Plaintiffs' motion for judgment must be granted, and this matter is remanded to Commerce for calculation and imposition of individual antidumping margins upon VAL, VIL and VFL. However, the court notes that Plaintiffs in this case have not objected to the potential collapse of VIL and VFL, "as these companies have similar functions for finishing VAL inputs." *Pls. Reply*, at 9 n.4. Therefore, on remand, Commerce may consider collapsing VIL and VFL in accordance with the court's opinions in *Slater I* and *Slater II*.

## Slip Op. 05–24

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

United States, Plaintiff, Ford Motor Company, Defendant.

Court No. 02–00106

The United States Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs"), plaintiff, seeks to collect civil penalties and customs duties concerning certain merchandise imported by Ford Motor Company ("Ford"), defendant, in violation of 19 U.S.C. § 1592 (1988). Customs moves pursuant to USCIT R. 56 for summary judgement on the prior disclosure and statute of limitations defenses raised by Ford. Customs also moves pursuant to USCIT R. 12 to dismiss Ford's counterclaim, which seeks a refund of certain duties tendered in connection with this matter.

**Held:** Customs' motion for summary judgment on the prior disclosure and statute of limitations defenses and to dismiss counterclaim is denied.

Dated: February 18, 2005

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David A. Levitt* and *Michael Panzera*); of counsel: *Jeffrey E. Reim* and *Katherine Kramarich*, United States Bureau of Customs and Border Protection, for the United States, plaintiff.

*Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt, LLP (Steven P. Florsheim, Robert B. Silverman, David M. Murphy*, and *Frances P. Hadfield*); of counsel: *Paulsen K. Vandevert*, Ford Motor Company, for Ford Motor Company, defendant.

## *OPINION AND ORDER*

**TSOUCALAS, Senior Judge:** The United States Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs"),[1] plaintiff, seeks to collect civil penalties and customs duties concerning certain merchandise imported by Ford Motor Company ("Ford"), defendant, in violation of 19 U.S.C. § 1592 (1988).[2] Customs moves pursuant to USCIT R. 56 for summary judgement on the prior disclosure and statute of limitations defenses raised by Ford. Customs also moves pursuant to USCIT R. 12(b) to dismiss Ford's counterclaim seeking a refund of certain duties tendered in connection with this matter.

## BACKGROUND

On October 25, 2004, Customs moved for summary judgement on the prior disclosure and statute of limitations defenses raised by Ford. Customs also moved to dismiss Ford's counterclaim for failure to state a claim upon which relief can be granted.[3] *See* Pl.'s Mot. Summ. J. Prior Disclosure Statute Limitations Defenses Dismiss Countercl. ("Customs' Mot."). Ford responded on December 13, 2004. *See* Def.'s Resp. Pl.'s Mot. Summ. J. Prior Disclosure Statute Limitations Defenses Dismiss Countercl. ("Ford's Resp."). Parties then submitted a joint pretrial order on January 5, 2005. *See* Pretrial Order. Customs submitted its reply on January 11, 2005. *See* Pl.'s Reply Support Mot. Partial Summ. J. Mot. Dismiss Countercl.. Finally, Ford, with leave from the Court, submitted a sur-reply on January 14, 2005. *See* Def.'s Sur-Reply Pl.'s Reply Mot. Summ. J.. The Court heard oral arguments from the parties on February 7, 2005.

Ford has waived the statute of limitations defense. *See* Ford's Resp. at 1. Thus, the remaining issues are whether Ford fulfilled the

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

[2] Customs seeks $184,495 in unpaid duties and civil penalties in the amount of $21,314,111 if Ford's conduct is found to be fraudulent; $3,497,080 if Ford was grossly negligent; or $1,748,540 if Ford was negligent. *See* Complaint.

[3] Customs mistakenly filed its motion pursuant to USCIT R. 12(b)(6). *See* Customs' Mot. at 1. USCIT R. 12(b)(6), however, is failure to join a party under R. 19. Although styled under USCIT R. 12(b)(6), the Court will treat Customs' motion as filed pursuant to its proper provision, USCIT R. 12(b)(5).

requirements for prior disclosure status and whether Ford's counterclaim has any merit. The Court denied Customs' motion at the close of oral arguments on February 7, 2005. This opinion elaborates the Court's bench ruling.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582 (2000). Jurisdiction over Ford's counterclaim is based on 28 U.S.C. §§ 1583 and 1585 (2000).

## STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id.* A genuine dispute for trial exists only if there is evidence from which a reasonable jury could return a verdict for the non-moving party. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if the moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The burden of demonstrating an absence of genuine disputes as to material facts is on the moving party. *See Celotex*, 477 U.S. at 323. Once that burden is discharged, the non-moving party has the burden of showing specific facts in dispute. *See id.*

The Court may dismiss a counterclaim for failure to state a claim only "where it appears beyond doubt that plaintiff can prove no set of facts which will entitle him to relief." *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1998) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A plaintiff is only required to set out in detail the facts upon which the claim is based so that the defendant has "fair notice of what his claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The particular relief requested is not required to be available, as long as the Court can ascertain that some relief is available. *See NEC Corp. v. United States*, 20 CIT 1483, 1485, 967 F. Supp. 1305, 1307 (1996).

## DISCUSSION

### I. Uncontested Facts

Ford, the importer on record, and through its customs broker, J.V. Carr, Inc., made eleven entries of dutiable merchandise ("Complaint Entries") between February 2, 1989, and March 12, 1989.[4] *See* Customs' Mot. at 2. The Complaint Entries consisted of dies, checking fixtures, welding equipment, and accessories purchased from Ogihara Iron Works, Ltd. of Japan ("OIW") through its subsidiary, Ogihara America Corporation ("OAC") (collectively, "Ogihara"), to manufacture and assemble parts in Ford's FN–36 program ("FN–36").[5] *See* Pretrial Order, Schedule C at ¶¶ 3–4; Ford's Resp. at 5 n.5. The entered value of the Complaint Entries was $63,078,426. *See* Pretrial Order, Schedule C at ¶ 10. Ford issued an original purchase order, also called the "base tool order," to OIW in May 1987. *See id.* at ¶ 3. Ford then issued 17 purchase order amendments to the base tool order and "over 200 separately numbered purchase orders for engineering changes and other price adjustments." *Id.* at ¶ 6. These amendments were issued between May 1987 and January 1991 modifying the purchase order price from $42,544,844 to $66,075,960. *See id.* at ¶ 12.

In 1989, various requests for information (referred to as "CF 28")[6] were issued from the Seattle and Detroit District Customs offices about FN–36 entries.[7] Ford responded to the Detroit CF 28 on November 20, 1989, and included copies of the original purchase order, amendments 1–16, and Ford's April 5, 1989, letter.[8] *See* Pretrial Order, Schedule C at ¶ 15. On December 5, 1990, the Seattle Customs office reissued a CF 28 covering additional FN–36 entries filed in Seattle. *See id.* at ¶ 16. Ford responded to the reissued CF 28 on May 6, 1991, stating that "final audit results and price adjustments will soon be available." *Id.* at ¶ 17.

Customs was investigating OAC's import practices in the late 1980s. *See* Customs' App., Ex. 6 at 9; Ford's Resp. at 10. As an outgrowth of the OAC investigation, Customs also began investigating Ford. *See* Customs' Mot. at 12; Ford's Resp. at 10. On June 7, 1991, Special Agent in Charge Richard J. Hoglund issued Ford a sum-

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[4] The eleven entries and their ports of entry are listed in Exhibit A of the Complaint.

[5] "FN–36" was Ford's program code for the 1990 model year Lincoln Town Car. *See* Pretrial Order, Schedule C at ¶ 2.

[6] Ford describes the CF 28s as routine requests for information which they respond to regularly from various Customs ports each year. *See* Ford's Resp. at 7.

[7] The CF 28s dated February 9, 1989, and March 2, 1989, are from Seattle and the CF 28 dated March 28, 1989, is from Detroit. *See* Pretrial Order, Schedule C at ¶¶ 13–14.

[8] The April 5, 1989 letter included a tender of $948,230.45 for certain research and development, tooling, and assists for the FN–36 program. *See* Pretrial Order, Schedule C at ¶ 15.

mons, served by Special Agent ("SA") Michael Turner, demanding production of documents related to the FN–36 program. *See* Pretrial Order, Schedule C at ¶ 19; Customs' App., Ex. 12 at 40–41.

On August 6, 1991, Ford submitted a supplemental response to its November 20, 1989, response to Detroit's CF 28.[9] *See* Pretrial Order, Schedule C at ¶ 20. The supplemental response identified twelve entries of FN–36 merchandise that Ford estimated it owed $684,417 in unpaid duties and offered to tender the duty upon Customs' review. *See id.* at ¶ 21. After review, Customs concluded that Ford undervalued the FN–36 entries by $16,816,296, thus owing $689,775 in unpaid duties. *See id.* at ¶ 22. On November 22, 1991, Ford tendered a check for $689,775 in unpaid duties. *See id.*

Customs exhausted its administrative procedures, initiated on January 10, 1995, by issuing pre-penalty and penalty notices and permitting Ford to file petitions in response. *See* Pretrial Order, Schedule C at ¶ 23; Customs' Mot. at 6. Customs then filed this civil action on January 24, 2002. *See* Complaint.

## II. Statutory Background

Title 19 of the United States Code, section 1592(a)(1) prohibits fraudulent, grossly negligent, or negligent "material and false" acts or omissions in connection with the entry of merchandise into the United States. The penalties for a violation of 19 U.S.C. § 1592(a) are substantially less if the alleged violator makes a prior disclosure. *See* 19 U.S.C. § 1592(c)(4). A prior disclosure is a disclosure of "the circumstances of a violation" before, "or without knowledge of, the commencement of a formal investigation of such violation." *Id.* An alleged violator has the burden of proof of establishing a lack of knowledge of the commencement of a formal investigation. *See id.* Furthermore, a person is presumed to have such knowledge if an investigating agent, who identifies himself and the nature of his inquiry, inquires about or requests specific records concerning "the type of or circumstances of the disclosed violation." 19 C.F.R. § 162.74(f)(2)&(3) (1991). The presumption is rebuttable with evidence that the person did not know an investigation had commenced with respect to the disclosed information. *See* 19 C.F.R. § 162.74(f). A formal investigation is considered to be commenced on the earliest of the following: (1) the date recorded in writing in the investigatory record when an investigating agent believed the possibility of a violation existed; (2) the date an investigating agent, after identifying himself and the nature of his inquiry: (a) inquired about the type of or circumstances of the disclosed violation, or (b) requested specific books and records relating to the disclosed information. *See* 19

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[9] Ford refers to the supplemental response as a reconciliation resulting from price negotiations with Ogihara after FN–36 imports were completed. *See* Ford's Resp. at 6.

C.F.R. § 162.74(d)(4). Further, a prior disclosure is made if it is disclosed "in writing to a district director" and "makes a tender of any actual loss of duties. . . ." 19 C.F.R. § 162.74(a).

### III. Further Findings of Fact are Required to Determine When Customs Commenced its Formal Investigation

Customs states that its investigation commenced, and that Ford knew it was being investigated no later than October 18, 1990. *See* Customs' Mot. at 14 and 19. On this date, Customs requested the production of FN–36 entry records during a meeting. *See id.* This meeting was documented in an OAC Report of Investigation ("ROI") dated January 7, 1991. *See id.* at 17. That documentation is valid, Customs argues, because the regulations do not require a separate file to record the opening of an investigation. *See id.* at 13. In the alternative, Customs argues that Ford's formal investigation commenced no later than January 7, 1991, when SA Turner's suspicions of a violation by Ford were recorded in the OAC ROI. *See id.* at 18–19. Customs also states that, even if Ford could establish that an alleged disclosure occurred prior to, or without the knowledge of a formal investigation, the alleged disclosure still fails to satisfy the controlling regulations. *See id. at 10.*

Ford, in response, argues that Customs did not commence its investigation until August 21, 1991. *See* Ford's Resp. at 30. In support, Ford argues that this is the only date when the office of investigations began taking steps it ordinarily takes when commencing an investigation, particularly when verifying a prior disclosure claim. *See id.* Such steps included opening a file, sending notice to auditors and import specialists, requesting liquidation of entries to be delayed, and requesting entries be sent to the agent in charge. *See id.*

Under 19 U.S.C. § 1592(c)(4) and 19 C.F.R. § 162.74(a), a valid prior disclosure must be made before, or without knowledge of, the commencement of a formal investigation. Based on the parties' contentions stated above, a dispute exists to when Customs commenced a formal investigation of Ford. Additionally, during the October 18, 1990, meeting, Customs states SA Turner asked Mr. Gibson, of Ford, about an entry related to the FN–36 program. *See* Customs' Mot. at 17. Ford states that the meeting occurred on November 27, 1990, but agrees that SA Turner and Mr. Gibson met and an entry related to FN–36 was inquired about. *See* Ford's Resp. at 31; Customs' App., Ex. 8 at 27. The parties only agree that a meeting occurred. Ford claims that it understood the inquiry made at the meeting to be a part of Customs' investigation of OAC and not a part of an investigation of Ford itself. *See* Ford's Resp. at 32–33. Customs states that Ford is presumed to have known of the investigation as a matter of law under 19 C.F.R. § 162.74(f) because Customs "inquired about a particular entry of FN–36 merchandise, sought information concerning all other FN–36 entries filed by Ford, and/or requested specific books and records from Ford related to the FN–36 project." Customs' Mot. at 19. In viewing the evidence in favor of the non-movant, the Court does not agree that the meeting clearly constitutes the commencement of a formal investigation of Ford. For Ford to presumably know of the investigation under 19 C.F.R. § 162.74(f), the investigating agent has to identify himself and the nature of his inquiry. The parties dispute whether the meeting and subsequent request for Ford's records was part of Customs' continuing investigation of OAC or was part of a separate investigation of Ford.

