

U.S. Customs and Border Protection

Slip Op. 10–85

CHANGZHOU WUJIN FINE CHEMICAL FACTORY Co., LTD. AND JIANGSU
JIANGHAI CHEMICAL GROUP, LTD., Plaintiffs, v. UNITED STATES,
Defendant, and COMPASS CHEMICAL INTERNATIONAL, LLC, Defendant-
Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 09–00216
Public Version

[The court sustains the U.S. Department of Commerce’s Remand Results.]

Dated: August 5, 2010

Riggle & Craven (David J. Craven), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Antonia R. Soares*); *Ahran Kang McCloskey*, Attorney-International, Of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Mondial Trade Compliance Services & Solutions Inc. (Jeffrey S. Levin), for Defendant-Intervenor.

OPINION

Barzilay, Judge:

I. INTRODUCTION

This case returns to the court following a partial remand of *1Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 Fed. Reg. 10,545 (Dep’t Commerce Mar. 11, 2009) (“*Final Determination*”). On remand, the court instructed the U.S. Department of Commerce (“Commerce” or “the Department”) to reconsider two aspects of its antidumping duty calculation: (1) “whether Commerce corroborated the adverse facts available rate upon which it relied in calculating the separate rate” in its determination and (2) “whether Commerce used the proper financial ratios and the proper surrogate value for Phosphorous Trichloride and steam in calculating the adverse facts available rate Commerce used as a basis for the separate rate.” *Changzhou Wujin Fine Chem. Factory Co. v. United States*, No.

09–00216 (CIT Feb. 8, 2010) (ordering partial remand of *Final Determination*) (“*Remand Order*”).

On May 3, 2010, Commerce filed its remand results with the Court. The Department found that it could not corroborate the original adverse facts available (“AFA”) rate used to calculate the separate rate¹, because the weighted-average United States price (“U.S. price”) of the mandatory respondent had [[not fallen]] between the investigation’s preliminary determination, *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 62,470 (Dep’t Commerce Oct. 21, 2008), and the *Final Determination*, while the mandatory respondent’s weighted-average normal value [[changed]].² *Final Results of Redetermination Pursuant to Court Order*, A-570–934 (Dep’t Commerce Apr. 30, 2010) (“*Remand Results*”) at 2, 5. Consequently, Commerce calculated a revised AFA rate based upon the average unit value from a questionnaire response of BWA Water Additives U.S., LLC (“BWA”), a non-cooperative, non-selected respondent from the investigation. *Id.* at 6. Commerce adjusted this average unit value to account for an industry-standard seven percent sales commission deduction to produce the U.S. price. *Id.* It subsequently compared this price to the weighted-average normal value calculated for the mandatory respondent, resulting in a new AFA rate of 30.94%. *Id.* Because the revised AFA rate relied on information obtained during the investigation, the Department determined that it did not require corroboration. *Id.* Commerce then calculated a revised separate rate by averaging the revised AFA rate and the zero rate calculated for the mandatory respondent in the *Final Determination*, producing a rate of 15.47%. *Id.* at 7.³

Plaintiffs Changzhou Wujin Fine Chemical Factory Co., Ltd., and Jiangsu Jianghai Chemical Group Co., Ltd., (together, “Plaintiffs”)

¹ Commerce presumes that all companies in a non-market economy operate under state-control. However, a company that demonstrates de jure and de facto independence from government control may qualify for a “separate rate” from that of the country-wide rate assessed against other firms operating within the non-market economy. *Royal United Corp. v. United States*, Slip Op. 10–71, 2010 Ct. Int’l Trade LEXIS 73, at *3–4 n.3 (June 25, 2010).

² In the antidumping context, the normal value of the subject merchandise is the price of that merchandise as sold for consumption in the exporting country at a time reasonably corresponding to that of the sale of the merchandise in the United States. 19 U.S.C. § 1677b(a)(1)(A)-(B)(i). The antidumping duty margin is the amount by which the normal value of the subject merchandise exceeds its export price, i.e., U.S. price. *Id.* § 1673.

³ Because the Department calculated the revised AFA rate using financial ratios and surrogate values for phosphorous trichloride and steam different from those used to determine the original rate, the Department correctly determined that it need not address the second issue in the *Remand Order*. *Remand Results* at 7–9.

contest the *Remand Results* on several grounds. First, they claim that Commerce inappropriately recalculated the U.S. price, because no party challenged its accuracy during the administrative process and because the *Remand Order*

Plaintiffs Changzhou Wujin Fine Chemical Factory Co., Ltd., and Jiangsu Jianghai Chemical Group Co., Ltd., (together, “Plaintiffs”) contest the *Remand Results* on several grounds. First, they claim that Commerce inappropriately recalculated the U.S. price, because no party challenged its accuracy during the administrative process and because the *Remand Order* “did not provide the Department the leeway to reconsider” the figure. Pls. Comments 4. Plaintiffs next assert that Commerce improperly adjusted BWA’s average unit value to account for an industry-standard seven percent commission, an adjustment that affected the value of the new U.S. price. Pls. Comments 6–7. Finally, Plaintiffs contend that the Department acted contrary to law when it used only the average unit value of BWA to recalculate the U.S. price. Pls. Comments 7–13. For the reasons stated below, Plaintiffs’ arguments fail.

II. STANDARD OF REVIEW

The court grants “tremendous deference” to Commerce’s final anti-dumping determinations due to the “technical” and “complex” economic and accounting decisions involved, for which the Department “possess[es] far greater expertise than [the Court].” *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (quotation marks & citation omitted); accord *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1367 (Fed. Cir. 1999). The court only will disturb a determination “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence on the record constitutes “less than a preponderance, but more than a scintilla.” *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted), *aff’d*, 284 F.3d 1261 (Fed. Cir. 2002). The requisite proof amounts to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” in light of the entire record, including “whatever fairly detracts from the substantiality of the evidence.” *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (quotation marks & footnote omitted). This standard necessitates that the Department thoroughly examine the record and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463

U.S. 29, 43 (1983) (quotation marks & citation omitted); *accord Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136–37, 787 F. Supp. 224, 227 (1992). That the court may draw two inconsistent conclusions from the evidence does not preclude Commerce from supporting its determination with substantial evidence. *Thai Pineapple Pub. Co.*, 187 F.3d at 1365.

To evaluate whether a Commerce determination accords with law, the court applies the two-step test articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. 467 U.S. 837 (1984). First, the court determines whether Congress has spoken directly to the issue at hand; if Congress's intent is clear, the court and the Department must "give effect to the unambiguously expressed intent of Congress." *Id.* at 843 (footnote omitted). If the court finds the relevant statute ambiguous or silent with respect to the specific issue, it must defer to the Department's interpretation as long as it is reasonable. *See id.* This deference extends to technical methodologies that Commerce may apply to fulfill its statutory mandate. *Thai Pineapple Pub. Co.*, 187 F.3d at 1365 ("The methodologies relied upon by Commerce in making its determinations are presumptively correct.").

III. DISCUSSION

A. Whether Commerce Lawfully Recalculated the U.S. Price

Plaintiffs contend that Commerce exceeded the bounds of the *Remand Order* when it recalculated the U.S. price during its review of the contested AFA rate. Pls. Comments 3–6. According to Plaintiffs, the *Remand Order* permitted Commerce to consider *only* whether Commerce corroborated the AFA rate upon which it relied in calculating the separate rate. Pls. Comments 5. Consequently, Plaintiffs assert that the Department "should have continued to use the U.S. price provided by petitioner in the petition." Pls. Comments 5–6.

Plaintiffs mischaracterize the scope of the *Remand Order*. In the antidumping context, an antidumping duty margin, including one calculated on the basis of AFA, is the difference between the normal value of the subject merchandise and the U.S. price. 19 U.S.C. § 1673. After the Department determined that it could not corroborate its initial AFA rate on remand, it acted in accordance with law when it used other sources in this case data collected from BWA during the investigation to calculate a new U.S. price in order to produce a revised AFA rate. *See id.* § 1677e(b); *Gallant Ocean (Thailand) Co. v.*

United States, 602 F.3d 1319, 1321 (Fed. Cir. 2010); *PAM S.p.A. v. United States*, 582 F.3d 1336, 1339–40 & n.2 (Fed. Cir. 2009) (holding that “Commerce is permitted to use the information available to it in choosing and supporting an AFA value” (citation omitted)); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338–39 (Fed. Cir. 2002) (same); *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (same); 19 C.F.R. § 351.308(c). To interpret the *Remand Order* as circumscribing Commerce’s ability to choose the proper methodology for its AFA calculation would place an impermissible restraint on the agency’s authority. *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1526, 412 F. Supp. 2d 1330, 1339 (2005) (“[T]he Federal Circuit has disfavored limited remands which restrict Commerce’s ability to collect and fully analyze data on a contested issue.”) (citing *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038–39 (Fed. Cir. 2003)). The court therefore sustains Commerce’s decision to recalculate the U.S. price.

B. Whether Commerce Erred by Adjusting the U.S. Price for a Sales Commission

Plaintiffs also claim that Commerce inappropriately adjusted the U.S. price in its revised AFA rate calculation to reflect a purported industry-standard [[]] sales commission. Pls. Comments 6–7. Specifically, they point to two factors that they believe invalidate the Department’s recognition of the commission: (1) that the only individually investigated entity did not pay this commission and (2) that “[t]he only evidence of the existence of Commissions . . . was set forth in the Antidumping Investigation Initiation Checklist” and linked to two subject importers “controlled by petitioner.” Pls. Comments 6–7. Accordingly, Plaintiffs insist that no evidence on the record supports Commerce’s finding that the commission exists as an industry practice. Pls. Comments 7.

Substantial evidence on the record demonstrates that this contention lacks merit. Although the Department found that the only individually investigated entity did not pay the commission during the period of review, *see Remand Results* at 19, that finding neither speaks to industry practice as a whole, nor nullifies the record affidavit provided by the petitioner from an industry source stating that “a 7% commission rate is typical . . . for the industry.” Pls. Pub. App. Tab 3 at 2 (quotation marks omitted) (ellipses in original) (emphasis added). Moreover, Plaintiffs point to nothing on the record that undermines the affidavit’s veracity. The court therefore finds that Commerce supported the commission adjustment to its U.S. price calcu-

lation with substantial evidence. *See Atl. Sugar, Ltd.*, 744 F.2d at 1562.

C. Commerce's Use of BWA's Average Unit Value to Calculate the Revised AFA and Separate Rates

Finally, Plaintiffs offer a host of reasons to show that Commerce acted contrary to law when it used the average unit value from a single uncooperative respondent, BWA, to calculate the revised AFA and separate rates. First, they aver that the Department erroneously chose BWA's data solely to obtain a positive separate rate and, instead, should have used data from another uncooperative respondent, which would have produced a separate rate of zero. Pls. Comments 7–9. Second, Plaintiffs insist that BWA's "aberrational and unreliable" data "do[] not reflect commercial reality." Pls. Comments 9. More specifically, they argue that the "whole" or "round" numbers in BWA's responses appear inaccurate, especially because the Department could not verify the figures due to BWA's failure to cooperate. Pls. Comments 10–11. Finally, Plaintiffs state that if the court finds that Commerce did not err in using BWA's data, Commerce also must use data from another uncooperative respondent so that "the data will reflect commercial reality." Pls. Comments 11–12.