The OAC ROI, dated January 7, 1991, documents the October 18, 1990/November 27, 1990, meeting. *See* Customs' Mot. at 17. The ROI states that:

> On October 18, 1990, I [SA Turner] met with Ford attorney C. Harry Gibson, and advised him that Customs would ask to review Ford's records related to payment for and receipt of the presses purchased from OIW and OAC for the FN–36 Lincoln Town Car Project. Gibson advised that Ford would compile the requested information.

*See* Customs' App., Ex. 6 at 14. The ROI, on its face, does not mention the possibility or suspicion that Ford violated 19 U.S.C. § 1592. Again, viewing the present evidence in a light favorable to the non-movant, the ROI could reasonably indicate that Customs was merely requesting Ford's participation in the OAC investigation. Because issues of material fact exist as to when Customs commenced its formal investigation of Ford, summary judgement fails and therefore is denied.

### IV. Ford's Counterclaim is Proper

Customs moves to dismiss Ford's refund counterclaim seeking $689,775 plus lawful interest for duties tendered on November 22, 1991, resulting from an undervaluation of the FN–36 project. *See* Customs' Mot. at 1; Answer at ¶ 42. Ford's counterclaim states that the Complaint Entries were appraised based on the transaction value of the imported merchandise, which was equal to the prices stated on the invoices presented at the time of entry. *See* Answer at ¶¶ 36–42. Therefore, Ford argues that it is entitled to a refund for overpaid duties. *See* Ford's Resp. at 37. Customs asserts that Ford's counterclaim fails to identify any statutory or regulatory basis for obtaining a refund. *See* Customs' Mot. at 24. Under USCIT Rules 8(a) and 13, however, Ford is not required to identify such a basis for its counterclaim. Ford's counterclaim is a short and plain statement properly limited to the value of the Complaint Entries, which is a direct challenge to Customs' case. Accordingly, Ford's counterclaim falls within the Court's subject matter jurisdiction thereby satisfying USCIT R. 8. Furthermore, a counterclaim "may or may not diminish or defeat the recovery sought by the opposing party." USCIT R. 13(b).

The Court finds that Ford's counterclaim meets the requirements of this Court's rules. Therefore, Customs' motion to dismiss Ford's counterclaim is denied.

## CONCLUSION

In conclusion, a factual dispute exists as to when Customs commenced its formal investigation of Ford. Factual issues also exist as to when Ford knew it was being investigated about the Complaint Entries. Additionally, Ford has properly pleaded its counterclaim. Upon consideration of Customs' motion for summary judgment on the prior disclosure and statute of limitations defenses and to dismiss counterclaim, all pleadings and papers filed herein, and oral arguments, it is hereby

**ORDERED** that the statute of limitations defense has been waived and is thus moot; and it is further

**ORDERED** that the Customs' motion for summary judgment on the prior disclosure defense is denied; and it is further

**ORDERED** that the Customs' motion to dismiss Ford's refund counterclaim is denied; and it is further

**ORDERED** that the parties prepare for trial on the merits.

Slip Op. 05–25

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

United States, Plaintiff, v. Ford Motor Company, Defendant.

Court No. 02–00116

Plaintiff, the United States Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs"), moves pursuant to USCIT R. 56 for summary judgment for reconciliation, shortfall payment, prior disclosure and statute of limitations defenses. Customs seeks payment of a civil penalty and customs duties concerning entries of vehicles and vehicle components between 1987 and 1992 made by Ford Motor Company ("Ford"), defendant, in violation of 19 U.S.C. § 1592 (1988). Customs also moves to dismiss Ford's counterclaim. Ford opposes Customs' motion and cross-moves for partial summary judgment, stating that Ford fulfilled its obligation under 19 U.S.C. §§ 1484 and 1485 (1988). Additionally, Ford seeks a refund of all or part of the $8,575,961.80 in duties tendered in connection with this matter, and lawful interest.

**Held:** Plaintiff's motion for summary judgment and its motion to dismiss the counterclaim is denied. Defendant's cross-motion for partial summary judgment is denied.

Dated: February 18, 2005

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David A. Levitt* and *Michael Panzera*); of counsel: *Jeffrey E. Reim* and *Katherine Kramarich*, United States Bureau of Customs and Border Protection, for the United States, plaintiff.

*Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt, LLP* (*Steven P. Florsheim*, *Robert B. Silverman*, *David M. Murphy*, and *Frances P. Hadfield*); of counsel: *Paulsen K. Vandevert*, Ford Motor Company, for Ford Motor Company, defendant.

## *OPINION AND ORDER*

**TSOUCALAS, Senior Judge:** Plaintiff, the United States Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs"),[1] moves pursuant to USCIT R. 56 for summary judgment for reconciliation, shortfall payment, prior disclosure and statute of limitations defenses. Customs seeks payment of a civil penalty and customs duties concerning entries of vehicles and vehicle components between 1987 and 1992 made by Ford Motor Company ("Ford"), defendant, in violation of 19 U.S.C. § 1592 (1988).[2] Customs also moves to dismiss Ford's counterclaim. Ford opposes Customs' motion and cross-moves for partial summary judgment, stating that Ford fulfilled its obligation under 19 U.S.C. §§ 1484 and 1485 (1988). Additionally, Ford seeks a refund of all or part of the $8,575,961.80 in duties tendered in connection with this matter, and lawful interest.

## BACKGROUND

On October 28, 2004, Customs moved for summary judgement on reconciliation, shortfall payment, prior disclosure and statute of limitations defenses raised by Ford and also moved to dismiss Ford's counterclaim for failure to state a claim upon which relief can be granted. *See* Mot. Summ. J. Reconciliation, Shortfall Payment, Prior Disclosure, Statute Limitations Defenses Dismiss Countercl. ("Customs' Mot."). Ford responded on December 15, 2004. *See* Def.'s Resp. Pl.'s Mot. Summ. J. Prior Disclosure Statute Limitations Defenses Dismiss Countercl. ("Ford's Response"). On October 28, 2004, Ford moved for partial summary judgment. *See* Def.'s Mot. Partial Sum. J. ("Ford's Mot."). Customs filed its response with this Court on December 16, 2004. *See* Resp. Customs' Def.'s Mot. Partial Summ. J..

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

[2] Customs asserts that it was deprived of $8,644,139.80 in lawful duty, of which $68,178 remains unpaid. *See* Complaint at ¶ 9. Customs seeks civil penalties in the amount of $34,576,559 if Ford's conduct is found grossly negligent and $17,288,279 if Ford's conduct is found negligent. *See* Complaint at ¶¶ 13–17.

Customs and Ford submitted a proposed joint pretrial order on January 5, 2005. *See* Pretrial Order. The Court heard oral arguments on February 7, 2005.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1582, 1583, and 1585 (2000).

## STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id.* A genuine dispute for trial exists only if there is evidence from which a reasonably jury could return a verdict for the non-moving party. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The burden of demonstrating an absence of genuine disputes as to material facts is on the moving party. *See Celotex*, 477 U.S. at 323. Once that burden is discharged, the nonmoving party has the burden of showing specific facts in dispute. *See id.*

The Court may dismiss a counterclaim for failure to state a claim only "where it appears beyond doubt that plaintiff can prove no set of facts which will entitle him to relief." *Constant v. Advanced Micro-Devices, Inc.* 848 F.2d 1560, 1565 (Fed. Cir. 1998) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F. 2d 1271, 1274 (Fed. Circ. 1991)). A plaintiff is only required to set out in detail the facts upon which the claim is based so that the defendant has "fair notice of what his claim is and the grounds upon which it rests." *Conley* 355 U.S. at 47.

## DISCUSSION

### I. Factual Background

Ford's supply agreements with many of its foreign vendors contained post-importation price adjustments, which typically provided a per vehicle or component base price subject to possible modifications. *See* Pretrial Order, Schedule C at ¶ 1. Ford entered the merchandise subject to this action beginning January 1, 1987 and continuing through December 31, 1992.[3] *See* Complaint at ¶ 5. On October 14, 1988, Ford proposed to Customs that it be allowed to track all lump sum billings throughout each model year, which runs from July 1 to June 30, and report dutiable expenses associated with each import program in a reconciliation report. *See* Pretrial Order, Schedule C at ¶ 5. Under Ford's proposal, the reconciliation report was to be "filed with the Detroit customs district within 60 days after the close of each model year (July 30)." *Id.* In a letter dated August 29, 1989, Customs approved the proposal for the annual reporting of price adjustments and payment of duty within 60 days of the close of each model year ("Reconciliation Agreement"). *See id.* at ¶ 8. On May 23, 1991, Customs informed Ford, in writing, that it was opening a formal investigation of the company regarding the proper declaration of assists and indirect payments on imports of vehicles and vehicle components. *See id.* at ¶ 14.

On May 22, 1992, Ford submitted a letter to Customs, which it claimed to be a prior disclosure, concerning certain undervaluations of imported tooling assists for the period of 1987 through 1992. *See id.* at ¶ 24. Customs, however, did not accept the letter as a prior disclosure. *See id.* On November 18, 1992, Ford tendered $1,304,847.95 in duties and fees in connection with undeclared tooling assist on merchandise imported between January 1, 1987 through May 22, 1992. *See id.* Furthermore, on August 6, 1992 Ford submitted a letter to Customs claiming to be a prior disclosure relating to lump sum payments for merchandise imported between 1987 and August 6, 1992. *See id.* at ¶ 39. Ford explained that it undervalued these goods because their price had been revised subsequent to importation and Ford had failed to identify and report the changes to Customs. *See id.* On December 16, 1992, Ford tendered $848,262.34 as unpaid duty in relation to these transactions and stated that it needed further time to analyze some additional payments. *See id.* On January 29, 1993, Ford tendered an additional $17,888.23 as duty for unreported lump sum payments for merchandise imported between 1987 and 1992. *See id.*

On October 22, 1992, Ford indicated to Customs that it had manufactured developmental engine parts for engines manufactured at its Windsor (Canada) Essex Plant. *See id.* at ¶ 40. These parts were provided free of charge to the plant and Ford had provided $1,327,455 worth of such parts for the 1990, 1991, and 1992 model year engines manufactured at the plant. *See id.* Accordingly, on April 13, 1993, Ford tendered $15,920.95 in duty for these undeclared assists. *See id.*

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[3] The subject entries consisted of vehicles, vehicle engines, and automotive parts/components entered through various ports. *See* Complaint at ¶ 5.

### A. Capri Vehicles

On June 7, 1991, Ford and Customs had a meeting to discuss the scope of Customs' investigation targeting undeclared assists and indirect payments. *See* Pretrial Order, Schedule C at ¶¶ 13, 15. Customs served Ford with a summons for records relating to the Mercury Capri ("Capri") vehicle import program. *See id.* at ¶ 16. The summons was for all records related to any and all assists and payments made in connection with the design, development, engineering, production, purchase, and importation of the Capri vehicles. *See id.* On August 26, 1991, Ford tendered $155,708 of duty to Customs indicating that it had made supplemental lump sum payments to Ford of Australia for the 1991 model year Capri. *See id.* at ¶ 17. On September 5, 1991, Ford provided Customs with a copy of the supply contract for the Capri, which indicated that transfer prices would be adjusted every six months to reflect increases or decreases in a market basket of similar vehicles. *See id.* at ¶ 19. The documents submitted by Ford indicated that two undeclared lump sum payments totaling $5,570,900 had been made for 1991 model year Capri vehicles entered in the Port of San Francisco. *See id.*

### B. Festiva Vehicles

On January 22, 1992, Customs issued a summons for information regarding Festiva vehicles supplies by KM Corporation of Korea. *See* Pretrial Order, Schedule C at ¶ 20. Ford submitted to Customs copies of its supply agreements for the Festiva program including the supply agreement between Ford and the Mazda Motor Corporation ("Mazda"), entitled *Passenger Vehicle Program Agreement*, and dated July 1, 1988.. *See id.* at ¶ 26. In this agreement, Ford agreed to purchase 85,000 Festiva vehicles for the United States and Canadian markets. *See id.* If Ford failed to purchase 85,000 vehicles, then it was subject to a per vehicle price adjustment. *See id.* The agreement between the two companies outlined various formulas whereby the purchase price was to be further adjusted based on the number of vehicles Ford purchased for each model year to arrive at the "Market Basket" purchase price. *See id.* On June 5, 1992, Ford apprised Customs that there had been $11,408,470.92 of undeclared engineering and tooling costs prior to the 1993 model year Festiva. *See id.* at ¶ 25. Ford stated that it owed $309,169.56 in duties and other fees and tendered the duty on April 29, 1993, after Custom's review. *See id.* On November 13, 1992, Ford tendered $362,013 as the duty and fees for an alleged "production shortfall" in connection with the Festiva program. *See id.* at ¶ 27. On November 18, 1992, Ford tendered $1,091,578 as the duty owed for a supplemental lump sum payment of $43,663,125 for Festiva vehicles entered between April 1, 1991 and July 31, 1992. *See id.* at ¶ 28.

### C. Yamaha SHO Engines

Customs issues a summons on January 22, 1992, for all documents and records related to any and all assists given and payments made by Ford in connection with the Yamaha SHO engine program. *See* Pretrial Order, Schedule C at ¶ 29. On June 5, 1992, in response to the summons, Ford disclosed that it had failed to declare $282,112 of merchandise value for the 3.0 liter SHO engines. *See id.* at ¶ 30. After Customs reviewed the information Ford provided, Ford tendered $9,623.16 for the duty owed on the 3.0 liter SHO engines. *See id.* In addition, Ford provided Customs with a copy of its supply agreement, indicating that the base price for the SHO engines could be adjusted. *See id.* at ¶ 31. On June 5, 1992, Ford responded that there were $14,779,026 in prototype and development costs for the 3.2 liter SHO engines for the 1993 model year, which would be declared 60 days after the end of the 1992 model year, July 30, 1992. *See id.* at ¶ 32.

On November 13, 1992, Ford identified further post-entry payments for the 3.0 liter SHO engines and tendered $59,707 for the duty. *See id.* at ¶ 34. On November 18, 1992, Ford tendered $404,100 for duty associated with lump sum payments of $14,274,097 for design and development costs for the 3.2 liter SHO engines made during 1991 and 1992. *See id.* at ¶ 35. Ford also indicated that at the end of the 1993 model year it would reconcile actual usage and tender additional money owed or request a refund based on actual occurrences during the 1993 model year. *See id.* In a meeting with Customs Import Specialist Spiro Karras on December 18, 1992, Ford admitted that it had not declared development costs apportioned to Yamaha prototype 3.2 liter SHO engines that were to be retained in Japan rather than shipped to the United States. *See id.* at ¶ 36. Ford sought advice from Customs' Office of Regulations and Rulings and was advised that the development costs should be apportioned over the imported production engines. *See id.* Ford did not tender $68,178 of alleged duty owed on the undeclared development costs for 3.2 liter SHO engines. *See id.* at ¶ 37.

### D. Engines From Germany and Transmissions from France

On March 23, 1992, Ford advised Customs that lump sum payments totaling $21,401,808 and $32,130,256 had been made to Ford of Germany for 1991 model year 2.9 liter and 4.0 liter V–6 engines, respectively. *See id.* at ¶ 21–22. Ford tendered $726,591 and $1,047,074, respectively, for duty on these payments. *See id.* On May 6, 1993, Ford disclosed it had made lump sum payments to Ford of Germany totaling $4,783,094 for 1991 model year V–6 engines. *See id.* at ¶ 42. Therefore, Ford tendered $162,625 for the duty. *See id.* Ford also disclosed on May 6, 1993, that it had made lump sum payments to Ford of Germany for 1992 model year 4.0 liter V–6 engines in the amount of $25,728,951. *See id.* at ¶ 43. Ford tendered $695,874 in unpaid duty in connection with these payments. *See id.*

Ford also disclosed, on March 23, 1992, that lump sum payments in the amount of $10,875,431 had been made to Ford of France for 1991 model year A4LD Bordeaux transmissions. *See id.* at ¶ 23. Accordingly, Ford tendered $339,379 for duty in connection with these payments. *See id.* On May 6, 1993, Ford disclosed that it had made lump sum payments to Ford of France in the amount of $16,359,794 for 1992 model year A4LD Bordeaux and tendered $458,893 for the unpaid duty. *See id.* at ¶ 44.

**II. Statutory Background**

Customs is directed to appraise imported merchandise based on the transaction value. *See* 19 U.S.C. § 1401a(a)(1)(A) (1988). The statute defines transaction value as "the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to . . . the value, apportioned as appropriate, of any assists. . . ." 19 U.S.C. § 1401a(b)(1). Under 19 U.S.C. § 1481(a), all invoices for imported merchandise are required to set forth, among other things, "[t]he purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of a purchase or an agreement to purchase." 19 U.S.C. § 1481(a)(5) (1988). The statute also states that the invoices must contain "[a]ny other facts deemed necessary to a proper appraisement, examination, and classification of the merchandise that [Customs] may require. " 19 U.S.C. § 1481(a)(10).

Pursuant to 19 U.S.C. § 1484(a)(1)(B), an importer is obligated to file, at the time of entry, such "other documentation as is necessary to enable [Customs] to assess properly the duties on the merchandise. . . ." *Id.* Furthermore, an importer must sign the entry form and "set forth such facts in regard to the importation as [Customs] may require for the purpose of assessing duties. . . ." 19 U.S.C. § 1484(d). An importer making an entry under the provisions of 19 U.S.C. § 1484 must file a declaration under oath stating that "the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased . . . [and that] all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct. . . ." 19 U.S.C. § 1485(a)(2) & (3). The importer also must declare "[t]hat he will produce at once to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct." 19 U.S.C. § 1485(a)(4).

Under 19 U.S.C. § 1952, "no person, by fraud, gross negligence, or negligence– (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of– (i) any document, written or oral statement, or act which is material and false, or (ii) an omission which is material. . . ." 19

U.S.C. § 1592(a). If an importer discloses facts and circumstance relating to a violation, then the maximum penalty is significantly reduced. *See* 19 U.S.C. § 1592(c)(4). Such disclosure, however, must come prior to the commencement of an investigation by Customs relating to a violation, or with a lack of knowledge of the commencement of such investigation. *See id.* If the alleged violator asserts a lack of knowledge of the commencement of a formal investigation, then such person bears the burden of proving such lack of knowledge. *See id.* A formal investigation is considered to be commenced on the earliest of the following: (1) the date recorded in writing in the investigatory record; (2) the date an investigating agent identified himself and the nature of his inquiry, in writing or in person; or (3) the date an investigating agent, after identifying himself and the nature of his inquiry, requested specific books and records. *See* 19 CFR § 162.74(d)(4) (1988).

## III. Further Findings of Fact are Required to Determine if Ford Complied with the Reconciliation Agreement

### A. Contention of the Parties

#### 1. Customs' Contentions

Customs contends that Ford violated 19 U.S.C. § 1592 by making false statements or omissions in connection with the entry into the United States of the merchandise at issue. *See* Customs' Mot. at 17. Specifically, Customs argues that Ford provided false prices in connection with the entries and that Ford failed to immediately advise Customs of additional payments made for the imported merchandise or of changes to the price information previously provided to Customs. *See id.* Ford was required to provide true and correct information in its invoices remitted at the time of entry. *See id.* at 18 (citing 19 U.S.C. §§ 1481, 1484, & 1485). Furthermore, Customs asserts that, under the Reconciliation Agreement, Ford was required to file an annual reconciliation report for each import "with the Detroit Customs District *within 60 days* after the close of each model year (July 30). . . ." *Id.* (emphasis in original). Customs alleges that Ford did not comply with the Reconciliation Agreement because it failed to file the reports and tender duties within 60 days of the close of the model year. *See id.* at 20.

Additionally, Customs argues that the Reconciliation Agreement did not relieve Ford of its liability under 19 U.S.C. § 1592. *See* Customs' Mot. at 20. Customs alleges that Ford falsely represented in its entry documents that the prices were true and accurate although it knew those prices were not final. *See id.* at 20–21. Customs maintains that the Reconciliation Agreement "did not allow [Ford] to misrepresent the facts at the time of entry, nor does subsequently tendering duties serve to negate a prior violation." *Id.* at 21.

#### 2. Ford's Contentions

Ford responds that it complied with the Reconciliation Agreement and all applicable reporting requirements. *See* Ford's Resp. at 19–26; *see also* Ford's Mot. at 9–18. Ford maintains that there is no statute, regulation or Customs' directive which sets requirements for merchandise entered with provisional prices. *See* Ford's Mot. at 9. Ford argues that "[t]he mere fact that a price may change after entry or that additional payments are made to the vendor at a later date does not mean that the entry was incorrect when it was filed." Ford's Resp. at 17. Ford also argues that its tenders were not late under the Reconciliation Agreement because the 60-day filing time frame was a "target date" and not a final deadline. *See id.* at 8 & 21. Ford maintains that Customs' acceptance of Fords submissions for years "led Ford to believe that it was acceptable to file voluntary submissions after 60 days under the [Reconciliation Agreement] and the law." *Id.* at 25. Ford further argues that Customs misinterprets the "at once" standard, set forth in 19 U.S.C. § 1485, because Ford was only required to place Customs on notice that the values of previously entered goods were incorrect. *See id.* at 22. Ford maintains that the Reconciliation Agreement put Customs on notice that it would regularly report post-entry price adjustments and lump sum payments to Customs. *See id.* at 23.

### B. Analysis

Pursuant to USCIT R. 56, summary judgment is only appropriate if the Court determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson*, 477 U.S. at 248–50; *see also Precision*, 24 CIT at 1023, 116 F. Supp. 2d at 1359. In the case at bar, summary judgment is not appropriate as to whether Ford complied with the Reconciliation Agreement or violated 19 U.S.C. §§ 1481, 1484 and 1485. The Reconciliation Agreement is a central component to Customs' contention that Ford violated the statutes, and that civil penalties are therefore warranted. Customs alleges that Ford failed to comply with the Reconciliation Agreement and that, with the exception of one of the twenty-one duty tenders in issue, Ford failed to file the reconciliation reports and tender duties within the 60 days of the close of the model year.[4] *See* Ford's Mot. at 20. Ford responds that it fully complied with the Reconciliation Agreement and that its ten-

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[4] Customs points to the tenders made by Ford for various entries on March 23, 1992, November 13 and 18, 1992, December 16, 1992, January 29, 1993, March 25, 1993, April 29, 1993, May 6, 1993, August 9, 1993, September 2, 1993, December 1, 1993, as being delinquent pursuant to the Reconciliation Agreement. *See* Customs' Mot. at 19.

ders were not late. *See* Ford's Resp. at 21. Ford maintains that the 60-day filing time frame was a "target date" for Ford's filings and not a final deadline. *See id.* at 8 & 21. The Court concludes that whether Ford's tenders were timely under the Reconciliation Agreement are issues of material fact that remain in dispute.

Moreover, whether Ford fulfilled the "at once" requirement of 19 U.S.C. § 1485 is also an issue of material fact that remains in dispute. Customs alleges that Ford falsely represented that the prices submitted at the time of importation were true and accurate because Ford knew those prices were not final. *See* Customs' Mot. at 20–21. Ford responds that the "at once" standard only required Ford to provide Customs with notice that the values of previously entered goods were incorrect. *See* Ford's Resp. at 22. Ford argues that the Reconciliation Agreement placed Customs on notice that it would regularly report post-entry price adjustments and lump sum payments to Customs. *See id.* at 23. The Court finds that the terms of the Reconciliation Agreement, and whether it altered the "at once" requirement, are issues of material fact in dispute. Accordingly, this issue cannot be disposed of on a motion for summary judgment. *See Anderson*, 477 U.S. at 248–50; *see also Precision*, 24 CIT at 1023, 116 F. Supp. 2d at 1359. Custom's motion and Ford's cross-motion are, therefore, denied with respect to whether Ford satisfied the requirements of 19 U.S.C. §§ 1481, 1484 and 1485.