Plaintiffs' arguments have no basis in law. When Commerce used BWA's data, rather than that of another uncooperative respondent, it complied with the law and its longstanding accepted methodologies for determining AFA and separate rates. Commerce customarily selects "the highest rate on the record of [a] proceeding" in this case BWA to calculate the AFA rate so that a "party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Remand Results* at 15 (citing *Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 39,940, 39,942–43 (Dep't Commerce July 11, 2008); *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 Fed. Reg. 69,937, 69,939–40 (Dep't Commerce Nov. 18, 2005)) (quotation marks omitted); *see PAM S.p.A.*, 582 F.3d at 1339–40 & n.2; *F.Lli de Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032; *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 851, 77 F. Supp. 2d 1302, 1323 (1999). Likewise, Commerce followed its customary practice when it calculated the separate rate by averaging the revised AFA rate with the zero rate of the mandatory respondent. *Remand Results* at 7; *see* 19 U.S.C. § 1673d(c)(5)(B) ("If the estimated weighted average dumping margins established for all exporters and

producers individually investigated are zero or de minimis margins . . . , the [Department] may use any reasonable method to establish the estimated all-others rate”); *see also KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Light-Walled Rectangular Pipe and Tube From the Republic of Korea*, 73 Fed. Reg. 5794, 5800 (Dep’t Commerce Jan. 31, 2008). Moreover, Plaintiffs’ complaints about the reliability and accuracy of BWA’s data suggest that Commerce had a duty to corroborate the firm’s submissions. The Department has no such duty. *See* § 1677e(c) (“When [Commerce] . . . relies on *secondary information* rather than on information obtained in the course of an investigation or review, [Commerce] . . . shall, to the extent practicable, corroborate that information”); § 351.308(c)-(d). Because the agency acquired the data contained in BWA’s questionnaire and response during the investigation, the Department properly used the uncorroborated information to calculate the AFA rate. *See* § 1677e(c).

Finally, Plaintiffs fail to demonstrate that the BWA data does not reflect commercial reality. BWA’s average unit value represents approximately [[a large portion]] of all subject merchandise sales in the United States during the period of investigation. *Remand Results* at 18. Because this value substantially reflects the market of the subject merchandise, the court cannot find BWA’s data to lie outside the realm of commercial reality, let alone instruct the Department to use unverified data from an additional uncooperative respondent to make its calculations. *See Ta Chen Stainless Steel Pipe, Inc.*, 298 F.3d at 1339–40; *see also KYD, Inc.*, 607 F.3d at 765–67. In sum, the court sustains the Department’s use of BWA’s average unit value in its AFA and separate rate calculations.

IV. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the Department’s *Remand Results* are **SUSTAINED**; it is further

ORDERED that Plaintiffs shall submit their reply brief for the case-in-chief no later than August 20, 2010; and it is further

ORDERED that in their reply brief, Plaintiffs shall concisely explain what active claims remain in their Motion for Judgment on the Agency Record. More specifically, Plaintiffs must note which issues have not been rendered moot by the *Remand Results* and this opinion, citing to the relevant statutory and jurisprudential authorities.

Dated: August 5, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–90

AROMONT USA, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 03–00354

[Upon cross-motions as to classification of certain food flavorings, summary judgment for the plaintiff.]

Dated: August 12, 2010

Bryan Cave LLP (Brian A. Sher and Joseph H. Heckendorn) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marcella Powell*); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Sheryl French*), of counsel, for the defendant.

OPINION & ORDER

AQUILINO, Senior Judge:

U.S. Customs and Border Protection (“CBP”) classified certain merchandise derived from veal, chicken, duck, lamb, beef, fish, lobster, mushroom or vegetable stock under subheading 2104.10.00 (“Soups and broths and preparations therefor . . . Other”) of the Harmonized Tariff Schedule of the United States (“HTSUS”) (2001) and imported from France by Aromont USA, Inc., which protested that classification, taking the position that those goods should have been classified under subheading 2106.90.99, covering “Food preparations not elsewhere specified or included . . . Other”. Upon denial of the protest after liquidation of duties¹, the plaintiff commenced this case, and, following joinder of issue, the defendant interposed a motion for summary judgment of dismissal.² The plaintiff has responded with a cross-motion for summary judgment on its behalf.

¹ They amounted to 100 percent *ad valorem* pursuant to the authority granted the U.S. Trade Representative by section 301 of the Trade Act of 1974, as amended, 19 U.S.C. §2411. See Defendant’s Memorandum, p. 2 n. 3.

² The motion papers make clear that only plaintiff’s entries classified under subheading 2104.10.00 remain at issue, not any of those encompassed by Protest No. 1101–02–100655, which was originally impleaded herein. Compare Defendant’s Statement of Undisputed Material Facts, paras. 6–8, with Plaintiff’s Response, paras. 6–8.

Jurisdiction of the court is pursuant to 19 U.S.C. §1581(a) and 28 U.S.C. §2631(a).

I

The import, of course, of a motion for summary judgment is that there is no genuine issue of material fact that requires trial within the meaning of USCIT Rule 56 and teaching of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Here, the parties' papers in support of their cross-motions do not lead this court to conclude otherwise. Indeed, the plaintiff admits defendant's description of the preparation if not nature of the products at issue, which are listed in its Exhibit A³, to wit:

- (a) First, Aromont ran the bones through the "guillotine" to cut them into small sizes.
- (b) Next, Aromont fe[l]d the bones directly into cookers, or the bones were roasted.
- (c) The bones were then simmered for a long period of time.
- (d) The resulting "classical stock" had the fat skimmed off and the bones and other sediment removed. The resulting mixture was a "clear richly flavored broth that [was] then reduced to a rich honey like consistency."
- (e) The honey paste packing machines. was then pumped into mixing and

* * *

16. There is no difference between the merchandise Aromont marketed as "demiglaces" and those it marketed as "stocks."

17. With the exception of the vegetable varieties, Aromont's "stocks" were prepared in the exact same manner.⁴

A

The primary thrust of plaintiff's protest to CBP, and now on appeal to this court, is that two rulings it obtained earlier from Customs, namely NY800645 (Aug. 26, 1994) and HQ957024 (March 3, 1995)⁵, should have led the agency to the classification preferred herein.

³ Listed, in each instance "concentrated", are beef stock; beef stock flavor; boiled chicken broth, duck fat and chicken fat flavor; roast chicken broth and duck fat flavor; duck broth and duck fat flavor; fish broth; lamb broth and lamb fat flavor; lobster broth; mushroom base; mushroom stock; veal broth flavor; veal and beef broth flavor; vegetable stock [numerical annotation of each omitted]. See generally Defendant's Exhibit K.

⁴ Compare Defendant's Statement of Undisputed Material Facts, para. 14 and paras. 16 and 17 (citations omitted), with Plaintiff's Response, paras. 14 and 16 and 17.

⁵ Plaintiff's Exhibits A and B.

They did not. Nor can this court conclude otherwise now. The Service's ruling practice and procedure published at the time of entry were in pertinent part:

Tariff classification rulings. Each ruling letter setting forth the proper classification of an article under the provisions of the [HTSUS] will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.

19 C.F.R. §177.9(b)(2) (2001). NY800645 describes one of Aromont's proffered substances as a beef flavoring in powder form without the use of beef extract. As for the other substances referred for ruling, all liquids, Customs found:

1) Veal flavoring – contains veal extract, veal fat, concentrates of carrot, onion, leek, tomato, garlic and mushroom, olive oil, sunflower oil, glucose, dextrine and other ingredients.

2) Chicken flavoring – contains chicken extract, chicken fat, duck extract, egg yolk, concentrates of carrot, onion and leek, olive oil, sunflower oil, glucose, dextrine and other ingredients.

3) Duck flavoring – contains duck extract, duck fat, sunflower oil, glucose, dextrine, and other ingredients.

4) Lamb flavoring – contains lamb extract, lamb fat, concentrates of carrot, onion, leek and garlic, olive oil, sunflower oil, glucose, dextrine, and other ingredients.

5) Fish flavoring – contains fish extract, chicken fat, seafood extract, concentrates of carrot, onion and shallot, sunflower oil, glucose, dextrine, and other ingredients.

6) Lobster flavoring – contains fish extract, lobster extract, chicken fat, seafood extract, concentrates of carrot, onion, tomato and shallot, sunflower oil, glucose, dextrin and other ingredients.

7) Beef flavoring – contains glucose, dextrine, autolysed yeast, soya lecithin, salt and other ingredients.⁶

On its face, this description is not "identical" to the description of plaintiff's merchandise currently at bar, either as admitted by it with regard to defendant's statement of undisputed material facts, *supra*, or in its own statement or pleadings. *Cf.* Plaintiff's Complaint *passim* and its Counter Statement of Undisputed Facts, paras. 3–8. Hence, the requirement of section 177.9(b)(2) is not satisfied, nor is the other

⁶ The focus of HQ957024 upon Aromont request for reconsideration by Headquarters was not on these findings *per se*, rather whether the percentages of the animal extracts therein entitled the flavorings to classification under HTSUS heading 1603. ("Extracts and juices of meat, fish or crustaceans, molluscs or other aquatic invertebrates").

requirement of that section met in the papers before this court. That is, they do not show that plaintiff's present products are "identical" to the samples upon which Customs made its findings in NY800645 and recited above.

B

The first general rule of interpretation of the HTSUS is that classification shall be determined according to the terms of its headings and any relative section or chapter notes. In this case, the defendant stands by CBP's classification of plaintiff's goods as "broth" *eo nomine* heading 2104. But it correctly notes that that term is not defined in the HTSUS. Hence, the common and commercial meaning is presumed. See, e.g., *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed.Cir. 1988). See also *E.M. Chemicals v. United States*, 920 F.2d 910, 913 (Fed.Cir. 1990) ("[t]ariff terms are to be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent").

The defendant relies on a dictionary definition of "broth", to wit, a "liquid in which meat, fish, cereal grains, or vegetables have been cooked". Defendant's Memorandum, p. 11, quoting from Webster's Third New International Dictionary, Unabridged (1981 ed.). While obviously broad, this definition does not capture the essence of plaintiff's "concentrated" products, the processing of which results in "a rich honey like consistency" or "honey paste". CPB's National Import Specialist refers to "reduc[tion] to 70% solids." Defendant's Exhibit I, para. 7. Whatever the precise percentage, it does not connote the degree of liquidity or fluidity forever expected of a broth. To quote the paragon American lexicon, broth is

[l]iquid in which meat, and often barley, rice, vegetables, or the like, have been gently boiled; thin or simple soup.

Webster's New International Dictionary of the English Language, Unabridged, p. 343 (2d ed. 1934). See also Plaintiff's Reply Memorandum, Exhibit B, first page. To recite from Plaintiff's Counter Statement of Undisputed Facts:

11. Aromont stocks are made from roasting bones; whereas broths are made from cooking meat in water.

12. The Aromont flavorings are physically different from broths in that they contain much less salt and are much more gelatinous.

13. The Aromont flavorings are not finished products, whereas broths are capable of being consumed.

14. Aromont is not aware of any of its customers using the products at issue as a finished soup or finished broth.

15. The largest customers of the Aromont flavorings at issue use the products as ingredients for gravies, sauces and salad dressings.⁷

Defendant's classification under HTSUS subheading 2104.10.00 ("Soups and broths and preparations therefor") encompasses not only elements *eo nomine* but also use. And,

in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision.

United States v. Siemens Am., Inc., 653 F.2d 471, 478 (CCPA 1981). The latter such provision in 2104.10.00, as well as in plaintiff's preferred 2106.90.99, is "preparations", which is not defined in the HTSUS. However, inherent in the term is an expectation of specific use. *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed.Cir. 1998), citing the definition of "preparation" in 12 The Oxford English Dictionary, p. 374 (2d ed. 1989), namely, "a substance specially prepared, or made up for its appropriate use or application, *e.g.* as food or medicine".