## IV. Further Findings of Fact are Required to Determine Whether Ford's Submissions Constitute Prior Disclosures

The Court finds that issues of material fact are in dispute with respect to whether Ford's submissions qualify for prior disclosure treatment. Customs argues that certain tenders made by Ford cannot be prior disclosures because they were not made before, or without knowledge of, the commencement of the underlying investigation. *See* Customs' Mot. at 21–25. Here, Customs argues that pursuant to 19 C.F.R. § 162.74(d)(4) and (f), Ford had knowledge, by May 20, 1991 or May 23, 1991, that a formal investigation by Customs was underway. *See id.* at 22. Customs maintains that "the documentary evidence establishes that Ford was aware that the investigation encompassed all undeclared payments and was not limited in any way." *Id.* at 24. Accordingly, Customs contends that all submissions concerning undeclared costs made after May 1991 are not entitled to prior disclosure treatment.

Ford contests Customs' assertion that the formal investigation began in May 1991 and that Ford's submissions are not prior disclosures. *See* Ford's Resp. at 26–28; *see also* Ford's Mot. at 19–26 . Ford argues that the formal investigation that began in May 1991 was limited to assists and indirect payments. *See* Ford's Mot. at 19–23.

Ford notes that a letter sent by Customs, dated May 23, 1991, indicates that the investigation was for Ford's failure to declare assists and indirect payments in its importation of vehicles and vehicle component assemblies. *See* Ford's Resp. at 26; *see also* Ford's Mot. at 20. Therefore, Ford was not precluded from filing prior disclosures unrelated to that investigation. *See* Ford's Resp. at 26. Moreover, Ford contends that, at a meeting held on June 7, 1991, it was notified that the investigation was only for assists and indirect payments. *See* Ford's Resp. at 27. Accordingly, Ford contends that its direct payments to its vendors after May 1991 qualify for prior disclosures treatment because they fall outside the scope of the investigation of assists and indirect payments. *See id.* at 28.

The date, if any, on which Customs commenced its formal investigation of Ford's payments to its vendors remains in dispute. Moreover, the scope of Customs' investigation and whether it merely covered assists and indirect payments or also included Ford's payments to its vendors in connection with the subject entries remains an issue of material fact in dispute. If Ford is correct that the formal investigation did not begin in May 1991, the Court must determine when, if ever, a formal investigation concerning the payments at issue began. Summary judgment is only appropriate when issues of material fact are not in dispute. *See Anderson*, 477 U.S. at 248–50; *see also Precision*, 24 CIT at 1023, 116 F. Supp. 2d at 1359. Accordingly, the Court denies Customs motion and Ford's cross-motion for summary judgment with respect to whether Ford's submission qualify for prior disclosure treatment.

### V. Further Findings of Fact are Required to Determine Whether Ford's Post-Importation Payments to Mazda are Dutiable

Summary judgment is not appropriate on the issue of whether certain payments by Ford for the 1990, 1991, and 1992 model year Festiva vehicles were shortfall payments and therefore not dutiable. The nature of Ford's agreement with Mazda and whether the payments Ford made constitute a contractual penalty or an adjustment in the purchase price requires further findings of fact. Customs argues that the alleged shortfall payments are not the type of payments which were found not dutiable in *Chrysler Corp. v. United States*, 17 CIT 1049 (1993). *See* Customs' Mot. at 27. The shortfall payments in *Chrysler* "were found to be non-dutiable based upon specific contractual provisions that addressed the buyer's failure to purchase merchandise. . . ." *Id.* at 29. Here, Customs contends that all of the agreements between Ford and Mazda were based on Ford's actions to purchase merchandise. *See id.* Customs argues that the agreements merely adjust the price of the vehicles Ford actually purchased and do not penalize Ford for its failure to meet a specific volume commitment. *See id.* Customs asserts that "[a]t most, the agreements only provide for cancellation costs, and those costs may not even apply to Ford," because either party may elect to terminate the agreement. *Id.* at 29–30.

Ford maintains that the amount paid to Mazda was a contractual penalty for vehicles Ford failed to purchase from Mazda. *See* Ford's Resp. at 31. Ford contends that the payments at issue are related the "Annual Volume Commitment" provision of Ford's contract with Mazda. *See id.* at 28–33. The terms of the agreement demonstrate that the volume adjustment is distinguishable in form and substance from any other adjustments contained in its agreement with Mazda. *See id.* at 29. The volume adjustments called for under the agreement, according to Ford, are essentially the same to the facts of *Chrysler*, where the court found "that shortfall payments were in the nature of a contract penalty and not part of the price paid or payable for the merchandise." *Id.* The sole difference between *Chrysler* and this case, Ford argues, is the method for calculating the amount of the shortfall payment. *See id.* at 30. Furthermore, the amount paid to Mazda did not effect the price of vehicles actually imported even though the amount was based on the "initial purchase price" set forth in the agreement. *See id.* at 30–31.

Without further findings of fact, the Court cannot determine the nature of Ford's agreement with Mazda and in turn whether such payments are dutiable. Accordingly, the Court denies Customs' motion for summary judgment on the payments Ford made to Mazda.

### VI. Further findings of Fact are Required to Determine Whether Ford Waived its Statute of Limitations Defense

Whether Ford has waived its statute of limitations defense is not ripe for summary judgment because issues of material fact remain in dispute. Customs argues that Ford executed a waiver of this defense on March 6, 2001. *See* Customs' Mot. at 31. Such waiver, according to Customs, was the last in a series of waivers dating back to the early 1990s. *See id.* Ford argues that the waiver related only to retroactive payments made to Yamaha for SHO engines imported between August 1, 1988, to date and did not include payments outside the scope of District Penalty Case 93–3801–21524–339. *See* Ford's Resp. at 44. Ford also argues that the waiver "does not explicitly include the claim for $68,178 in additional duties due on prototype engines. . . ." *Id.* The content of Ford's executed waiver and whether Ford in fact waived its statute of limitations defense remains in dispute. Accordingly, Customs' motion for summary judgment is denied.

## VII. Ford's Counterclaim for a Refund of Overpayments is Proper

Customs moves to dismiss Ford's counterclaim to refund duties it tendered to Customs. *See* Customs' Mot. at 31–38. Customs argues that Ford has failed to identify any statute or regulatory basis for obtaining a refund. *See id.* at 31. Under USCIT R. 13 and 8(a), however, Ford is not required to identify such a basis for its counterclaim. Ford may bring as a counterclaim "any claim which at the time of serving the pleading the pleader has against any opposing party, if (1) the claim involves the imported merchandise that is the subject matter of the civil action. . . ." USCIT R. 13(a). Furthermore, such counterclaim "may or may not diminish or defeat the recovery sought by the opposing party." USCIT R. 13(b). Under USCIT R. 8(a), Ford's counterclaim must contain "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." USCIT R. 8(a). The Court finds that Ford's pleading meets the requirements of this court's rules and includes sufficient facts to support its claim. Therefore, the Court denies Customs' motion to dismiss Ford's counterclaim.

## CONCLUSION

The Court finds that further findings of fact are required with respect to: (1) whether Ford complied with the Reconciliation Agreement or violated 19 U.S.C. §§ 1481, 1484, and 1485; (2) whether Ford's submissions qualify for prior disclosure treatment; (3) whether Ford's post-importation payments to Mazda constitute a penalty or price adjustment; and (4) whether Ford waived its statute of limitations defense with respect to prototype Yamaha SHO engines. The Court finds that Ford satisfied the court's rules with respect to its counterclaim for a refund of tendered duties.

For the foregoing reasons, the Court denies Customs' motions for summary judgment and to dismiss Ford's counterclaim and denies Ford's motion for partial summary judgment. Accordingly, parties are hereby ordered to proceed with litigation on the merits.

Slip Op. 05–26

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NSK LTD. and NSK CORPORATION; NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC. and NTN-BOWER CORPORATION; and TIMKEN U.S. Corporation, Plaintiffs and Defendant-Intervenors, v. UNITED STATES, Defendant, KOYO SEIKO CO., LTD. and KOYO CORPORATIONS OF U.S.A.; and NACHI-FUJIKOSHI CORP., NACHI AMERICA, INC. and NACHI TECHNOLOGY, INC., Defendant-Intervenors.

Consol. Court No. 98–07–02527

***ORDER***

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *NSK Ltd. v. United States*, 390 F.3d 1352 (Fed. Cir. 2004), and the CAFC mandate of January 24, 2005, vacating and remanding the judgment of the Court in *NSK Ltd. v. United States*, 28 CIT ____ , 217 F. Supp. 2d 1291 (2004).[1]

The CAFC held that the United States Department of Commerce's ("Commerce") classification of United States repacking expenses incurred by NSK Ltd. and NSK Corp. (collectively "NSK") as selling expenses was arbitrary. The CAFC reasoned that Commerce's classification of these expenses is internally inconsistent with Commerce's classification of United States warehousing expenses and United States warehouse-to-customer-shipping expenses as movement expenses. *See NSK Ltd.*, 390 F.3d at 1357. The CAFC found that Commerce failed to sufficiently explain these inconsistencies. *See id.* at 1357–58. Accordingly, pursuant to said decision by the CAFC, the Court hereby

**REMANDS** this case to Commerce to revisit its classification of United States repacking expenses as selling expenses and provide an explanation for the inconsistent treatment of United States repacking, United States warehousing, and United States Shipping from warehouse to customer expenses; and its hereby

**ORDERED** that the remand results are due within ninety (90) days of the date that this order is entered. Any responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

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[1] This action was brought by The Torrington Company that was later acquired by The Timken Company, and is now known as Timken U.S. Corporation. The Court refers to plaintiff and defendant-intervenor as Timken U.S. Corporation in the caption.

## Slip Op. 05–27

**USR OPTONIX, INC.,** Plaintiff, v. **UNITED STATES**, Defendant.

**Court No. 98–08–02723**
**Before: Judge Timothy C. Stanceu**

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted in part and denied in part]

Decided: February 18, 2005

*Neville Peterson LLP* (*John M. Peterson* and *Curtis W. Knauss*) for plaintiff.

*Peter D. Keisler*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, and *James A. Curley*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Beth C. Brotman*, Office of Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of Counsel, for defendant.

## OPINION AND ORDER

**STANCEU, Judge:**

Plaintiff USR Optonix, Inc. ("Optonix") challenges the determinations of tariff classification that the United States Customs Service ("Customs") applied to two products imported during a period beginning in November 1994 and concluding in May 1997.[1] Optonix moves for summary judgment with respect to the classification of both products; defendant United States cross-moves for summary judgment in its favor, also with respect to both products. The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000).

The first product at issue, designated as "P22–RE1," is a white powder consisting by weight of at least 99 percent yttrium oxide ($Y_2O_3$). The remaining 1 percent or less of the product consists of europium oxide. The product is represented by the formula "$Y_2O_3$:Eu" and also is identified as "Yttrium Oxide: Europium Doped." The second product, "P22–HCR2," is a red powder comprised by weight of at least 90 percent yttrium oxygen sulfide ($Y_2O_2S$), 10 percent or less europium oxygen sulfide ($Eu_2O_2S$), and 1 percent or less ferrous oxide ($Fe_2O_3$). Each product is used as a material in the production of phosphorescent coatings that are applied in the manufacturing of cathode ray tubes.

The court awards summary judgment to defendant on the issue of the tariff classification of P22–RE1. The court concludes that there are no genuine issues of fact material to that tariff classification and

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[1] The U.S. Customs Service now is renamed as the Bureau of Customs and Border Protection. *See Homeland Security Act of 2002*, Pub. L. 107–296, § 1502, 116 Stat. 2135 (2002); Reorg. Plan for the Dep't of Homeland Security, H.R. Doc. No. 108–32 (2003).

that the tariff classification determined by Customs was correct, entitling defendant to judgment as a matter of law. The motions of both parties for summary judgment on the tariff classification of P22–HCR2 are denied because of the existence of one or more genuine issues of material fact.

### *I. BACKGROUND*

Upon liquidation, Customs classified the entries of P22–RE1 that were made prior to 1995 in subheading 2846.90.50, Harmonized Tariff Schedule of the United States ("HTSUS"), subject to duty at 3.7 percent *ad valorem*. The version of the provision that was in effect at the time of the pre-1995 entries of P22–RE1 read as follows:

| | |
|---|---|
| 2846 | Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: |
| | * * * |
| 2846.90 | Other: |
| | * * * |
| 2846.90.50 | Other . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3.7%. |

Customs classified entries of P22–RE1 made in 1995 and thereafter in subheading 2846.90.80, HTSUS, the provision that superceded the former subheading 2846.90.50, HTSUS. The article description for heading 2846 and the duty applicable to the subheading at issue, 3.7 percent *ad valorem*, remained unchanged.

Upon liquidation, Customs classified entries of P22–HCR2 in subheading 3206.50.00, HTSUS. At the time the entries were made, this tariff provision read, in relevant part, as follows:

| | |
|---|---|
| 3206 | . . . inorganic products of a kind used as luminophores, whether or not chemically defined: |
| | * * * |
| 3206.50.00 | Inorganic products of a kind used as luminophores . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10.0% |

HTSUS, 1994.[2]

Plaintiff protested the classification determinations that Customs made upon liquidation. Following denial of the protests, plaintiff commenced this action.

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[2] During the time plaintiff imported the subject entries, the duty rate was reduced in stages, as follows: 1995, 9.3%; 1996, 8.6%; 1997, 7.9%.

*A. Contentions of the Parties on the Classification of P22–RE1*

Defendant maintains that Customs was correct in determining upon liquidation to classify P22–RE1 in subheading 2846.90.50, HTSUS, and subsequently in subheading 2846.90.80, HTSUS. In challenging that determination, plaintiff's principal argument is that P22–RE1 is excluded from the scope of heading 2846 because it is a mixture of two compounds (*i.e.*, yttrium oxide and europium oxide) and therefore is not itself a "compound" within the meaning of the article description for the heading ("Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals"). On the basis of this assertion, plaintiff advocates classification in subheading 3824.90.39, HTSUS, free of duty. That provision pertains to "mixtures of two or more inorganic compounds"; the superior heading (heading 3824, HTSUS) is a "basket" heading that includes, *inter alia*, "chemical products and preparations of the chemical or allied industries . . . not elsewhere specified or included."

Plaintiff claims an alternative classification in subheading 2846.90.20, HTSUS, the article description for which is "[m]ixtures of rare-earth oxides or of rare-earth chlorides." Plaintiff argues that, should the court determine that P22–RE1 falls within the scope of heading 2846, the court should rule that P22–RE1 is classified in subheading 2846.90.20 based on its assertion that both yttrium oxide and europium oxide are rare-earth oxides.

Defendant argues that P22–RE1 is correctly classified in subheading 2846.90.80, HTSUS, (and in the predecessor subheading 2846.90.50, HTSUS, prior to 1995) because heading 2846, in defendant's view, includes mixtures of oxides of yttrium and europium. As confirmation that the scope of the heading includes mixtures as well as compounds, defendant points to the article description for another eight-digit subheading within the heading, subheading 2846.90.20, HTSUS, which, as noted above, reads "[m]ixtures of rare-earth oxides or of rare-earth chlorides." Defendant also directs the court's attention to Explanatory Note 32.06, which contains a reference identifying headings 2843 to 2846 as appropriate for the classification of a mixture of yttrium oxide and europium oxide. Further, defendant points to the first paragraph of Explanatory Note 28.46 in support of its contention that heading 2846 includes mixtures of oxides of the metals mentioned in the article description for the heading; plaintiff relies on this same paragraph to support its argument that mixtures such as P22–RE1 are excluded from heading 2846 because they are not "compounds of mixtures" but instead are mixtures of compounds made intentionally for special purposes.

Concerning plaintiff's alternative classification of subheading 2846.90.20, HTSUS, which pertains to "mixtures of rare-earth oxides," defendant contends that yttrium is not a rare-earth metal for tariff classification purposes and, consequently, that yttrium oxide is not a rare-earth oxide within the meaning of subheading 2846.90.20, HTSUS.

*B. Contentions of the Parties on the Classification of P22–HCR2*

Plaintiff argues that P22–HCR2 is not classifiable in subheading 3206.50.00, HTSUS, ("Inorganic products of a kind used as luminophores") because it is not a finished product capable of use as a luminophore in the condition in which it is imported. Plaintiff asserts that the product requires further processing consisting of reduction of particle size and blending with other products to obtain the characteristics desired by the manufacturer of the cathode ray tube. Plaintiff submits that the correct classification is subheading 3824.90.39, HTSUS, which is free of duty. As noted previously, that subheading pertains to "mixtures of two or more inorganic compounds," with the superior heading pertaining to "chemical products and preparations of the chemical or allied industries . . . not elsewhere specified or included." At an early point in this litigation, plaintiff argued in the alternative that P22–HCR2 should be classified in subheading 2846.90.20, HTSUS ("mixtures of rare-earth oxides . . .").

Defendant responds that P22–HCR2 falls within the definition of "inorganic products of a kind used as luminophores" despite the further processing alleged by plaintiff to be required. In rebuttal of plaintiff's argument for alternative classification in subheading 2846.90.20, HTSUS ("mixtures of rare-earth oxides"), defendant maintains that the product is excluded from that provision because it is not comprised of a mixture of oxides of rare-earth metals.

## *II. APPLICABLE LEGAL STANDARDS*

### *A. Standard of Review*

The court proceeds *de novo* in actions brought to contest the denial of a protest under section 515 of the Tariff Act of 1930. *See* 28 U.S.C. § 2640(a)(1). In a classification action, plaintiff has the burden of establishing that the government's classification of the product was incorrect but does not bear a burden of establishing the correct tariff classification; instead, the correct tariff classification is to be determined by the court. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984).

Customs classification decisions are entitled to a presumption of correctness by 28 U.S.C. § 2639(a)(1), but the presumption does not apply if the court is presented with a question of law by a proper motion for summary judgment. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court affords deference to a classification decision by Customs to the extent that the decision has the power to persuade. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

*B. The General Rules of Interpretation and the Explanatory Notes*

The General Rules of Interpretation, HTSUS, govern the determination of tariff classification. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). General Rule of Interpretation ("GRI") 1, HTSUS, requires that tariff classification, in the first instance, "be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. GRIs 2 through 5 apply "provided such headings or notes do not otherwise require." *Id.*

For guidance as to the scope and meaning of tariff terms, the court may resort to the Explanatory Notes, which, although not part of U.S. law, are "indicative of [the] proper interpretation" of the tariff schedule. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992), *quoting* H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

## ***III. DISCUSSION***

*A. Absence of a Genuine Issue of Material Fact Concerning the Tariff Classification of P22–RE1*

Under USCIT Rule 56, summary judgment is appropriate when the parties' submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(c). The parties agree that P22–RE1 consists by weight of at least 99 percent yttrium oxide ($Y_2O_3$), a fact corroborated by the Material Safety Data Sheet ("MSDS") prepared by the manufacturer, Kasei Optonix, Ltd. of Tokyo, Japan. As specified by the MSDS and as stated in an affidavit by plaintiff's Technical Director, Mr. Susumu Omatoi, P22–RE1 is represented by the formula "$Y_2O_3$:Eu." According to that affidavit, P22–RE1 is identified by the name "Yttrium Oxide: Europium Doped."

In its Rule 56 *Statement of Material Facts Not in Dispute*, plaintiff asserted that P22–RE1 is a mixture of yttrium oxide and europium oxide, manufactured by separately producing the yttrium oxide and europium oxide components, intentionally blending them in specific quantities, and mixing them by heating in a kiln at high temperatures. *See Pl.'s Statement of Material Facts Not in Dispute* ¶ 8. In the pleadings, defendant denied this assertion but did not allege facts to the contrary. In its *Statement in Response to Plaintiff's Statement of Material Facts*, defendant admitted "that P22–RE1 consists of a mixture of yttrium oxide with smaller amounts of europium oxide." *Def.'s Resp. to Pl.'s Statement of Material Facts* ¶ 7. In the *Statement of*

*Material Facts Not in Dispute* that it filed in support of its cross-motion for summary judgment, defendant stated that “P22–RE1 consists, by weight, of 99 percent or more yttrium oxide, and 1 percent or less europium oxide.” *Def.’s Statement of Material Facts Not in Dispute* ¶ 1.

Although defendant initially agreed with plaintiff that P22–RE1 is a “mixture of compounds” and not a “compound of mixtures,” defendant in its post-argument brief advanced an alternative argument in favor of its classification position; in this alternative argument defendant departed in two respects from its earlier admissions concerning the composition of P22–RE1. In presenting this alternative argument, defendant regarded P22–RE1 as a “compound” instead of a “mixture.” Further, defendant asserted that the product consists of yttrium oxide and europium, rather than consisting of yttrium oxide and europium oxide.

Despite defendant’s conflicting viewpoints, and the apparent disagreement with plaintiff, on the composition of P22–RE1, the court finds that there is no genuine issue of fact material to the tariff classification of P22–RE1, for two reasons. First, much of the apparent factual disagreement, to the extent it is relevant to the classification issue presented, is resolved by assigning the proper meaning to the term “compounds” as used in the article description for heading 2846. That meaning is a question of law, not of fact. *See David W. Shenk & Co. v. United States*, 21 CIT 284, 286, 960 F. Supp. 363, 365 (1997). As discussed in the next section, the court concludes that in using the term “compounds” in the heading, Congress did not intend this term and the term “mixtures,” which is used in a subheading of the heading, to be read as mutually exclusive. Instead, the term “compounds,” as used in the heading, is properly understood to be broader than such terms as “chemical compounds” or “separate chemically defined compounds” and to include some products that also are described by the term “mixtures.”[3] Second, the parties agree that P22–RE1 consists by weight of at least 99 percent yttrium oxide. The remainder, which is one percent or less by weight, either consists of europium oxide, as plaintiff contends and as defendant initially admitted, or, as defendant subsequently asserted based on its interpretation of the MSDS for P22–REI, consists of europium. This factual distinction is not material to the issue of classification of P22–RE1, because, in either case, the correct classification for P22–RE1 is subheading 2846.90.80, HTSUS (or, for entries prior to 1995, subheading 2846.90.50, HTSUS), for the reasons discussed later in this opinion.

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[3] The term “chemical compound” usually refers to “a substance composed chemically of two or more elements in definite proportions (as opposed to a *mixture*).” *Oxford English Dictionary*, 629, vol. III (2d ed. 1989).

The court notes, in passing, that defendant has not asserted new facts to establish either that P22–RE1 is a "compound," however defined, or that the product contains europium rather than europium oxide. Instead, these two contentions by defendant appear to be based on inferences it draws from information already on the record, specifically, information presented in the MSDS for P22–RE1. Defendant draws these inferences from its submissions of affidavits by Mr. Larry D. Fluty, a Senior Science Officer in the Office of Laboratory and Scientific Services, Bureau of Customs and Border Protection, particularly a statement by Mr. Fluty that products similar to P22–RE1 (but not necessarily P22–RE1 itself) consist of "compounds" in which europium atoms are bound to oxygen atoms, replacing yttrium atoms in a yttrium oxide crystal lattice.

Defendant presented two affidavits of Mr. Fluty that address P22–RE1. In the first affidavit, Mr. Fluty had stated that "[t]his combination of yttrium oxide and europium oxide is a mixture described by the Explanatory Notes to Heading 2846." *First Fluty Decl.* ¶ 9 (Sep. 11, 2002). In that same affidavit, Mr. Fluty, in referring to the term "compounds . . . of mixtures of these metals" as used in heading 2846, stated that "it is possible to have mixtures of compounds but not compounds of mixtures." *Id.* ¶ 6. Citing to that statement by Mr. Fluty, defendant in its brief supporting its cross-motion for summary judgment argued that "[t]he language of heading 2846, 'compounds . . . of mixtures,' moreover, is meaningless from a technical point of view. . . . To make sense out of the language, it must be understood, insofar as relevant here, as providing for mixtures that have as ingredients the compounds named in the heading, *i.e.*, compounds of rare earth metals and compounds of yttrium." *Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J., & Cross-Mot. for Summ. J.* at 7 n.2. In short, defendant argued at that time that "compounds of mixtures" is the equivalent, in the context of the heading, of "mixtures of compounds."