Proper classification turns on the principal use of subject merchandise. *See, e.g., Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed.Cir. 1998) (holding the principal use of the class is controlling, not the principal use of the specific import). Additional U.S. Rule of Interpretation 1(a) of the HTSUS provides that, in

the absence of special language or context which otherwise requires -- a tariff classification controlled by use . . . is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Principal use has been defined as the one "which exceeds any other single use." *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F.Supp.2d 1020, 1027 (2000) (citations omitted). In evaluating principal use, courts may consider, *inter alia* : the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the mer-

⁷ Citations omitted. The defendant disagrees, at least in part, with these statements of fact but also responds as to each that its "dispute is not material to the issues in this action, and therefore does not prevent summary judgment." Defendant's Response to Plaintiff's Counter Statement of Material Facts, pp.7-9.

chandise moves, the environment of the sale, the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA), *cert. denied*, 429 U.S. 979 (1976).

In the case at bar, Aromont products are not principally used as soups or broths. They are “sold through three principal channels: large ingredient customers, food service distributors, and [] retail distributors and retail stores.” Plaintiff’s Memorandum, p. 13. Review of the company’s sales reports reveals that Aromont’s single largest industrial customer accounts for over half of its sales and uses the flavorings in gravies and sauces in its line of frozen dinners. Other applications include “brines, marinades, injections, rubs, flavor additives, and vacuum tubing.” *Id.* at 17. In short, plaintiff’s products are found in a variety of end uses:

. . . [A]pplications abound, with the addition of wine, water, meat jus or cream; delectable traditional sauces, glazes, stocks and soups are readily fashioned or try our heat and serve EZ-Sauces and Gravies!

Defendant’s Exhibit C. While the result of such application could be “soup”, as imported plaintiff’s goods are properly classified under heading 2106 “Food preparations not otherwise specified or included”).⁸

II

In view of the foregoing, defendant’s motion for summary judgment must be denied. Plaintiff’s cross-motion will be granted, with summary judgment entered in its favor.

So ordered.

Dated: August 12, 2010

New York, New York

/s/ Thomas J. Aquilino, Jr.

SENIOR JUDGE

⁸ In reaching this conclusion of law, based on the parties’ excellent submissions in support of their cross-motions for summary judgment, the court has not found it necessary to consider the declaration of Khaled Zitoun, plaintiff’s exhibit D. Ergo, defendant’s motion to strike certain portions of that declaration and plaintiff’s Motion for Leave to File a Supplemental Declaration of Khaled Zitoun *Instantly* can be, and each hereby is, denied as moot.

Slip Op. 10–91

UNITED STATES, Plaintiff, v. TIP TOP PANTS, INC. Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00171

[Denying plaintiff’s motion for partial reconsideration]

Dated: August 13, 2010

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David M. Hibey* and *Meredyth C. Havasy*); *Chris Yokus*, Office of the Assistant Chief Counsel, United States Customs and Border Protection, of counsel, for plaintiff.

Ballon Stoll Bader & Nadler, P.C. (Vano I. Haroutunian) for defendant.

OPINION AND ORDER**Stanceu, Judge:****I. INTRODUCTION**

Plaintiff brought this action under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2006) (“Section 592”), to recover from defendant Tip Top Pants, Inc. (“Tip Top”) a civil penalty of \$55,636.90 and duties of \$1,640.53, plus interest, for alleged material false statements or acts, or material omissions, made in connection with a single entry of apparel made in 2002. Compl. ¶¶ 1, 3–4, 8. On January 13, 2010, the court denied plaintiff’s motion for summary judgment, concluding that plaintiff failed to show that it cured the “apparent procedural defect” resulting from the failure of United States Customs and Border Protection (“Customs” or “CBP”) to issue “a written statement setting forth the final determination and the findings of fact and conclusions of law” in response to Tip Top’s petition for remission and mitigation of the penalty as required by Section 592.¹ *United States v. Tip Top Pants, Inc.*, 34 CIT __, __, Slip Op. 10–5, at 9–10 (Jan. 13, 2010) (“*Tip Top I*”). On February 12, 2010, plaintiff filed a USCIT Rule 59 motion (“Reconsideration Motion”) for reconsideration of the denial of its motion for summary judgment on the grounds that no procedural violation occurred and, alternatively,

¹ The court also denied plaintiff’s motion for summary judgment against co-defendant Saad Nigri. *United States v. Tip Top Pants, Inc.*, 34 CIT __, __, Slip Op. 10–5, at 20 (Jan. 13, 2010) (“*Tip Top I*”). The court, *sua sponte*, dismissed Mr. Nigri from this lawsuit. *Id.* Plaintiff’s motion for partial reconsideration addresses only the court’s denial of summary judgment against Tip Top Pants, Inc. See Pl.’s Mot. for Partial Reconsideration 1 (“Reconsideration Mot.”).

that any procedural violation that did occur should be disregarded because Tip Top failed to demonstrate substantial prejudice. Pl.'s Mot. for Partial Reconsideration 1–3 (“Reconsideration Mot.”). Defendant opposes this motion on various grounds. Def.'s Opp'n to Pl.'s Mot. for Partial Reconsideration 2 (“Def.'s Opp'n”). The court concludes that the Reconsideration Motion must be denied because plaintiff has failed to demonstrate that the court erred in denying plaintiff's summary judgment motion.

II. BACKGROUND

The background of this case is set forth in detail in the court's previous Opinion and Order, *Tip Top I*, 34 CIT at ___, Slip Op. 10–5, at 2–8, and is summarized more generally herein.

A. The Entry of the Merchandise for Consumption in 2002

Plaintiff's penalty claim is based on a single consumption entry filed by Tip Top with Customs in 2002 at Laredo, Texas for a shipment from Mexico of 954 dozen men's denim cotton shorts and pants and 960 dozen boys' denim cotton shorts, with an entered value of \$215,398 and a date of entry of May 24, 2002. Pl.'s Mot. for Summ. J. app. at 25–28 (“Pl.'s Mot.”) (setting forth the entry summary form and commercial invoices); Pl.'s Statement of Material Facts pursuant to Rule 56(h)(1) ¶¶ 1–2, 7 (“Pl.'s Statement of Material Facts”). Tip Top entered the goods under subheading 6203.42.4050, Harmonized Tariff Schedule of the United States (2002) (“HTSUS”) for the men's apparel items and Subheading 6203.42.4060, HTSUS for the boys' shorts. Pl.'s Mot. app. at 25–26. Both provisions were subject to a General (Most Favored Nation (“MFN”)) duty rate of 16.8% *ad valorem*; goods classified thereunder that qualified as originating goods under the North American Free Trade Agreement (“NAFTA”) Implementation Act, as provided for in General Note 12, HTSUS, were eligible for duty-free tariff treatment. Subheading 6203.42.40, HTSUS; General Note 12, HTSUS. The entry summary form does not appear to indicate a claim for the NAFTA tariff preference and instead claims duty-free tariff treatment under Subheading 9802.00.9000, HTSUS.² Pl.'s Mot. app. at 25–26.

² Subheading 9802.00.9000 provided duty-free treatment for apparel goods assembled in Mexico from fabric components wholly formed and cut in the United States, subject to certain conditions. Subheading 9802.00.9000, Harmonized Tariff Schedule of the United States (2002) (“HTSUS”); *see* Chapter 98, Subchapter II, U.S. Note 4, HTSUS.

B. The Customs Form 28 Request for Information and the Customs Form 29 Notice of Proposed Action

On November 19, 2002, Customs issued to Tip Top a request (“Customs Form 28”) for various documentation pertaining to the entry. Pl.’s Statement of Material Facts ¶¶ 3–4; Pl.’s Mot. app. at 10–11. After Tip Top did not respond to the Customs Form 28, Customs, on January 16, 2003, issued a notice of proposed action (“Customs Form 29”) stating that it was proposing to disallow Tip Top’s duty-free claim under Subheading 9802.00.9000, HTSUS due to Tip Top’s failure to respond to the Customs Form 28 and allowing Tip Top 20 days to supply the documentation previously requested. Pl.’s Statement of Material Facts ¶¶ 3–4; Pl.’s Mot. app. at 12. The Customs Form 29 also states that “[t]his office will be disallowing all 9802.00.9000 claims, and duties will be assessed at the general rate of duty. Your firm has made false claims under this program and is subject to possible penalties.” Pl.’s Mot. app. at 12.

C. The Administrative Penalty and Protest Proceedings

Customs issued a pre-penalty notice to Tip Top on May 7, 2003, citing “material false statements, acts and/or omissions,” “HTS 9802.00.9000,” an alleged degree of culpability of negligence, and a proposed penalty of \$55,636.90, which it described as “two (2) times the potential loss of revenue.” Pl.’s Mot. app. at 14; Pl.’s Statement of Material Facts ¶ 5. As the basis for the contemplated penalty, the pre-penalty notice cited only one fact, Tip Top’s failure to respond to the Customs Form 28 “requesting documentation to substantiate the 9802 claim.” Pl.’s Mot. app. at 14. Even though the notice was a pre-penalty notice, and not a claim for penalty, the notice stated: “Importer has failed to respond resulting in entry being rate advanced in the sum of \$27,818.45 and penalty assessment.” *Id.* Tip Top filed a response to the pre-penalty notice on June 26, 2003. Pl.’s Mot. app. at 15–20; Pl.’s Statement of Material Facts ¶ 6. Among other arguments, the response claimed that the apparel items on the entry at issue “were . . . entered duty-free as products of Mexico eligible for duty-free treatment under the provisions of the North American Free Trade Agreement (‘NAFTA’)” and that “[t]he entry in question was filed on the basis of a NAFTA blanket Certificate of Origin, covering the period of January 1, 2002 through December 31, 2002.” Pl.’s Mot. app. at 17.

Following the liquidation of the entry on April 4, 2003, Tip Top filed a protest and request for further review on June 30, 2003. *Id.* app. at 76–82. The protest contested “the decision of Customs to deny duty-free treatment to the merchandise imported and entered under the

captioned entry under HTSUS subheading 9802.00.9000, and under subheadings 6203.42.4050 [or] 6203.42.4060, as qualifying products of Mexico under NAFTA” and the assessment of duties at 16.8% *ad valorem*. *Id.* app. at 77. The submissions of the parties do not indicate whether Customs has ruled on the protest.

Customs issued a penalty claim for \$55,636.90 on a Customs Form 5955A dated October 6, 2003 and a cover letter dated October 7, 2003. Pl.’s Mot. app. at 60–62; Pl.’s Statement of Material Facts ¶ 9. The notice of penalty stated that Tip Top “entered or caused to be entered merchandise into the commerce of the United States by means of material false statements, acts and/or omissions.” Pl.’s Mot. app. at 62. The notice of penalty cited, as the reason for the “penalty assessment,” Tip Top’s failure to respond to the Customs Form 28. *Id.* The cover letter stated as the basis for the assessment of a penalty that

[a]lthough the entry is being protested, and you claim a correct NAFTA Certificate of Origin submitted [*sic*], we find that the failure to provide the Certificate within the time allowed is material to the orderly and proper assessment and collection of duties by Customs and Border Protection and demonstrates negligence.

Id. app. at 60.

On November 4, 2003, Tip Top filed with Customs a petition seeking cancellation or substantial mitigation of the penalty. Pl.’s Mot. app. at 63–70 (setting forth *Letter from Follick & Bessich to Bureau of Customs & Border Prot.* 1–8 (Nov. 4, 2003) (“Petition”)); Pl.’s Statement of Material Facts ¶ 10. Among other arguments, Tip Top stated that the failure to respond to the Customs Form 28 was the fault of its freight forwarder, South Texas International (“STI”) of Laredo, Texas, upon whom Tip Top relied to maintain the required records and respond to the request for information. Pl.’s Mot. app. at 65–67 (Petition 3–5). It also argued that the merchandise at issue qualified for duty-free treatment under Subheading 9802.00.9000, HTSUS, that documentation, although filed late, established that the merchandise was entitled to duty-free tariff treatment, and that Tip Top had claimed duty-free entry under NAFTA on the basis of facts, circumstances, and documents (albeit late filed) that supported such entry. *Id.* app. at 66–68 (Petition 4–6). Although arguing that no penalty was warranted, *id.* app. at 68 (Petition 6), it also argued that any penalty should be canceled or substantially mitigated because of Tip Top’s excellent compliance record, because this was Tip Top’s first experience with importing merchandise duty-free under NAFTA, and because of Tip Top’s reliance “upon professionals, customs brokers and

freight forwarders who held themselves out as qualified and informed in handling NAFTA importations and their documentary requirements.” *Id.* app. at 69 (Petition 7). The documentation submitted as evidence in support of plaintiff’s motion for summary judgment contains no written decision by Customs responding to the arguments in Tip Top’s Petition.

Plaintiff’s appendix contains a second Customs Form 5955A dated January 9, 2006, *id.* app. at 121, that plaintiff describes as an “amended penalty notice.” Pl.’s Statement of Material Facts ¶ 12. The text substantively is the same as the penalty notice dated October 6, 2003, except that the following sentence was added: “The fact that the fabric was cut and assembled in Mexico disqualifies you from claiming 9802.00.9000; therefore, your HTS 9802.00.9000 claim was false.” Compare Pl.’s Mot. app. at 121 with *id.* app. at 62. In July 2006, Tip Top paid Customs \$33,842.45. Pl.’s Statement of Material Facts ¶ 13; Pl.’s Mot. app. at 122–23.

D. Judicial Proceedings

On May 18, 2007, plaintiff commenced this action to recover a penalty and additional duties. Summons; Compl. ¶ 1. On June 9, 2009, defendants moved to dismiss the complaint as to Mr. Nigri for failure to state a claim upon which relief can be granted. Notice of Mot. to Dismiss the Compl. against Sadi Nigri for Failure to State a Claim upon which Relief Can Be Granted pursuant to USCIT R. 12(b)(5), at 1 (“Mot. to Dismiss”). Two days later, plaintiff moved for summary judgment against both defendants for a civil penalty of \$55,636.90 and unpaid duties and interest of \$1,640.53, for which it alleges a degree of culpability of negligence. Pl.’s Mot. 13.

The court’s previous Opinion and Order denied plaintiff’s motion for summary judgment, dismissed Mr. Nigri as a defendant, and directed counsel for plaintiff, in consultation with counsel for defendant, to submit a proposed schedule for the remainder of the proceedings. *Tip Top I*, 34 CIT at __, Slip Op. 10–5, at 20. Instead of responding to the order to submit a proposed schedule, plaintiff moved on February 12, 2010 for partial reconsideration of the court’s denial of its motion for summary judgment pursuant to USCIT Rule 59. Reconsideration Mot. On March 8, 2010, defendant filed its response opposing plaintiff’s motion for partial reconsideration. Def.’s Opp’n. On March 26, 2010, plaintiff moved for leave to file a reply to defendant’s opposition. Pl.’s Unopposed Mot. for Leave to File Reply in Supp. of its Mot. for Reconsideration; Pl.’s Reply in Supp. of its Mot. for Partial Reconsideration (“Pl.’s Reply”).

III. DISCUSSION

USCIT Rule 59 provides a rehearing “for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.” USCIT Rule 59(a)(1)(B). The granting or denying of a motion for reconsideration lies within “the sound discretion of the court.” *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336, 601 F. Supp. 212, 214 (1984). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Royal Thai Gov’t v. United States*, 30 CIT 1072, 1074, 441 F. Supp. 2d 1350, 1354 (2006) (internal quotation marks and citation omitted). The purpose of reconsideration is “to direct the Court’s attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.” *Target Stores, Div. of Target Corp. v. United States*, 31 CIT 154, 159, 471 F. Supp. 2d 1344, 1349 (2007) (quoting *Agro Dutch Indus. Ltd. v. United States*, 29 CIT 250, 254 (2005)).

In support of its motion, plaintiff argues that “the Court misapprehended the facts concerning the administrative proceedings in this matter, and this reconsideration is necessary to prevent manifest injustice.” Reconsideration Mot. 2. As facts claimed to have been misapprehended by the court, plaintiff states that the court’s Opinion and Order “does not take into account [1] that CBP amended its original penalty notice to Tip Top altering the original basis for penalty; [2] that Tip Top never formally responded to the amended penalty; and, [3] that Tip Top has never contended that CBP failed to follow administrative procedures.”³ *Id.* at 3.

Plaintiff’s argument that the court did not take into account the “amended penalty notice altering the original basis for penalty,” *id.*, is incorrect. The court discussed that document in its Opinion and Order. *Tip Top I*, 34 CIT at ___, Slip-Op. 10–5, at 9. Although plaintiff alleged in support of summary judgment that “CBP amended its original penalty notice to Tip Top altering the original basis for penalty,” Reconsideration Mot. 3, the court correctly held that plaintiff failed to put forth facts by which the court could conclude that the

³ The alleged fact that “Tip Top never formally responded to the amended penalty” and the alleged fact that “Tip Top has never contended that CBP failed to follow administrative procedures” are not included in plaintiff’s Rule 56(h)(1) statement of material facts. See Pl.’s Statement of Material Facts. Because the motion now before the court is a motion for reconsideration, the court is not required to consider new factual assertions plaintiff makes for the first time. But as discussed *infra*, these allegations, even if assumed to be true, do not address the problem that the procedure followed by Customs was in violation of statutory and regulatory requirements.

issuance of this document cured the apparent procedural defect. *Tip Top I*, 34 CIT at __, Slip-Op. 10–5, at 9. As the court stated, “[i]f agency action on Tip Top’s Petition was still pending at the time Customs issued the second Customs Form 5955A, and if no decision under 19 U.S.C. § 1618 was ever issued, then the requirements of the statute and the regulations were not satisfied.” *Id.* at __, Slip-Op. 10–5, at 9–10. Plaintiff’s argument that the court failed to consider what plaintiff terms as the “amended penalty notice” is incorrect in assuming that the second Customs Form 5955A was issued in accordance with law, even though Customs was obligated instead to issue a written decision on the mitigation petition.

Plaintiff argues, further, that “[b]ecause the second notice effectively superseded the original notice and was based upon a different legal principle, it follows then that CBP had no obligation to file a written response to Tip Top’s mitigation claim concerning the original notice.” Reconsideration Mot. 6. This argument is refuted by the statute and the Customs regulations. The latter direct that “[i]f a petition for relief relates to a violation of section[] 592 . . . , the petitioner *will be* provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based.” 19 C.F.R. § 171.21 (2009) (emphasis added). Neither the statute nor the regulation provides an exception under which Customs, instead of issuing the written statement required by Section 592(b)(2) and 19 C.F.R. § 171.21, may issue a document purporting to bring an “amended” penalty claim alleging a different violation, even though the petition that is the subject of § 171.21 has been timely filed. *See* 19 U.S.C. § 1592(b); 19 C.F.R. § 171.21.

As support for its conclusion that Customs had no obligation to respond to Tip Top’s petition, plaintiff explains that “[i]n September 2005, the Office of Rules & Regulations (“OR&R”) at CBP requested that Laredo Fines, Penalties & Forfeiture (“FP&F”) amend the penalty notice because, as Tip Top contended, the original penalty notice did not allege an offense.” Reconsideration Mot. 5. The Reconsideration Motion further states that “[a]ccordingly, OR&R gave FP&F the option of either cancelling the penalty, amending the penalty to state that Tip Top filed a false 9802.00.9000 entry, or issuing a 19 U.S.C. § 1509(g) penalty in lieu of, or in addition to, a 19 U.S.C. § 1592 penalty” and that “FP&F elected to amend the penalty notice to state that Tip Top filed a false entry.” *Id.*

Although plaintiff admits that Customs determined, as Tip Top had contended, that what Customs alleged in the penalty notice issued

under Section 592(b)(2) was not a violation of Section 592,⁴ the Reconsideration Motion fails to appreciate the significance of this point. Plaintiff admits, in effect, that Customs had reached the conclusion of law that its claim of a violation of Section 592, as stated in the penalty notice, was invalid. At that point, Customs was required to set forth “the decision on the matter,” 19 C.F.R. § 171.21, including in particular the negative conclusion of law it had reached, in the written statement required by Section 592(b)(2), thus bringing to an end the “proceeding under such section 1618” to which Section 592(b)(2) refers. 19 U.S.C. § 1592(b)(2). As plaintiff admits in its Reconsideration Motion, no such statement was ever issued.

Plaintiff’s argument that the court’s Opinion and Order “does not take into account . . . that Tip Top never formally responded to the amended penalty,” Reconsideration Mot. 3, is also meritless. In support of this argument, plaintiff submits that “Tip Top’s failure to respond to the amended notice vitiated any obligation for CBP [] to issue a written report pursuant to section 1618.” *Id.* at 6. This argument wrongly presumes that Tip Top somehow was obligated to respond to the second Customs Form 5955A even though the issuance of that document was in violation of law.

Plaintiff’s related argument that the court’s Opinion and Order “does not take into account that . . . Tip Top has never contended that CBP failed to follow administrative procedures,” *id.* at 3, is not a basis for reconsideration of the denial of plaintiff’s summary judgment motion. Plaintiff is not entitled to summary judgment unless the pleadings and related submissions on file demonstrate that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. USCIT Rule 56(c). From the facts plaintiff has put forth thus far, the court cannot conclude, for purposes of satisfying the standard for summary judgment, that Customs has adhered to statutory and regulatory procedures that would allow recovery of a civil penalty on the Section 592 claim at issue in this case.

Similarly, plaintiff argues that “[e]ven assuming that CBP should have issued a written response, Tip Top has failed to proffer any evidence that it suffered substantial prejudice” and that, in any event, no prejudice occurred because Tip Top, having paid most of the

⁴ The alleged failure of Tip Top to respond to the Customs Form 28 which was the violation claimed in the penalty notice (and also the pre-penalty notice) was not a violation of Section 592. The cover letter to the penalty claim refers to an alleged failure by Tip Top to submit a requested NAFTA Certificate of Origin within the time allowed. Pl.’s Mot. for Summ. J. app. at 60. The latter allegation also was insufficient under Section 592 and is puzzling in that the entry summary does not appear to indicate a claim for the NAFTA preference. *See id.* app. at 25–26.

duties without complaint and having participated in this litigation, received adequate notice of the CBP claims. Reconsideration Motion 7; see Pl.'s Reply 2–5. Plaintiff relies on *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353 (Fed. Cir. 2006), and *PAM, S.p.A. v. United States*, 463 F. 3d 1345 (Fed. Cir. 2006), for the proposition that any procedural error that occurred, which plaintiff submits would be harmless, did not invalidate the agency's action. *Id.* These two cases, each of which involves procedures under statutes other than Section 592, are not on point. In *Dixon*, the issue before the Court of Appeals for the Federal Circuit was whether the late publication by Customs of a Notice of Intent to Distribute prejudiced Dixon's right to file a timely application for distributions under the Continued Dumping and Subsidy Offset Act ("CDSOA"). *Dixon*, 468 F.3d at 1354–55. In *PAM*, at issue was whether PAM, a foreign pasta exporter, was required to show substantial prejudice in challenging the failure to serve it with a domestic pasta producer's request for administrative review in response to antidumping orders by the United States Department of Commerce. *PAM*, 463 F. 3d at 1346–47.