In his second affidavit on P22–RE1, Mr. Fluty described products similar to P22–RE1 as products in which a europium atom replaces a yttrium atom in a crystal lattice consisting of the yttrium oxide. Mr. Fluty pointed out that the MSDS for P22–RE1 states as follows: "Classification if single or mixed: Single Product." He further stated in his affidavit his opinion that the chemical formula stated in the MSDS, $Y_2O_3$:Eu, "means yttrium oxide containing an indeterminate amount of europium" and that this formula "indicates that the product should be considered a single chemical compound." *Second Fluty Decl.* ¶ 13 (Mar. 17, 2004). In its post-argument brief, defendant maintained its position that heading 2846 encompasses mixtures within its scope but, on the basis of the second affidavit of Mr. Fluty, contended in the alternative "that if the Court determines that Heading 2846 covers only compounds, and not mixtures of compounds, then P22–RE1 was correctly classified there because it is a single compound consisting of yttrium oxide and europium." *Def.'s Br. in Reply to Pl.'s Post-Argument.* Br. at 6.

In stating that the remainder is "europium," defendant has not disputed that the remaining europium may exist in the product in the form of europium oxide and has not offered to prove any facts relevant to this question. Defendant has not attempted to show how europium, which is regarded as having an extremely high affinity for oxygen, could exist in its metallic form, *i.e.*, as a separate element, within a powdered mixture rather than being present in the mixture in the form of europium oxide. Rather, defendant's reference to the remainder being "europium" appears to be related to its argument that "if the Court determines that Heading 2846 covers only compounds, and not mixtures of compounds, then P22–RE1 was correctly classified there because it is a single compound consisting of yttrium oxide and europium." Defendant's contention apparently refers in part to the aforementioned statement, set forth in paragraph 14 of Mr. Fluty's second affidavit on P22–RE1, to the effect that products such as P22–RE1 typically have a "single phase" chemical structure consisting of yttrium oxide and europium bound together in a crystal lattice, in which europium atoms replace yttrium atoms in the crystal lattice. Mr. Fluty's statement, however, appears to avoid making any direct statement that P22–RE1 actually consists of such a crystal lattice.

As discussed *infra*, the uncontested facts are sufficient to establish that P22–RE1 does not conform with established definitions of the terms "chemical compound" or "separate chemically defined compound" but also are sufficient to establish that P22–RE1 is a "compound" within the scope of the term "compounds" as used in heading 2846. It is immaterial to this conclusion whether the portion of the product not consisting of yttrium oxide consists of europium or europium oxide. Nor does the classification within heading 2846 depend on whether europium atoms are bound to oxygen atoms, replacing an indefinite number of yttrium atoms within a yttrium oxide crystal lattice. Because there is no genuine issue of fact that is material to the classification of P22–RE1, the court concludes that summary judgment is the appropriate disposition of the classification issue plaintiff has raised with respect to this product.

### *B. P22–RE1 Is Classified under Heading 2846, HTSUS*

In the various pleadings, the parties have identified two headings as relevant to the classification issue presented by P22–RE1. They are heading 2846, HTSUS, ("Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals") and heading 3824, HTSUS ("chemical products and preparations of the chemical and allied industries . . . not elsewhere specified or included"). The court has considered both of these headings and heading 3206, HTSUS, to which the parties also have referred in this case. The latter heading includes within its scope "inorganic products of a kind used as luminophores, whether or not chemically defined." Neither the court nor the parties have identified any other heading of the HTSUS that merits consideration.

The court concludes that, by application of GRI 1, P22–RE1 is correctly classified under heading 2846, HTSUS. The court reaches this conclusion for the following reasons: (1) Heading 3824 is excluded from consideration if P22–RE1 is elsewhere specified or included or if it answers to descriptions in heading 2843 or 2846; (2) Heading 3206 is excluded from consideration by the terms of that heading, as construed according to guidance in the relevant Explanatory Note; and (3) P22–RE1 answers to a description in, and is included in, heading 2846, because it is described by a term of that heading, "compounds . . . of mixtures of these metals," with "these metals" referring to rare-earth metals, yttrium, and scandium. In the discussion below, the court discusses in further detail the reasoning underlying its conclusions concerning the tariff classification of P22–RE1.

### *1. Heading 3824 Applies Only if P22–RE1 Is Not Elsewhere Specified or Included*

Because heading 3824, HTSUS, contains the qualifying term "not elsewhere specified or included," GRI 1 precludes classification of P22–RE1 under heading 3824 if P22–RE1 is described by heading 2846 or heading 3206. The same conclusion emerges from the application of Note 1(b) to Section VI, HTSUS, which provides in relevant part that "goods answering to a description in heading 2843 or 2846 are to be classified in those headings and in no other heading of this section." Headings 3824 and 3206, like heading 2846, are in Section VI of the HTSUS. Accordingly, the issue presented is whether P22–RE1 falls within the scope of either heading 2846 or heading 3206, HTSUS.

### *2. Heading 3206 Does Not Include Mixtures of Yttrium Oxide and Europium Oxide*

The court concludes that P22–RE1 is not properly classified under heading 3206. The Explanatory Notes offer relevant guidance on the intended scope of heading 3206 and its relationship to the intended scope of heading 2846. Explanatory Note 32.06 states that "[t]he heading [*i.e.*, 3206] **does not cover** products answering to descriptions in **headings 28.43 to 28.46** (e.g., a mixture of yttrium oxide and europium oxide), however put up and whatever their intended use." EN 32.06 (emphasis in original). The parenthetical example used to identify the group of products excluded from heading 3206 and falling within headings 2843 to 2846 describes by composition a product identical or highly similar to P22–RE1. Thus, Explanatory Note 32.06 clarifies that a class of products to which P22–RE1 appears to belong, *i.e.*, those products consisting of a mixture of yttrium oxide and europium oxide, should not be classified under heading 3206, regardless whether they are of a kind used as luminophores.

*3. P22–RE1 Answers to a Description in Heading 2846 and Is Included Therein*

Explanatory Note 32.06 also provides guidance on whether P22–RE1 may be classified under heading 2846. The "mixture of yttrium oxide and europium oxide" chosen as an example by Explanatory Note 32.06 is intended not only to direct the reader away from heading 3206, but also to refer the reader to classification under heading 2846. Implicit in the Note is that a mixture of yttrium oxide and europium oxide answers to a description in the group of headings consisting of headings 2843, 2844, 2845, and 2846. However, headings 2843 through 2845 refer to classes of goods that differ considerably from mixtures of yttrium oxide and europium oxide. Heading 2843 pertains generally to precious metals, heading 2844 addresses radioactive elements and compounds, and heading 2845 is confined to isotopes and compounds thereof. Explanatory Note 32.06, therefore, lends strong support to defendant's position that P22–RE1 is properly classified under heading 2846. However, the terms of that heading, as interpreted according to their plain meaning and according to guidance contained elsewhere in the Explanatory Notes and specifically in Explanatory Note 28.46, raise an additional issue requiring the court to consider the matter further. That issue is whether, as plaintiff contends, P22–RE1 is excluded from heading 2846 because the heading contains terms that, in pertinent part, confine the scope to "[c]ompounds . . . of rare-earth metals, of yttrium . . . , or of mixtures of these metals." Plaintiff argues, *inter alia*, that P22–RE1 is not a compound within the meaning of the heading.

The threshold issue presented is the meaning of the term "compounds" as used in heading 2846. The term "separate chemically defined compounds" is used elsewhere in the HTSUS, which in note 1(a) to chapter 28 expresses the general rule that chapter 28 is confined to "separate chemical elements" and "separate chemically defined compounds."[4] Under note 1(a) to chapter 28, HTSUS, this general rule applies "[e]xcept where the context otherwise requires." The General Explanatory Note to Chapter 28 defines the term "separate chemically defined compound" as follows: "A separate chemically defined compound is a substance which consists of one molecular spe-

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[4] Note 1(a) to ch. 28, HTSUS ("Except where the context otherwise requires, the headings of this chapter apply only to: . . . separate chemical elements and separate chemically defined compounds, whether or not containing impurities.").

cies (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell." The Note further explains that "[t]he elements of a separate chemically defined compound combine in a specific characteristic proportion determined by the valency and the bonding requirements of the individual atoms. The proportion of each element is constant and specific to each compound and it is therefore said to be stoichiometric."

P22–RE1 does not conform to the Explanatory Note definition of a "separate chemically defined compound." As defendant acknowledges in citing Mr. Fluty's second affidavit, the chemical formula for P22–RE1, $Y_2O_3$:Eu, "means yttrium oxide containing an indeterminate amount of europium." As demonstrated by the chemical formula, the europium or europium oxide is not present within P22–RE1 in a specific or characteristic proportion that is determined by the valency and bonding requirements of the individual atoms of yttrium and oxygen that comprise the portion of the product that consists of yttrium oxide, which itself is a separate chemically defined compound. P22–RE1, therefore, is not stoichiometric. The proportion of europium or europium oxide is not chemically defined by molecular structure and instead is described as being present in the overall product only according to a range, *i.e.*, at a level of one percent or less by weight. Even if, as defendant suggests, P22–RE1 is a single-phase product consisting of a yttrium oxide crystal lattice, with an indeterminate but small number of europium atoms replacing yttrium atoms within that lattice, the product still would fall outside the Explanatory Note definition of the term "separate chemically defined compound." In the latter, "the molecular species corresponds to the repeating unit cell." General Explanatory Note to Chapter 28. The HTSUS also uses the term "compounds, whether or not chemically defined."[5] Heading 2846 refers to "compounds" without specifying whether the term is intended to refer to "separate chemically defined compounds" or, alternatively, to "compounds, whether or not chemically defined."

The court concludes that the term "compounds" as used in heading 2846 is intended to have a broader meaning than the more specific term "separate chemically defined compounds" and is intended to include certain products that also could be described as "mixtures," which term commonly would include within its scope products consisting of two or more separate chemically defined compounds.[6] One

[5] *E.g.*, Note 6(c) to chapter 28, HTSUS, uses the term "compounds . . . whether or not chemically defined" ("Heading 2844 applies only to: . . . Compounds, inorganic or organic, of these elements or isotopes, whether or not chemically defined.").

[6] The term "mixture" is defined as "[a]n aggregate composed of two or more distinct chemical components which retain their identities regardless of the degree to which they

indication of this intent is the General Explanatory Note to Chapter 28, which instructs that heading 2846 is one of the specified exceptions to the general rule that Chapter 28 is confined to chemical elements and separate chemically defined compounds.[7] Another indication of this intent is the inclusion within the heading of subheading 2846.90.20, HTSUS, the article description for which is "[m]ixtures of rare-earth oxides or of rare-earth chlorides." A third indication is the first paragraph of Explanatory Note 28.46, which indicates that the heading includes at least some products that can be described as "mixtures of oxides or hydroxides of these elements," with "these elements" referring to yttrium, scandium, and the rare-earth metals. Therefore, the term "compounds" as used in heading 2846 cannot properly be interpreted to mean "separate chemically defined compounds," and it must be read to encompass some products that also may be described as "mixtures."[8]

Plaintiff has pointed to this same provision of the Explanatory Notes, *i.e.*, the first paragraph of Explanatory Note 28.46, in contending that the scope of heading 2846 is too narrow to encompass P22–RE1. Optonix relies on this paragraph and on the term "compounds" in the heading for its argument that "mixtures consisting of two or more compounds, made intentionally for special purposes, are expressly excluded from Heading 2846," and that P22–RE1 is such a mixture. *Pl.'s Post-Argument Br.* at 3. The paragraph at issue reads as follows:

> This heading [*i.e.*, heading 28.46] covers the inorganic or organic compounds of yttrium, of scandium or of the rare-earth metals of heading 28.05 (lanthanum, cerium, praseodymium, neodymium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium). The heading also covers compounds derived directly by chemical treatment from mixtures of the elements. This means that the heading will include mixtures of oxides or hydroxides of these elements or mixtures of salts having the same anion (e.g., rare-

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have become mingled." *McGraw-Hill Encyclopedia of Chemistry*, 607 (5th ed. 1983).

[7] The General Explanatory Note states that "[t]here are certain exceptions to the rule that this Chapter is limited to separate chemical elements and separate chemically defined compounds." The Note then lists specific products falling within the exception, including: "Heading 28.46 - Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium or of mixtures of these metals."

[8] A broader definition of the word "compounds" is consistent with a common meaning of the term found among dictionary definitions. The *Merriam-Webster Collegiate Dictionary*, 236 (10th ed. 2002), defines "compound" as "something formed by a union of elements or parts." The *Oxford English Dictionary*, 629, vol. III (2d ed. 1989), in the relevant part, defines "compound" as "[a] union, combination, or mixture of elements." In turn, the *Oxford English Dictionary* includes a definition of "element" as "[a] component part of a complex whole," a definition broader in scope than the chemical definition of the term "element." *Id.* at 130, vol. V.