Plaintiff also argues that "CBP's actions may not be set aside where the error was harmless or the defendant was given sufficient opportunity to be heard," citing *United States v. Roteck, Inc.*, 22 CIT 503 (1998), *United States v. JAC Natori Co.*, 17 CIT 348, 821 F. Supp. 1514 (1993), and *United States v. Obron Atl. Corp.*, 18 CIT 771, 862 F. Supp. 378 (1994). Reconsideration Mot. 7–8. These cases, although involving Section 592, also are inapposite. All involve the refusal by Customs to rule on a supplemental petition; supplemental petitions are not required by the statute and are governed entirely by the Customs regulations. None of these cases involves a failure to comply with a statutory requirement. In contrast, one of the issues presented by this case involves the statutory requirement in Section 592(b)(2) to issue a written decision at the conclusion of a 19 U.S.C. § 1618 proceeding and a regulation, 19 C.F.R. § 171.21, which, in construing the statutory requirement, directs Customs to issue such written decision if the petition contemplated by Section 592(b)(2) is submitted. It also presents the question of whether the United States may recover on a claim of an alleged Section 592 violation that was not made in the only penalty notice that was issued according to the procedures the statute and regulations require.⁵

In summary, none of the cases plaintiff cites supports a conclusion that, on the facts of this case as developed in the summary judgment

⁵ The Court of International Trade previously has held that the United States may sue in the Court of International Trade to recover on a Section 592 penalty claim only after perfecting that same claim according to the procedures required by Section 592(b). *United States v. Optrex Am., Inc.*, 29 CIT 1494 (2005).

proceeding, plaintiff may overcome the effect of the procedural violation through a showing that Tip Top was not prejudiced thereby. At this stage of the case, the court need not decide the question of whether such a showing will suffice because plaintiff, in seeking summary judgment, has not demonstrated that prejudice to Tip Top did not occur. Plaintiff argues that Tip Top has wholly failed to demonstrate prejudice to the extent Tip Top's prejudice claim is not waived. Pl.'s Reply 2–3. The determination of whether and to what extent prejudice to Tip Top occurred as a result of the procedural violation involves questions of fact that have not been resolved, and the court disagrees that Tip Top, at this stage of the litigation, already has waived an opportunity to establish prejudice. One fact relevant to a prejudice determination is plaintiff's admission that Customs continued the penalty proceeding in September 2005 after reaching an administrative decision that the penalty claim was invalid. *See* Reconsideration Mot. 5.

IV. CONCLUSION

The Reconsideration Motion must be denied because it fails to demonstrate that the court erred in denying plaintiff's motion for summary judgment.

ORDER

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that Plaintiff's Unopposed Motion for Leave to File Reply in Support of Its Motion for Reconsideration, be, and hereby is, **GRANTED**; it is further

ORDERED that plaintiff's reply is deemed filed; it is further

ORDERED that plaintiff's motion for partial reconsideration, as filed on February 12, 2010, be, and hereby is, **DENIED**; and it is further

ORDERED that counsel for both parties shall appear before the court for a conference on September 1, 2010, at 11:00 a.m. in Courtroom 3 of the James L. Watson Courthouse, United States Court of International Trade, New York, New York. Counsel shall be prepared to discuss scheduling for the remainder of these proceedings and the preliminary identification of issues to be resolved at trial. To assist the court in scheduling, the court requests that counsel advise the court of the status of their discussions, if any, directed to possible settlement of this matter.

Dated: August 13, 2010

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–92

BP OIL SUPPLY COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 04–00321

[Granting in part and denying in part the defendant's motion to strike with respect to the plaintiff's motion to stay the Court's scheduling order.]

Dated: August 13, 2010

Galvin & Mlawski (John Joseph Galvin), for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-In-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marcella Powell*), for the defendant.

OPINION AND ORDER**Musgrave, Senior Judge:****Introduction**

On June 15, 2010, Plaintiff BP Oil Supply Company (“BP”) moved to stay the Court’s scheduling order in this matter for the purpose of interposing on the defendant certain requests for admission. *See* Pl.’s Mot. for Order Staying Ct.’s Scheduling Order to Permit Pl. Time to Interpose Req. for Admis. (“Pl.’s Mot.”). In response, Defendant U.S. Customs and Border Protection (“CBP” or “the government”) moved to have the entirety of BP’s motion stricken from the record on the ground that evidence offered therein is inadmissible under Rule 408 of the Federal Rules of Evidence (“FRE 408”). *See* Def.’s Mot. to Strike at 1. For the reasons set forth below, the government’s motion to strike will be granted in part and denied in part.

Background

According to the complaint, BP allegedly imported “API Class III” crude petroleum from various foreign countries, paid duties thereon, exported API Class III Alaskan North Slope crude petroleum, and filed a claim with CBP for duty drawback, claiming that the latter satisfied the statutory substitution requirements of the former. Upon denial of that claim and its protest thereof, BP commenced this action, invoking this Court’s jurisdiction under 28 U.S.C. § 1581(a). After a brief stint on the Court’s reserve calendar, the first of several scheduling orders was issued on November 29, 2006, and this matter has been in discovery and/or settlement negotiations since that time. On March 10, 2010, the court lifted a previously-imposed stay on the scheduling order and granted BP’s consent motion in what had appeared to be the final amendment to the scheduling order before trial.

Pursuant to that order, discovery was to be completed by March 20, 2010, and dispositive motions were to be filed with the Court no later than June 15, 2010. However, on June 15, 2010, BP again moved to stay the scheduling order for the limited purpose of serving on the defendant requests for admission on certain issues. *See* Pl.'s Mot. at 3.

BP's motion, submitted pursuant to Rules 6(b), 7, and 16 of the Court's Rules, states that the court should grant its request "for the reasons set forth below." However what follows that statement is not reasoning *per se*, but a short narrative of events concerning the parties' recent attempts to resolve which facts are "not in issue" for the purposes of the pending litigation. This narrative is punctuated with block-quoted emails from government counsel expressing disagreement with, *inter alia*, BP's proposed stipulation of facts. *See* Pl.'s Mot. at 1, 2. The motion concludes without comment, requesting simply that the stay be granted "[i]n view of the foregoing . . ." Pl.'s Mot. at 3. As to the substance of the motion, the court notes only that BP appears to be frustrated by the government's refusal to concede that three of the imported crude types are "commercially interchangeable" with the exported crudes in spite of allegedly contrary views expressed by the government's own expert witnesses. Pl.'s Mot. at 1. Attached to BP's motion is (1) a March 25, 2010 letter from BP to government counsel discussing reports prepared by government expert witnesses; (2) a proposed "Stipulated Judgment on Agreed Statement of Facts"; (3) a June 11, 2010 letter from BP to government counsel debating whether CBP may "reliquidate partial claims"; and (4) a document entitled "Schedule of Stip[ul]able Partial Claims." *See* Pl.'s Mot. at Attach. A, B, C.

By way of response, the government has filed a motion to strike BP's motion on the ground that it used "confidential settlement communications" in a manner specifically prohibited by FRE 408. According to the government, BP impermissibly offered evidence of "confidential settlement communications both as a justification for its request to reopen discovery and as a basis for obtaining admissions," and asserts that "[t]he underlying premise of [BP's] motion is that its request to reopen discovery is justified because the confidential settlement negotiations demonstrate the merits of its claims . . ." Def.'s Mot. at 5. Accordingly, states the government, the court should strike BP's motion in its entirety and order that it be refiled without the prohibited evidence.

BP disagrees with the government's characterization of its motion, arguing that neither the letters accompanying the motion nor the emails quoted therein constitute "confidential settlement communi-

cations.” Pl.’s Resp. at 4. BP asserts that the communications contain no offers of compromise and that all of the materials “rely upon or reference” testimony of the government’s experts. *Id.* BP contends further that, even if the disputed evidence were found to be settlement communications, it would not be excluded by FRE 408 because the materials (1) only contain “otherwise discoverable” evidence; and (2) were included in the motion for the sole purpose of “negat[ing] any contention of undue delay on plaintiff’s part.” *Id.*

Discussion

FRE 408 provides:

Rule 408. Compromise and Offers to Compromise

(a) **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

The rationale underlying Rule 408 is twofold: First, the rule promotes the settlement of disputes prior to litigation by recognizing that compromises are more likely to result when parties are free to speak openly during settlement negotiations and are not inhibited by the fear that statements made therein may later be used against them. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). Second, the rule seeks to exclude irrelevant or unreliable evidence, recognizing that parties will often settle disputes for reasons completely unrelated to the merits of a claim. *Goodyear*, 332 F.3d at 981.

Significantly, FRE 408 permits the use of evidence of settlement negotiations “for purposes not prohibited by subdivision (a),” *i.e.*, for a purpose other than to prove or disprove the validity of the claims that the offers were meant to settle. Examples of uses “permitted” by the rule include proving “a witness’s bias or prejudice”; “negating a contention of undue delay”; or proving that a party had breached the settlement agreement. Fed. R. Evid. 408(b); 2006 Amendment Adv. Com. Note.

Hence, the two questions that must be resolved on the instant motion are (1) whether the evidence set forth in BP’s motion constitutes “confidential settlement communications,” and (2) if so, whether that evidence is being offered for an improper purpose, *e.g.*, “to prove liability for . . . or amount of” the claims at issue in this dispute. Further, the court may consider whether admitting the evidence would be contrary to “the public policy of encouraging settlements and avoiding wasteful litigation.” *Trebor Sportswear, Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 293 (2d Cir. 1999).

As to the letters of March 25, 2010 and June 11, 2010, the court agrees that they do not fall within the prohibition of FRE 408. Although the letters are communication that occurred within the context of “compromise negotiations,” the information contained in the letters is admissible on other grounds. The March 25, 2010 letter contains only BP’s brief summary of the reports generated by the government’s expert witnesses. Expert witness reports are independently admissible (in fact, required) by USCIT R. 26 and cannot be excluded by their use in settlement negotiations. The June 11, 2010 letter appears to be nothing more than BP’s views on a purely legal question. Accordingly, these letters are not excluded by FRE 408.

Of more concern, however, is BP’s direct quotation of emails sent by government counsel in response to certain of BP’s proposals. The emails divulge the government’s position regarding which concessions it was willing and unwilling to make, particularly as to the commercial interchangeability of certain crudes. Although the emails may be related to government expert reports, the discussion therein is focused on the government’s disagreement with BP on several issues, including BP’s proposed stipulation of material facts. And although the emails contain no express offers to compromise, the statements therein certainly appear to be “made in compromise negotiations regarding the claim.” Fed. R. Evid. 408(a)(2).

Finally, although the exact extent of the dispute is not entirely clear at this point in the litigation, BP’s proposal of stipulated facts (and related documents) is in the nature of a proposed settlement as applied to certain crudes and appears to be precisely the type of

communication described in FRE 408(a). If used for a prohibited purpose, proposals of this nature are inadmissible even if offered by the party making the proposal. See *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992).

In that regard, the court must reject BP's contention that the sole purpose of the evidence was to "negate any contention of undue delay" that could have been levied against BP for requesting the stay. The use of the word "negate" in FRE 408 is an indication that although settlement-negotiation evidence may be used to *rebut* a claim that a party engaged in undue delay, the evidence is inadmissible "unless the door is first opened by a party raising the issue of undue delay." *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 808 (6th Cir. 2007). See Charles Alan Wright and Kenneth W. Graham, Jr., 23 *Fed. Prac. & Proc.* § 5312 (2010) (noting that "the offeror cannot himself raise the issue of delay as a justification for the admission of the evidence").

Finally, the court is compelled to observe that, although unstated, the evidence provided in BP's motion to stay the scheduling order presumably is being offered, at least in part, for the purpose of convincing the court to grant the motion, *i.e.*, that it somehow speaks for itself of "good cause" pursuant to USCIT R. 16. Settlement-negotiation evidence might be permissible for that purpose under certain circumstances, but the evidence encompassed by this motion does not pertain solely, or even necessarily, to demonstrating "good cause" under USCIT R. 16. Rather, the evidence appears in large measure as "proof" of BP's position on the issue of the commercial interchangeability of certain crudes.

The burden is on the plaintiff to prove its case. In the legal course thereof, the government has every right, within reason, to dispute a fact as to its legal conclusion, in this instance as to those crudes' commercial interchangeability. Prudence therefore dictates that it would be exceedingly unwise for the court to give any consideration to these materials or to allow them to become part of the record. The emails, proposed stipulation of facts, and documents related to that proposal are therefore inadmissible on this motion pursuant to FRE 408 and its underlying policies. In the interests of judicial economy, however, these items will be disregarded by the court rather than stricken from the record.

Conclusion

Upon consideration of the foregoing, the government's motion to strike is granted in part and denied in part, and the disputed evidence contained in BP's motion will be treated in accordance with the

court's findings as discussed above. The government shall therefore either consent to BP's motion to stay the scheduling order or submit its response to the motion not later than 10 days from the date of this order.

SO ORDERED.

Dated: August 13, 2010
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE



Slip Op. 10–93

PSC VSMPO AVISMA CORPORATION and VSMPA TIRUS, U.S., INC.,
Plaintiff, v. UNITED STATES, Defendant, and U.S. MAGNESIUM LLC,
Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00321
Public Version

[The court remands the U.S. Department of Commerce's redetermination.]

Dated: August 17, 2010

Arent Fox LLP (John M. Gurley, Mark P. Lunn and Diana Dimitriuc Quaia) for Plaintiffs PSC VSMPO-AVISMA Corporation and VSMPO-Tirus, US Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, Trial Attorney) for Defendant United States; *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

King & Spalding, LLP (Stephen A. Jones and Jeffery B. Denning) for Defendant-Intervenor US Magnesium LLC.

OPINION

Barzilay, Judge:

I. Introduction

This case concerns a challenge to the U.S. Department of Commerce's ("the Department" or "Commerce") determination in an anti-dumping administrative review covering pure and alloyed magnesium metal from the Russian Federation. Plaintiffs PSC VSMPO Avisma Corporation ("Avisma") and VSMPA Tirus, U.S., Inc., (collectively, "Plaintiffs") and Defendant-Intervenor U.S. Magnesium, LLC ("USM"), challenge Commerce's method for calculating the value of chlorine gas when determining the normal value for the subject merchandise in *Results of Redetermination Pursuant to Remand*,

A-421–819 (Dep’t Commerce Mar. 30, 2010) (“*Redetermination Results*”).¹ Because the court finds that the Department’s method for calculating the value for chlorine gas is not supported in the record and does not comport with the statute, the court remands the proceedings to Commerce for further consideration.

I. Background & Procedural History.

A. The Industrial Processes at Issue

A thorough understanding of this case demands familiarity with the industrial processes at issue.² Avisma is the world’s largest producer of titanium. Pls. Br. App. Tab 3 Ex. 5 at 2; Pls. Br. App. Tab 5 at 11. Its production facility operates in two principal stages. In the carnallite refinement stage, enriched carnallite³ undergoes dehydration and electrolysis to produce raw magnesium and chlorine gas. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma processes [[much]] of the resulting raw magnesium to create the subject merchandise and uses the [[rest]] later in the titanium production chain, as described below. Pls. Reply Br. App. Tab 18 at 3. Avisma uses the chlorine gas in three ways: [[Much]] goes toward the ilmenite catalyzation process, while [[some]] recycles into the carnallite refinement process, and [[some]] goes on to produce calcium chloride, a de-icer. Pls. Reply Br. App. Tab 18 at 3. Therefore, only a portion of the chlorine gas goes into the production of the subject merchandise as described more completely below.

In the next stage of production, which does not result in subject merchandise, chlorine gas reacts as a catalyst with ilmenite ore⁴ to separate titanium from titanium oxide, resulting in titanium tetrachloride. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma then uses raw magnesium and technical-quality magnesium⁵ to separate the chlorine from the titanium tetrachloride, producing titanium sponge and magnesium chloride. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma refines the titanium sponge to create salable products, including titanium

¹ The subject merchandise in this case is pure and alloyed magnesium. Because chlorine gas and raw magnesium emerge as co-products in the carnallite refinement stage, Commerce must determine the value of chlorine gas in order to determine the value of raw magnesium and thus the subject merchandise.

² For a visual representation of the industrial process, see *infra* p. 4.

³ Carnallite is “a mineral . . . consisting of a hydrous potassium-magnesium chloride.” *Webster’s Third New International Dictionary* 340 (2002).

⁴ The mineral ilmenite is “a compound of iron, titanium, and oxygen.” *Webster’s Third New International Dictionary* 1127 (2002).

⁵ Unlike raw magnesium, technical-quality magnesium, due to impurities, cannot become subject merchandise. *Redetermination Results* at 6–7. However, in this production step, these two components are interchangeable.

ingots, billets, and slabs. Pls. Br. App. Tab 3 Ex. 5 (“*2006 Avisma Annual Report*”) at 2. It subjects the magnesium chloride to electrolysis, splitting it into chlorine gas which feeds back into the ilmenite catalyzation process and technical-quality magnesium. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma recycles the technical-quality magnesium into the titanium tetrachloride separation process. Pls. Br. App. Tab 8 Ex. 1.A at 1.

[[

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B. Procedural History

In 2007, Avisma and USM requested a review of an antidumping order covering imports of pure and alloyed magnesium from the Russian Federation for the period from April 1, 2006 to March 31, 2007. See *Notice of Antidumping Duty Order: Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 19,930, 19,930 (Dep’t Commerce Apr. 15, 2005). On May 30, 2007, Commerce commenced the review, *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 29,968, 29,968 (Dep’t Commerce May 30, 2007), and nearly a year later published its preliminary results. *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 24,541 (Dep’t Commerce May 5, 2008). At this

point Avisma and USM submitted briefs proposing, *inter alia*, changes to the Department's methodology for determining the value of chlorine gas. Commerce rejected a portion of Avisma's brief because it contained new factual information: an affidavit from accounting expert Professor George Foster ("Foster Affidavit"). See Pls. Br. App. Tabs 8–11.

On September 10, 2008, Commerce issued the final results of the subject administrative review. *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,642 (Dep't Commerce Sept. 10, 2008) ("*Final Results*"). To determine the normal value of the subject merchandise,⁶ the Department employed a method of constructing a value for chlorine gas which severed Avisma's production process at the point where raw magnesium and chlorine gas emerge from the carnallite refinement process. Pls. Br. App. Tab 14 ("*Final Results Issues and Decision Memorandum*") at 10. Commerce then constructed the value of Avisma's chlorine gas by taking a bulk quantity market value of liquid chlorine and adjusting it for transportation costs between facilities and for the estimated cost of converting the liquid chlorine to chlorine gas. *Final Results Issues and Decision Memorandum* at 18–19. The Department then allocated this cost among the co-products of the carnallite refinement process. *Id.* at 10. Commerce justified this methodology by claiming that because the Department perceived a clear split-off point at the carnallite refinement process, it was reasonable to ignore the parts of Avisma's operation subsequent to that process and to treat raw magnesium as one of Avisma's primary products. *Id.* at 14; see also *Redetermination Results* at 6. The Department additionally claimed, without explanation, that determining the value of chlorine gas by taking into account Avisma's entire operation would result in a value for chlorine gas too high relative to the value that Avisma obtains from it. *Final Results Issues and Decision Memorandum* at 14; see also *Redetermination Results* at 5. Because the normal value of the subject merchandise necessarily bears an inversely proportional relationship to the value of chlorine gas, its co-product in the carnallite refinement process, an "unreasonably" high value for chlorine gas would result in an unreasonably

⁶ In the antidumping context, the normal value of the subject merchandise is the price of that merchandise as sold for consumption in the exporting country at a time reasonably corresponding to that of the sale of the merchandise in the United States. 19 U.S.C. § 1677b(a)(1)(A)-(B)(i). Correspondingly, the antidumping duty margin is the amount by which the normal value of the subject merchandise exceeds its export price or constructed export price. *Id.* § 1673.

low normal value for the subject merchandise. See *Redetermination Results* at 13. A lower normal value for the subject merchandise, in turn, would lead to a lower antidumping duty rate.

Plaintiffs and USM filed suit in this Court to contest the *Final Results*. Avisma claimed, *inter alia*, that Commerce employed an erroneous method to allocate joint costs between raw magnesium and chlorine gas, and that Commerce inappropriately rejected the portions of its case brief containing the Foster Affidavit. *PSC VSMPO Avisma Corp. v. United States*, Slip Op. 09120, 2009 Ct. Int'l Trade LEXIS 127, at *5 (Oct. 20, 2009). USM also contested the Department's method for allocating joint costs between raw magnesium and chlorine gas. *Id.* In its decision, the court instructed Commerce to admit the Foster Affidavit to the record, citing concerns over the determination's accuracy given that the case presents an issue of first impression, and remanded the proceedings so that the Department could consider the affidavit's arguments. *Id.* at *22.

On March 30, 2010, Commerce issued its remand results, which left the methodology for constructing the value for chlorine gas unchanged. *Redetermination Results* at 4. Avisma again contests the Department's chlorine gas valuation methodology, arguing that the methodology inappropriately truncates the production process at Avisma's facilities and thereby ignores the intertwined nature of Avisma's operations. Pls. Br. 2–7. USM supports the *Redetermination Results* “in large part,” but disagrees with the Department's method of constructing the value for chlorine gas. Def.-Int. Resp. 2.

II. Standard of Review

Because of the “complex” and “technical” nature of the Department's determinations, Commerce's expertise in determining these matters entitles it to great deference. *Fujitsu Gen., Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). The court must sustain Commerce's determination so long as the determination is supported by “substantial evidence on the record” and is “otherwise in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

“Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted). This evidence must consist of “more than a scintilla” but need not constitute a preponderance. *Id.* at 6, 128 F. Supp. 2d at 725 (citation omitted). To determine whether the Department supports its determination with substantial evidence, the court must take into account the entire record, including anything that detracts from the weight of the evidence that

Commerce employs to make its determination. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Commerce must supply a “satisfactory explanation” for its determination, including a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks & citation omitted). The court may not supply a “reasoned basis” for the Department’s decision that Commerce itself did not give. *Id.* Even if it is possible to draw two inconsistent conclusions from the evidence on record, it does not mean that Commerce did not support its findings with substantial evidence. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

To determine whether Commerce’s findings are in accordance with law, the court applies the two-part test articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. 467 U.S. 837, 842–43 (1984). The court first must determine whether Congress has spoken directly to the issue in question; if so, the court must ensure that the Department’s methods comport with “the unambiguously expressed intent of Congress.” *Id.* at 843 (footnote omitted). If Congress is silent on the issue, the court must determine whether the methods that the Department employed to reach its conclusion are “based on a permissible construction of the statute.” *Id.* (footnote omitted). The court must defer to Commerce’s interpretation of the statute so long as it is reasonable and “may not substitute its own construction of a statutory provision for a reasonable interpretation made by” Commerce. *Id.* at 844.

III. Discussion

How to value co-products in an antidumping case where the manufacturer in question produces one product the subject merchandise simultaneously with a second product that serves as a catalyst in the production of a third product is an issue of first impression for the Court. When Commerce uses a constructed value as the normal value of the subject merchandise, Congress instructs the Department to take into account “the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . . *in the ordinary course of business.*” 19 U.S.C. § 1677b(e)(1) (emphasis added). The “ordinary course of business” means “[t]he transaction of business according to the common usages and customs of . . . the particular individual whose acts are under consideration.” *Black’s*

Law Dictionary 1098 (6th ed. 1990); see also *Black's Law Dictionary* 404, 1209 (9th ed. 2009).⁷ From a thorough examination of the record, the court finds that the Department's chosen chlorine gas valuation methodology in the *Redetermination Results* fails to take into account Avisma's ordinary course of business and, therefore, does not accord with law.