> earth metal chlorides), but not mixtures of salts having different anions, whether or not the cation is the same. The heading will not therefore, for example, cover a mixture of europium and samarium nitrates with the oxalates nor a mixture of cerium chloride and cerium sulphate since these examples are not compounds derived directly from mixtures of elements, but are mixtures of compounds which could be conceived as having been made intentionally for special purposes and which, accordingly, fall in **heading 38.24.**

EN 28.46 (emphasis in original). Under the interpretation of the paragraph advanced by plaintiff, the clause "the heading will include mixtures of oxides . . . of these elements" is qualified by the preceding sentence such that the only mixtures of yttrium oxide and europium oxide that fall within the scope of heading 2846 are those that are "derived directly by chemical treatment from mixtures of these elements." Plaintiff construes the latter phrase, when read together with the later reference in the paragraph to "mixtures of compounds which could be conceived as having been made intentionally for special purposes," to mean that a product obtained by intentionally mixing yttrium oxide and europium oxide for a special purpose is excluded from the scope of the heading and is not described by the term in the heading, "compounds . . . of mixtures of these metals." Plaintiff's interpretation of Explanatory Note 28.46 is that P22–RE1 is described by the term "mixtures of compounds" as used in the last sentence of the above-quoted paragraph from Explanatory Note 28.46 and thus is to be distinguished from what plaintiff views as the relevant term in heading 2846, which is "compounds . . . of mixtures of these metals."

The court does not agree with the meaning plaintiff ascribes to the first paragraph of Explanatory Note 28.46. Under plaintiff's construction of the paragraph, mixtures of oxides of the metals of heading 2805 (which metals include yttrium and the rare-earth metals) would be excluded from heading 2846 if two such oxides were produced separately and blended intentionally for a special purpose. The reference in the second sentence, "compounds derived directly by chemical treatment from mixtures of these elements," may be susceptible to more than one meaning when viewed standing alone, but its meaning, to the extent it is relevant to the issue presented by P22–RE1, is clarified by the following sentence. That third sentence, which is introduced with the words "[t]his means that," directly states that mixtures of oxides of the metals in question fall within heading 2846. Plaintiff's interpretation would require the court to interpret the third sentence to mean that some, but not all, mixtures of oxides of the subject metals are within the heading, an interpretation that appears to be at odds with the plain meaning of that sentence. Moreover, it would be incongruous to ascribe to the word "compounds," as used in the second sentence of the paragraph, a narrow meaning such as "separate chemically defined compounds" and at the same time ascribe to the term "compounds" as used in the heading the broader meaning that is required by the context and is clarified by other provisions of the Explanatory Notes.

Plaintiff's interpretation of the first paragraph of Explanatory Note 28.46 would seek to introduce ambiguity into the third sentence of the paragraph by resort to the last sentence in the paragraph, which contains a reference to "mixtures of compounds which could be conceived as having been made intentionally for special purposes." The context of the last sentence, however, is the issue of which mixtures of salts fall within the heading and which do not; the last sentence, therefore, addresses an issue not relevant to the classification of P22–RE1, which is a mixture of oxides, not a mixture of salts. Even if considered relevant to the issue of classification of P22–RE1, the last sentence would present a problem when viewed against plaintiff's premise that any mixture of compounds made intentionally for a special purpose is excluded from the heading. That problem is the contradiction that would arise in the instance of a mixture of salts, made intentionally for a special purpose, in which each salt has the same anion but a different cation. The contradiction does not arise when the paragraph is construed to establish a clear dividing line that would place such a mixture within the heading and exclude another mixture of salts, each of which had different anions, whether or not made intentionally for a special purpose.

For these several reasons, plaintiff's interpretation of the first paragraph of Explanatory Note 28.46 creates difficulties and internal conflicts that it is unable to resolve. Plaintiff's interpretation of that paragraph also would appear to create a conflict with the express language of Explanatory Note 32.06, which directs the reader to heading 2846 to ascertain the classification of "a mixture of yttrium oxide and europium oxide" and does so without making an exception for the case of a mixture of yttrium oxide and europium oxide that is made by combining the two oxides intentionally for a special purpose.

Plaintiff's Technical Director, in his affidavit, described P22–RE1 as "Yttrium Oxide: Europium Doped."[9] That the parties have not es-

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[9] The use of the term "Yttrium Oxide: Europium Doped" in the affidavit of plaintiff's Technical Director, Mr. Omatoi, to describe P22–RE1 suggests that the product could be shown to be identified in commerce as a "compound" (broadly defined) of yttrium (in this case, yttrium oxide), such that it would fall squarely within the terms of heading 2846. Under such an argument, regardless of whether the europium is present in the P22–RE1 as europium oxide that is mixed with yttrium oxide, or is present as europium atoms bound to oxygen atoms within the structure of a crystal lattice, that presence in a small quantity by weight would not prevent the product from conforming to a commercial definition of the term "yttrium oxide." *See Rohm & Haas Co. v. United States*, 5 CIT 218, 225, 568 F. Supp. 751, 756 (1983) ("Congress is presumed to know the language of commerce, and to have framed tariff acts so as to classify commodities according to the general usage and denomination of the trade."). Defendant did not develop this argument or support it with addi-

tablished whether the europium is bound in the structure of the crystal lattice of the yttrium oxide or is in the form of europium oxide mixed together with yttrium oxide is not a material fact because P22–RE1 would be classified under heading 2846 in either case. As discussed previously, the term "compounds" as used in heading 2846 is not limited to "chemical compounds," "stoichiometric compounds," or "separate chemically defined compounds." Various provisions of the Explanatory Notes, as well as the article description for subheading 2846.90.20 ("Mixtures of rare-earth oxides or of rare-earth chlorides") clarify that the term "compounds" as used in heading 2846 includes some products that also fall within definitions of the term "mixtures." If the europium is bound in the crystal lattice of the yttrium oxide compound, albeit in a non-stoichiometric proportion, P22–RE1 would be considered a "compound" of yttrium under some definitions of "non-stoichiometric compounds."[10]

If P22–RE1 is actually a mixture of two separate chemically-defined compounds, yttrium oxide and europium oxide (as the parties initially appeared to agree), it nevertheless would fall within the scope of heading 2846, because the proper interpretation of the term "compounds" as used in the heading is sufficiently broad to include this product. Explanatory Note 28.46 states that P22–RE1 is covered by heading 2846 because this "heading also covers compounds derived directly by chemical treatment from mixtures of these elements. This means that the heading will include mixtures of oxides or hydroxides of these elements. . . ." Yttrium oxide and europium oxide in mixture form plainly would be described as "mixtures of oxides . . . of these elements." As noted above, Explanatory Note 32.06 also indicates that a mixture of yttrium oxide and europium oxide should be classified under heading 2846.

For these reasons, the court concludes that the terms of heading 2846, considered in the proper context of related provisions of the HTSUS and as informed by the guidance in the Explanatory Notes, encompass P22–RE1. Those terms describe P22–RE1 whether europium exists in the product as atoms of europium metal bound

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tional evidence of such a commercial designation; therefore, the court does not have before it evidence sufficient to establish that the product is considered to be a form of yttrium oxide for commercial purposes.

[10] P22–RE1, if consisting of a single "crystal lattice" structure as described by defendant, possibly could conform to definitions of "non-stoichiometric compounds" as found in scientific references. For example, *McGraw-Hill Encyclopedia of Chemistry* defines "nonstoichiometric compounds" as "[c]hemical compounds in which the relative number of atoms is not expressible as the ratio of small whole numbers. . . . Nonstoichiometry is a property of the solid state and arises because a fraction of the atoms of a given kind may be (1) missing from the regular structure . . . (2) present in excess over the requirements of the structure . . . or (3) substituted by atoms of another kind. . . ." *McGraw-Hill Encyclopedia of Chemistry* at 665. The *McGraw-Hill Encyclopedia of Chemistry* further states that nonstoichiometry "is also well represented in the so-called insertion or intercalation compounds, in which a metallic element or neutral molecule has been inserted in a stoichiometric host."

into a crystal lattice formed by yttrium oxide or whether the product contains, within a mixture, the separate chemically defined compound europium oxide.

### *C. P22–RE1 Is Classified in Subheading 2846.90.80, HTSUS*

The court concludes that Customs was correct in classifying P22–RE1 in subheading 2846.90.80, HTSUS (and, prior to 1995, in the predecessor provision, subheading 2846.90.50, HTSUS). Plaintiff's alternative classification of subheading 2846.90.20, HTSUS, which pertains to "mixtures of rare earth oxides . . . ," is incorrect because yttrium oxide is not a "rare-earth oxide" within the meaning of that term as used in subheading 2846.90.20, HTSUS.

As plaintiff has pointed out, some technical references list yttrium among the rare-earth elements or otherwise indicate that yttrium oxide is a rare-earth oxide. Plaintiff has identified two such authorities, the *CRC Handbook of Chemistry and Physics* and *The Phosphor Handbook*.[11] However, the court disagrees with plaintiff's contention that the term "rare-earth oxides" as used in subheading 2846.90.20, HTSUS, includes yttrium oxide.

Various dictionaries and technical references are in general agreement that the oxides of the elements with the atomic numbers 58 (cerium) through 71 (lutetium) comprise the "rare earths" and that the elements themselves are known as the "rare-earth elements" or "rare-earth metals." Many, but not all, of the dictionaries and technical references consulted by the court consider atomic number 57 (lanthanum) to be a rare-earth element. The court has found that there is no general agreement as to whether atomic number 39 (yttrium) and atomic number 21 (scandium) are rare-earth metals. Accordingly, there is no general agreement on whether the oxide of yttrium is one of the so-called "rare earths" or "rare-earth oxides."

For these reasons, each of the terms "rare-earth metals," "rare earths," and "rare-earth oxides," when considered outside of any context, are ambiguous. The salient point, however, is that the article description for heading 2846, HTSUS, refers to yttrium and scandium in a context indicating that, for purposes of the heading, these two metals are not considered to be among the rare-earth elements. The heading identifies "[c]ompounds, inorganic and organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals." The plain meaning of the words indicates an intent to regard yttrium and scandium as separate from the rare-earth metals. The same intent is apparent from the wording of the article description for the heading in which the rare-earth metals are classified. Heading 2805 provides for "[a]lkali or alkaline-earth metals;

[11] *CRC Handbook of Chemistry and Physics*, §§ 4–114, 4–115 (77th ed. 1996–97); *The Phosphor Handbook* at 178, 179 (Shingeo Shinionoya & William M. Yen eds., 1999).

rare-earth metals, scandium and yttrium, whether or not intermixed or interalloyed; mercury." Here also, the language indicates an intent to treat yttrium and scandium as separate from the rare-earth metals.

Plaintiff states in its memorandum in support of its summary judgment motion that "[t]he Explanatory Notes to the HTSUS indicate that the definition of 'rare earth' metals includes not only those falling within the 'Lanthanide Series' of the periodic table of the elements (atomic numbers 58 through 71) but also the rare earth elements Lanthanum (atomic number 57), Yttrium (atomic number 39) and Scandium (atomic number 21)." *Mem. of P. & A. in Supp. of Pl.'s R. 56 Mot. for Summ. J.* at 21. Plaintiff has misinterpreted the Explanatory Notes. The Explanatory Notes, consistent with the terms of headings 2805 and 2846, instruct that scandium and yttrium are not to be considered rare-earth metals for purposes of the Harmonized System nomenclature. "Rare-earth metals (the term 'rare-earth' applies to their oxides) or lanthanons comprise the elements with atomic numbers from 57 to 71 in the periodic system. . . ." EN 28.05(C). "This heading [*i.e.*, heading 28.05] also covers **scandium** and **yttrium** which resemble the rare-earth metals quite closely. . . ." *Id.* (emphasis in original).

Because yttrium oxide is not a rare-earth oxide for purposes of heading 2846, P22–RE1 is not described by the term "mixtures of rare-earth oxides" as used in the article description for subheading 2846.90.20, HTSUS. The high (99 percent or higher) yttrium oxide content excludes P22–RE1 from subheading 2846.90.40, HTSUS ("Other: Yttrium bearing materials and compounds containing by weight more than 19 percent but less than 85 percent yttrium oxide equivalent"), which was in effect beginning in 1995. Therefore, the correct classification for P22–RE1 is subheading 2846.90.80, HTSUS (prior to 1995, subheading 2846.90.50, HTSUS), subject to duty at 3.7 percent *ad valorem*. Because this is the classification determined by Customs upon liquidation, plaintiff's classification claim, and its alternate classification claim, for P22–RE1 must be dismissed. Plaintiff has not met its burden of establishing that the government's classification of this product is incorrect, and defendant is entitled to summary judgment on the issue of the tariff classification of P22–RE1.