Avisma is primarily a producer of titanium sponge, and its business structure reflects this focus. Pls. Br. App. Tab 2 at 3 ("VSMPO-AVISMA is a titanium manufacturer and AVISMA's Berezniki facility supports that production."); *2006 Avisma Annual Report* 8. To that end, Avisma strives to produce raw magnesium and chlorine gas only in the quantities necessary to enable its overarching titanium operation. Pls. Br. App. Tab 2 at 6. The subject merchandise, pure and alloyed magnesium, is an ancillary product of the overall production process. Pls. Br. App. Tab 5 at 8; see also Pls. Br. App. Tab 2 at 6.

The subservient nature of magnesium production to titanium production becomes apparent from an examination of Avisma's finances. Titanium products account for 78 percent of Avisma's sales revenue, while only four percent comes from the subject merchandise. *2006 Avisma Annual Report* 8, 10, 17. This figure puts subject merchandise on par with ferrotitanium, aluminum and its alloys, and "other goods and services" in terms of Avisma's sales revenue, demonstrating its comparatively minor role. *2006 Avisma Annual Report* 10. In addition, the *2006 Avisma Annual Report* reveals that Avisma allocated 29% of its investments that year toward improvements in titanium sponge production, with only three percent going toward "other primary production areas." *2006 Avisma Annual Report* 22; see also *2006 Avisma Annual Report* 23 (noting that "major modernization project in magnesium processing" geared toward increasing titanium sponge production). From a financial standpoint, Avisma's ordinary course of business places titanium in a preeminent position. Claiming that it is reasonable to treat magnesium as a primary product of Avisma, Commerce disregards the vast majority of Avisma's financial activity. Compare *Final Results Issues and Decision Memorandum* at 14 (truncating production process at carnallite refinement stage), with § 1677b(e)(1) (directing Commerce to take into account entity's ordinary course of business when using constructed value as normal value).

Avisma's treatment of its raw magnesium production capabilities following its 2005 merger with titanium producer VSMPO under-

⁷ The statute itself does not define "ordinary course of business." It does define "ordinary course of trade." The court notes that the phrases have different meanings and that "trade" connotes commercial transactions such as sales between individual entities. See, e.g., *NTN Corp. v. United States*, 28 CIT 108, 139, 306 F. Supp. 2d 1319, 1346-47 (2004).

scores the subsidiary nature of the subject merchandise production in Avisma's ordinary course of business. Pls. Br. App. Tab 5 at 3. Even prior to the merger, Avisma planned to gradually reduce its raw magnesium output to the level minimally sufficient to produce the chlorine gas necessary for its titanium output projections. Pls. Br. App. Tab 5 at 3 ("It was understood that this merger would shift AVISMA's production focus *more* squarely into the production of . . . titanium sponge." (emphasis added)), 6–7. To achieve this goal, Avisma planned and carried out a gradual reduction in raw magnesium output [[]].⁸ Pls. Br. App. Tab 5 at 5–6. Over the course of the following three years, raw magnesium output and therefore the output of its co-product chlorine gas dropped [[significantly]]. From the second quarter of 2006 to the first quarter of 2007 alone, raw magnesium output fell from [[many]] metric tons to [[fewer]] metric tons. Pls. Br. App. Tab 6 Ex. 2SD-2. By the end of 2006, raw magnesium production fell to the level minimally sufficient to produce Avisma's desired amount of chlorine gas. Pls. Br. App. Tab 2 at 4–5 ("[P]roduction of magnesium was limited to the amount unavoidable under the existing technology and because of supply issues."). Commerce's chlorine gas valuation methodology effectively disregards the ample record evidence that shows that Avisma's raw magnesium production is completely subservient to titanium production. Pls. Br. App. Tab 2 at 5.

Avisma's attempts to increase technical-quality magnesium production are further indicative of its desire to avoid production of subject merchandise to the extent possible. *See* Pls. Br. App. Tab 5 at 4. During the period of review, Avisma made steps toward increasing its output of technical-quality magnesium specifically to use in the titanium tetrachloride separation process so that Avisma could limit further its output of raw magnesium, and thus subject merchandise, to the amount necessary for Avisma to obtain chlorine gas in the quantities that it needs to make titanium. Pls. Br. App. Tab 5 at 4.

⁸ Avisma found it economically expedient to reduce raw magnesium production gradually rather than immediately because it would provide "an opportunity to minimize its electrolysis operations while avoiding any layoffs by increasing its titanium production." Pls. Br. App. Tab 5 at 3. An immediate cessation of magnesium production would have subjected Avisma to disposal costs and workforce downsizing:

Once a decision has [sic] been made to [[restrain]] [raw] magnesium production above a certain level (that need [sic] to produce chlorine), there were logical economic reasons for switching somewhat gradually in reducing production of magnesium. Generally, each electrolytic cell is budgeted to serve for [[many]] months between capital repairs. These are expensive repairs . . . and an abrupt stoppage would have resulted in [[undesirable consequences]]. This would have been in addition to the loss of whatever material was loaded in the cells at the time of the stoppage.

Pls. Br. App. Tab 5 at 7–8. A 2006 mine collapse at Avisma's carnallite supplier caused Avisma to cut magnesium production more rapidly than originally intended. Pls. Br. App. Tab 5 at 6.

The record evidence shows that subject merchandise production clearly does not lie at the heart of Avisma's business plans or operations; rather, it is an incidental product of Avisma's titanium production. Treating subject merchandise otherwise does not reflect the costs incurred in Avisma's ordinary course of business as the statute requires. § 1677b(e)(1).

Despite the financial and operational cohesiveness of Avisma's titanium operations, the Department nevertheless belittles the integrated nature of Avisma's facility to justify its severing of Avisma's production process in its chlorine gas valuation methodology. For example, the Department claims that the quantities of materials that travel between segments of the production process are too small to warrant considering the facility an integrated whole. *Redetermination Results* at 8. The Department claims that it is therefore reasonable to truncate its consideration of the production process at the carnallite refinement stage and calculate the value for chlorine gas considering only the outputs of that stage. In reality, however, the record shows that the production process depends entirely on the movement of materials between stages. Avisma primarily uses the chlorine gas produced from carnallite in the ilmenite catalyzation process. Pls.Reply Br. App. Tab 18 at 3. The raw magnesium produced jointly with chlorine gas not only becomes subject merchandise, but also plays a fundamental role in the titanium tetrachloride separation process. Pls. Br. App. Tab 5 at 4. In addition, Avisma takes the chlorine gas that it recovers along with technical-quality magnesium following the titanium tetrachloride separation process and recycles it into the ilmenite catalyzation process. Pls. Br. App. Tab 2 at 5–6. Although the raw magnesium and chlorine gas produced at the carnallite refinement stage serve crucial purposes throughout the chain of production, Commerce insists on employing a methodology that turns a blind eye to this undeniable fact.

The 2006 mine collapse suffered by Avisma's carnallite supplier further highlights the interdependent nature of Avisma's operations. Pls. Br. App. Tab 5 at 5; *see also 2006 Avisma Annual Report* 33. After the accident, Avisma could not procure carnallite and, therefore, was unable to produce the raw magnesium and chlorine gas needed to run its operations. Pls. Br. App. Tab 5 at 5. This threat of a production collapse forced Avisma to purchase outside chlorine to continue its production of titanium. Pls. Br. App. Tab 5 at 5. Commerce characterizes Avisma's production facility as a series of discrete, independently-operating processes, but the events following the mine accident demonstrate that the processes cannot operate indepen-

dently. The lack of carnallite threatened to halt not only the carnallite refinement process, but all of Avisma's production.⁹

The court finds nothing in the record to legitimize Commerce's characterization of Avisma's production process. *Cf. Thai Pineapple Pub. Co.*, 187 F.3d at 1365 ("Even if it is possible to draw two inconsistent conclusions from evidence contained in the record, this does not mean that Commerce's findings are not supported by substantial evidence."). Commerce claims that its method for valuing chlorine gas more closely comports with "economic reality" than other methods. *Redetermination Results* at 12. But Commerce may not substitute its own definition of "economic reality" for the standard which Congress has mandated. In other words, Commerce must calculate the value of the subject merchandise, including "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise," by taking into account Avisma's ordinary course of business. § 1677b(e)(1). The Department cannot take into account Avisma's ordinary course of business while basing its methodology to calculate the cost of chlorine gas in its overall determination of the normal value of the subject merchandise on a misapprehension of the company's production process. Because Commerce has failed to take into account Avisma's ordinary course of business in calculating the value for chlorine gas, its methodology does not accord with law. *See id.*; *Chevron U.S.A., Inc.*, 467 U.S. at 842–43.

IV. Conclusion

For the foregoing reasons, it is

ORDERED that Commerce's *Redetermination Results* are **REMANDED** to the Department for further proceedings; it is further

ORDERED that Commerce recalculate the value for chlorine gas in its determination of the normal value of the subject merchandise, taking into account Avisma's ordinary course of business by focusing on Avisma's entire production process, including the stages of production encompassing and following ilmenite catalyzation; and it is further

⁹ Additionally, the Department's justification for truncation is internally inconsistent. The Department severs the carnallite refinement process from the rest of the titanium production while claiming that the goal of its chlorine gas valuation methodology is to arrive at a price that accurately reflects the benefit Avisma obtains from chlorine gas. *Final Results Issues and Decision Memorandum* at 14–15. But Avisma obtains value from chlorine gas precisely as a means to produce titanium. The only other product that Avisma produces with chlorine gas is calcium chloride de-icer, which it sells at a loss as a way of disposing of excess chlorine gas. Pls. Br. App. Tab 5 at 6 n.3 ("This is a process of transforming excess chlorine into [[de-icer]] (i.e., a marketable, albeit inexpensive, product . . .)"). Were it not for titanium production, Avisma would have no need for chlorine gas at all.

ORDERED that Commerce shall have until November 9, 2010 to file its remand results with the Court. Plaintiffs and Defendant-Intervenor shall file comments, if any, with the Court no later than December 7, 2010.

Dated: August 17, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–94

CITIZEN WATCH CO. OF AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 04–00220

[Plaintiff’s motion for summary judgment granted; defendant’s cross-motion for summary judgment denied.]

Dated: August 18, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Erik D. Smithweiss, Frances P. Hadfield, Heather C. Litman, Robert F. Seely, Joseph M. Spraragen, and Robert B. Silverman) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marcella Powell* and *Aimee Lee*); *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge:

I. Introduction

This matter is before the court on cross-motions for summary judgment by plaintiff Citizen Watch Co. of America, Inc. (“Citizen”) and defendant United States (“the Government”) pursuant to USCIT Rule 56. Citizen challenges the tariff classification of its imported watch boxes. U.S. Customs and Border Protection (“Customs”) classified the merchandise under subheading 4202.99.90 of the Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for jewelry

boxes and similar containers.¹ Citizen asserts that the proper classification is under subheading 4819.50.40, HTSUS as packing containers.² For the reasons below, the court concludes that Citizen is correct and thus grants Citizen’s motion for summary judgment and denies the Government’s cross-motion for summary judgment.

BACKGROUND

Between 2001 and 2003, Citizen imported the merchandise at issue, four models of boxes manufactured in China and Thailand, at the Port of Los Angeles. Def.’s Statement Undisputed Material Facts (“Def.’s SMF”) ¶ 1; Pl.’s Objs. & Resps. Def.’s Statement Undisputed Facts (“Pl.’s Resp. SMF”) ¶ 1; Pl.’s Resp. Def.’s First Interrogs. & Req. Produc. Docs., *available at* Mem. Supp. Def.’s Cross Mot. Summ. J. & Opp’n Pl.’s Mot. Summ. J. (“Def.’s Br.”) Ex. J, at 4. Each box is specially fitted to hold a single watch. Def.’s SMF ¶ 6; Pl.’s Resp. SMF ¶ 6. The boxes are made of non-corrugated cardboard with a core thickness of 2 mm and an insert thickness of 1.2 mm, uncoated ribbed paper weighing 110 grams per square meter, flocked paper weighing 60 grams per square meter, and white glue. Pl.’s Statement Material

¹ The relevant portion of Chapter 42 of the HTSUS reads:

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

....