*D. Issues of Fact Material to the Tariff Classification of P22–HCR2*

The parties agree that P22–HCR2 consists by weight of approximately 90 percent $Y_2O_2S$, which is known as yttrium oxygen sulfide or "yttrium oxysulfide," approximately 10 percent $Eu_2O_2S$, which is europium oxygen sulfide or "europium oxysulfide," and less than 1 percent $Fe_2O_3$, iron ("ferrous") oxide. Also, it is undisputed that P22–HCR2 is used as a material in the production of phosphorescent coatings that are applied in the manufacturing of cathode ray tubes. The court concludes from the submissions of the parties, however, that at least one issue of fact material to the classification of this product otherwise exists that requires the court to deny the motions of both parties for summary judgment.

In seeking summary judgment, plaintiff's principal claim for classification of P22–HCR2 is subheading 3824.90.39, HTSUS, which pertains to "mixtures of two or more inorganic compounds." Plaintiff presented an alternative claim for classification of P22–HCR2 in subheading 2846.90.20, HTSUS, which provides for "[m]ixtures of rare-earth oxides or of rare-earth chlorides." This alternative claim was not included in the complaint, nor has plaintiff sought to amend its complaint to include this claim.[12] In its brief in support of summary judgment, plaintiff also asserted that "P22–HCR2 is also susceptible to classification under HTSUS subheading 2846.90.40, HTSUS." That subheading applies to "[y]ttrium-bearing materials and compounds containing by weight more than 19 percent but less than 85 percent of yttrium-oxide equivalent." Here also, plaintiff did not seek to amend its complaint to include this claim.[13] In its post-argument brief, plaintiff addressed only its principal claim for classification of P22–HCR2 in subheading 3824.90.39, HTSUS.

With respect to plaintiff's principal classification claim, subheading 3824.90.39, HTSUS, ("Mixtures of two or more inorganic compounds: Other") describes P22–HCR2 by composition; however, the pertinent term of the superior heading is "chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) *not elsewhere specified or included*." Heading 3824, HTSUS (emphasis added). By application of GRI 1, heading 3824 is excluded from consideration if P22–HCR2 is specified or included by the terms of another heading.

In its cross-motion for summary judgment, defendant claims that Customs was correct in classifying P22–HCR2 in subheading 3206.50.00, HTSUS, the article description for which is "[i]norganic products of a kind used as luminophores." The pertinent language of the article description for the superior heading, heading 3206, HTSUS, is also "[i]norganic products of a kind used as luminophores."

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[12] Were plaintiff to do so, the court would find this alternative claim to be meritless. P22–HCR2 differs from the goods of subheading 2846.90.20, HTSUS, in several respects. It contains a compound, yttrium oxysulfide, that is not a rare-earth oxide for tariff classification purposes. It also contains a small amount of iron oxide, which is not a rare-earth oxide.

[13] Plaintiff has not developed its argument for this second alternative claim. The court notes, however, that the presence of iron oxide, which is not a compound of yttrium, scandium or the rare-earth metals, would appear to exclude the product from heading 2846, even if plaintiff could show that the article description for subheading 2846.90.40, HTSUS, describes P22–HCR2.

The phrase "of a kind used as luminophores," as used in heading 3206 and subheading 3206.50, HTSUS, identifies a tariff provision controlled by principal use. *See Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999) (holding that a heading with the phrase "of a kind used" is a principal use provision). "The purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *Id.* at 1364 (citing *Clarendon Mktg. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998)); *see also E.M. Chems. v. United States*, 20 CIT 382, 387, 923 F. Supp. 202, 208 (1996) ("the principal use of the class . . . is controlling, not the principal use of the specific import"). "Principal use" is defined as the use "which exceeds any other single use." *See Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F. Supp. 2d 1020, 1027 (2000) (citing Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report at 34–35 (USITC Pub. No. 1400) (June 1983)).

Additional U.S. Rules of Interpretation 1(a), HTSUS, provides that "[i]n the absence of special language or context which otherwise requires–a tariff classification controlled by use (other than actual use)[14] is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use."

The Court of Appeals for the Federal Circuit has held that delimiting the class or kind of goods to which the imported goods belong "[c]all[s] for a determination as to the group of goods that are commercially fungible with the imported goods." *Primal Lite*, 182 F.3d at 1365. Moreover, the taxonomy of the group should be narrowly drawn to encompass only "the particular species of which the [subject] merchandise is a member." *Id.* at 1364. The court may examine factors such as: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (*e.g.*, the manner in which the merchandise is advertised and displayed or the accompanying accessories); (5) the usage of the subject merchandise and whether that use corresponds to the use of class-defining merchandise; (6) the economic practicality of us-

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[14] The court concludes that heading 3206 and specifically, subheading 3206.50, HTSUS, do not establish an "actual use" provision so as to invoke the operation of Additional U.S. Rule of Interpretation 1(b). The language of the provision does not require establishing "the actual use made of the imports in the United States" as would a provision controlled by actual use. *See Clarendon Mktg.*, 144 F.3d at 1468.

ing the import in that manner; and (7) the recognition in the trade of this use. *See United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976) (citations omitted); *see also Lenox Collections v. United States*, 20 C.I.T. 194, 196 (1996). "Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling." *Carborundum*, 63 C.C.P.A. at 102, 536 F.2d at 377 (citations omitted).

In moving for summary judgment on the classification of P22–HCR2, Optonix challenges the Customs classification of P22–HCR2 under heading 3206 as a "product of a kind used as a luminophore," contending that "[p]roducts that are commercially fungible with P22–HCR2 are not used as luminophores because of the need to further process these items in order to make them commercially usable." *Pl.'s Reply in Opp'n to Def.'s Cross-Mot. for Summ. J.* at 15. In an affidavit by Mr. Richard Castello, a sales engineer for Optonix, plaintiff identified additional processing that P22–HCR2 is said to undergo before it is supplied to Optonix's customer for use in manufacturing television picture tubes.

To support its cross-motion for summary judgment, defendant relies, in part, on plaintiff's statement in the protest that P22–HCR2 is used in the manufacture of phosphors for television screens. Defendant also relies on the second affidavit of Mr. Fluty on P22–RE1, which states that " 'P22' is the name from the Electronics Industries Association (EIA) for a family of phosphors used in color cathode ray tubes and elsewhere." *Second Fluty Decl.* ¶ 14. Some dictionary definitions identify "phosphors" as a subset, along with "fluorophores," of "luminophores." *See Oxford English Dictionary*, 1105, vol. V (2d ed. 1989) ("Other terms sometimes used synonymously with phosphor are luminophor . . . or fluorophor.").[15] Also relevant to the "principal use" issues are statements in another affidavit of Mr. Fluty, submitted by defendant, that identify the chemical mixture comprising P22–HCR2 as a "red luminescent phosphor" and a "pigment coated phosphor." These statements were supported by reference to a process patent for producing pigment-coated phosphors, the documentation for which, attached to the affidavit, lists as an assignee Kasai Optonix, Ltd., the manufacturer of P22–HCR2.

The court's examination of the pleadings, admissions, and affidavits reveals at least one issue of fact material to the tariff classification of P22–HCR2. The principal issue of fact to be resolved is

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[15] A luminophor is defined therein as "[a] luminescent substance. . . . The generic term *luminophor* is subclassified into fluorophors . . . and phosphors. . . ." *Id.* at 99, vol. IX. A phosphor is "[a]nything that phosphoresces, or emits light without sensible heat" or in modern use "any substance exhibiting phosphorescence or fluorescence, esp. one that is an artificially prepared solid." *Id.* at 708, vol. XI.

whether the class or kind of goods to which P22–HCR2 belongs were, at or immediately prior to the time of importation, principally used in the United States as "luminophores." The relevant Explanatory Note contains the following definition: "Inorganic products of a kind used as luminophores are products which, under the action of visible or invisible radiations (solar rays, ultra-violet rays, cathode rays, X-rays, etc.), produce a luminescent effect (flourescent or phosphorescent)." EN 32.06(B). Based on this guidance, on Additional U.S. Rule of Interpretation 1(a), and on dictionary definitions of "luminophore" and "phosphor," the court concludes that determination of the correct classification of P22–HCR2 requires a factual determination whether the class or kind of goods to which P22–HCR2 belongs were, at or immediately preceding importation, principally used in the United States for their luminescent property. The court's consideration of this issue is confined to the pleadings, admissions and supporting affidavits of the parties, which are not sufficient to resolve the issue. In summary, plaintiff alleges the existence of a class or kind of products not used as luminophores because of the need to further process these items in order to make them commercially usable. Defendant does not directly address the issues raised by the application of Additional U.S. Rule of Interpretation 1(a), HTSUS, but contends that "[t]he fact that the P22–HCR2 undergoes further processing after importation in the form of blending to meet a customer's specification does not prevent it from being a kind of product (i.e., a phosphor) used as a luminophore, as the plaintiff argues." *Def.'s Br. in Reply to Pl.'s Post-Argument Br.* at 9–10.

In addition, the parties appear to be in disagreement on a physical characteristic of P22–HCR2. Defendant's argument is premised in part on its contention that the product, as imported, is of a kind used as a luminophore, based on its characteristics and its use in the manufacturing of color cathode ray tubes. Plaintiff indicated that P22–HCR2, in the condition in which it is imported, *i.e.*, before the processing plaintiff identifies as necessary to commercial use, does not luminesce or does so only crudely.

Because the court has identified facts that are material to the proper application of Additional U.S. Rule of Interpretation 1(a), HTSUS, to the determination of the tariff classification of P22–HCR2, and because these facts remain in controversy, the motion and cross-motion for summary judgment of plaintiff and defendant, respectively, must be denied with respect to the classification of P22–HCR2.

### *IV. CONCLUSION*

The court awards to defendant partial summary judgment based on its determination that there is no genuine issue of fact material to the classification of P22–RE1 and its conclusion that Customs was correct in classifying in subheading 2846.90.50, HTSUS, the entries of P22–RE1 made prior to 1995 and in classifying in subheading 46.90.80, HTSUS, the entries of P22–RE1 made in 1995 and thereafter. The court concludes that summary judgment is not appropriate to resolve the dispute between the parties concerning the classification of P22–HCR2 because of the existence of at least one issue of fact material to the classification of this product. That issue, as discussed above, is whether the class or kind of goods to which P22–HCR2 belongs were, at or immediately preceding the time of importation, principally used in the United States for their luminescent property.

## *V. Order*

This action having been duly submitted for decision, and this court, after due deliberation, having rendered a decision herein; now, in conformity with that decision, it is hereby

**ORDERED** that plaintiff's motion for summary judgment be, and hereby is, denied; and it is further

**ORDERED** that defendant's cross-motion for summary judgment be, and hereby is, granted with respect to the determination of the tariff classification of plaintiff's entries of P22–RE1 at issue in this case; and it is further

**ORDERED** that defendant's cross-motion for summary judgment be, and hereby is, denied with respect to the determination of tariff classification of plaintiff's entries of P22–HCR2 at issue in this case; and it is further

**ORDERED**, pursuant to USCIT R. 56(d), that the following facts material to the tariff classification of P22–HCR2 are specified to exist without substantial controversy: (1) P22–HCR2 consists of a red powder comprised by weight of at least 90 percent yttrium oxygen sulfide ($Y_2O_2S$), 10 percent or less europium oxygen sulfide ($Eu_2O_2S$), and 1 percent or less ferrous oxide ($Fe_2O_3$); and (2) P22–HCR2 is used as a material in the production of phosphorescent coatings that are applied in the manufacturing of cathode ray tubes; and it is further

**ORDERED**, pursuant to USCIT R. 56(d), that at least one fact material to the tariff classification of P22–HCR2 is specified as remaining in controversy, that fact being whether the class or kind of goods to which P22–HCR2 belongs were, at or immediately preceding the time of importation, principally used in the United States for their luminescent property; and it is further

**ORDERED**, pursuant to USCIT R. 56(d) and R. 16, that the parties shall consult with the objective of developing for submission to the court an agreed-upon draft scheduling order to govern such further proceedings as are necessary to resolve the factual issue or issues material to the determination of the tariff classification of P22–HCR2 and to govern other proceedings as are necessary in this case, including dates for discovery, if any, the filing of dispositive motions, if any, and tentative dates for trial; and it is further

**ORDERED** that the parties shall file with the court on or before March 18, 2005 an agreed-upon draft amended scheduling order, except that, in the event the parties are unable to agree upon a draft amended scheduling order, each party shall file with the court by that date its own proposed draft amended scheduling order.