Other:

....

4202.99 Other:

....

4202.99.90 Other.

The term “insulated food or beverage bags” is in the 2002 and 2003 versions of the HTSUS, but not the 2001 version. Goods falling within subheading 4202.99.90, HTSUS are subject to a 20% duty.

² The relevant portion of Chapter 48 of the HTSUS reads:

4819 Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like:

....

4819.50 Other packing containers, including record sleeves:

....

4819.50.40 Other.

Goods falling within subheading 4819.50.40, HTSUS were dutiable at 1.6% in 2001, 1.1% in 2002, and 0.5% in 2003.

Facts (“Pl.’s SMF”) ¶¶ 9–10; Def.’s Resp. Pl.’s Statement Undisputed Facts (“Def.’s Resp. SMF”) ¶¶ 9–10; Fuller Decl. ¶ 4. They consist of a removable lid and a base. Fuller Decl. ¶ 4. Each box contains a bendable metal collar on which a watch can be placed. Def.’s SMF ¶¶ 19–20; Pl.’s Resp. SMF ¶¶ 19–20; Fuller Decl. ¶ 6. The collar consists of a metal band of 0.5 mm thickness that is glued or laminated to flocked paper. Pl.’s SMF ¶¶ 9–10; Def.’s Resp. SMF ¶¶ 9–10; Def.’s SMF ¶ 18; Pl.’s Resp. SMF ¶ 18. The boxes are cylindrical in shape, and the insides of the boxes are angled. Def.’s SMF ¶¶ 21–22; Pl.’s Resp. SMF ¶¶ 21–22. A recycling symbol is stamped onto each box. Pl.’s SMF ¶ 22; Def.’s Resp. SMF ¶ 22. The undisputed evidence indicates that each box is capable of between ten and fifty applications, or cycles of opening the box and removing a watch and then replacing the watch and closing the box, as the Government’s counsel confirmed at oral argument. *See Singh Aff.* ¶ 14, *available at* Corrected Reply Mem. Further Supp. Def.’s Cross Mot. Summ. J. (“Def.’s Reply Br.”) Ex. P; *Singh Dep.* 113:12–20, Sept. 23, 2008, *available at* Pl.’s Mem. Law Opp’n Def.’s Cross-Mot. Summ. J. (“Pl.’s Reply Br.”) Ex. A; Pl.’s Resp. SMF ¶ 11.

Customs classified and liquidated the merchandise under heading 4202, HTSUS. Pl.’s SMF ¶ 4; Def.’s Resp. SMF ¶ 4. Citizen timely filed protests, which Customs denied.³ *See* Pl.’s SMF ¶ 2; Def.’s Resp. SMF ¶ 2. In May 2004, Citizen commenced the present action. Both parties now move for summary judgment pursuant to USCIT Rule 56.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate if “there is no genuine issue as to any material fact,” and “the movant is entitled to judgment as a matter of law.” USCIT R. 56(c). The proper construction of a tariff provision is a question of law, and whether the imported merchandise falls within a particular tariff provision is a question of fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002). The court decides both questions *de novo*. *See* 28 U.S.C. § 2640(a)(1); *Metchem, Inc. v. United States*, 441 F. Supp. 2d 1269, 1271 (CIT 2006). Although Customs’

³ The protests at issue are: (1) Protest Number 2704–02–102651, covering one entry in October 2001; (2) Protest Number 2704–02–102743, covering twenty-five entries from October 2001 to May 2002; (3) Protest Number 2720–02–100791, covering one entry in April 2002; (4) Protest Number 2720–03–100262, covering two entries in June and July 2002; (5) Protest Number 2704–03–101635, covering fifteen entries from June to August 2002; (6) Protest Number 2704–03–102502, covering fifteen entries from July to November 2002; (7) Protest Number 2704–04–100100, covering one entry in November 2002 and four entries in January 2003; (8) Protest Number 2704–04–100700, covering seven entries from January to March 2003; and (9) Protest Number 2704–04–101025, covering eight entries from March to May 2003. Order (Apr. 11, 2005); Summons.

classification decision “is presumed to be correct,” 28 U.S.C. § 2639(a)(1), this presumption attaches only to factual determinations, *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

DISCUSSION

The General Rules of Interpretation (“GRIs”) of the HTSUS direct the proper classification of merchandise entering the United States. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). Under GRI 1, HTSUS, “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” The terms “are construed according to their common and commercial meanings.” *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Note 2(h) to Chapter 48 of the HTSUS provides that the chapter “does not cover . . . [a]rticles of heading 4202 (for example, travel goods).”⁴ Accordingly, the court considers whether the watch boxes are classifiable under heading 4202 before considering whether they are classifiable under heading 4819.

I. Heading 4202

A. Watch boxes may be containers similar to jewelry boxes under heading 4202.

Heading 4202, HTSUS consists of a list of exemplars, including “jewelry boxes,” followed by the general phrase “similar containers.” Here, Customs classified the imported watch boxes as “jewelry boxes and similar containers.” HQ 966321 (Nov. 21, 2003), *available at* 2003 WL 23303771, at *1, 5. The Government now contends that the watch boxes are “covered by the tariff term ‘similar containers’ in heading 4202” under the doctrine of *ejusdem generis* and argues in the alternative that the imported watch boxes are “jewelry boxes” under heading 4202. Def.’s Br. 2, 6–20. The court determines that watch boxes that fall within heading 4202 are most precisely classified as containers similar to jewelry boxes because watches are not necessarily jewelry. *Compare* Chapter 71, HTSUS (covering jewelry) *with* Chapter 91, HTSUS (covering watches); *see also* HQ 951028 (Mar. 3, 1993), *available at* 1993 WL 126634, at *3 (stating that because jewelry presentation cases are “jewelry boxes,” “cases used in the presentation and sale of other articles are ‘similar containers’ as that phrase

⁴ This chapter note is numbered 2(h) in the 2002 and 2003 versions of the HTSUS and 1(h) in the 2001 version of the HTSUS.

appears in” heading 4202). This distinction, however, does not affect the requirements the watch boxes must satisfy to be classifiable under heading 4202.

B. Any item classifiable under heading 4202 must be suitable for long-term or prolonged use.

Where, as in heading 4202, “a list of items is followed by a general word or phrase, the rule of *ejusdem generis* is used to determine the scope of the general word or phrase.” *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005). Under that rule, “the general word or phrase is held to refer to things of the same kind as those specified.” *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994). “In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase.” *Aves. In Leather*, 423 F.3d at 1332.

The U.S. Court of Appeals for the Federal Circuit has held that the essential characteristics or purposes of the exemplars in heading 4202 consist of “organizing, storing, protecting, and carrying various items.” *Id.* (internal quotation marks and citation omitted). According to the Government, the watch boxes are “similar containers” simply because they may organize, store, protect, and carry watches. Def.’s Br. 6–12. As each watch box is designed to hold a single watch, the watch boxes can organize and store watches, at least for the short term. *See* Leavey Dep. 22:16–25, June 25, 2008, *available at* Def.’s Br. Ex. C. Citizen admits that the watch boxes can protect and carry watches. Pl.’s Resp. SMF ¶¶ 4, 7; *see* Def.’s SMF ¶¶ 4, 7. Citizen, however, contends that organizing, storing, protecting, and carrying are also characteristics of containers classifiable under heading 4819 and are not determinative in this case. Pl.’s Reply Br. 7–9. Citizen is correct.

Another essential, and here determinative, characteristic of the exemplars in heading 4202 is suitability for long-term or prolonged use. *See Aves. In Leather*, 423 F.3d at 1332–33 (affirming this Court’s determination that a folio that was not sufficiently durable to hold personal items for any extended period did not have the essential characteristics of a container classifiable under heading 4202); *see also* Chapter 42 Note 2(A)(a), HTSUS (providing that heading 4202 does not cover “[b]ags made of sheeting of plastics . . . with handles, not designed for prolonged use”); World Customs Organization, *Harmonized Commodity Description & Coding System Explanatory Notes*, Explanatory Note 42.02, 792 (3d ed. 2002) (“Explanatory

Note(s)”) (providing that heading 4202 does not cover “[s]hopping bags . . . not designed for prolonged use”).⁵ As this Court has observed, the exemplars in heading 4202 “are all intended for reuse,” and “[s]uitcases, briefcases, cigarette cases, musical instrument cases, and all the others listed therein are items which are used repeatedly.” *Jewelpak Corp. v. United States*, 97 F. Supp. 2d 1192, 1196 (CIT 2000) (“*Jewelpak I*”). Thus, “for the boxes at issue here to be classified . . . in this heading, fitting with the rest of the items in the list, the boxes must be usable on a repeated basis.” *Id.* ; see also *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1337 (Fed. Cir. 2002) (“*Jewelpak III*”).

Additionally, this Court and Customs have applied the requirements of the definition of “jewelry boxes” to watch boxes that may be containers similar to jewelry boxes. See, e.g., *Jewelpak I*, 97 F. Supp. 2d at 1194 (applying the definition of “jewelry boxes” to boxes the parties agreed were designed to hold jewelry, “including rings, bracelets, necklaces, and watches ” (emphasis added)); HQ 953398 (Sept. 15, 1993), available at 1993 WL 474190; HQ 950396 (Apr. 6, 1993), available at 1993 WL 163479. The term “jewelry boxes”

covers not only boxes specially designed for keeping jewellery, but also similar lidded containers of various dimensions (with or without hinges or fasteners) specially shaped or fitted to contain one or more pieces of jewellery and normally lined with textile material, of the type in which articles of jewellery are presented and sold and which are suitable for long-term use.

Explanatory Note 42.02, at 791.⁶

Here, the imported watch boxes are not boxes specially designed for keeping jewelry because they are not designed to hold many items of jewelry. See HQ 953398, available at 1993 WL 474190, at *2. Nevertheless, the imported watch boxes are lidded containers, and each is specially fitted to contain one watch. Def.’s SMF ¶ 6; Pl.’s Resp. SMF ¶ 6; Fuller Decl. ¶ 4. Watches can be presented or sold in the boxes, as some retailers display the watches in the boxes, although Citizen requests that retailers present its watches for sale in display cases and not in the boxes. Pl.’s Resp. SMF ¶ 20; Zuckerman Dep. 34:9–18,

⁵ The Explanatory Notes are not binding but “may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions.” *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

⁶ Before Explanatory Note 42.02 was amended to include jewelry presentation boxes “suitable for long-term use,” Customs classified jewelry presentation boxes and similar containers used as retail or premium packaging “according to the constituent material that imparted the essential character of the containers’ frames” because they were not *eiusdem generis* with the exemplars listed in heading 4202. HQ 966321, available at 2003 WL 23303771, at *2.

Mar. 26, 2008, *available at* Def.'s Br. Ex. A. The watch boxes, however, are lined with flocked paper, not more durable textile material. *See* Pl.'s SMF ¶¶ 9–10; Def.'s Resp. SMF ¶¶ 9–10. In any event, because the requirements of heading 4202 apply to such watch boxes, which may be similar to jewelry boxes, the watch boxes must be suitable for long-term use to be classifiable under that heading.

C. A box may be suitable for long-term use even if it does not have a durability comparable to that of the articles for which it is intended.

Explanatory Note 42.02 does not define “suitable for long-term use.” This Court addressed the meaning of the phrase in *Jewelpak Corp. v. United States*, 131 F. Supp. 2d 100 (CIT 2001) (“*Jewelpak II*”). The court concluded in *Jewelpak II* that the jewelry presentation boxes at issue in the case were suitable for long-term use and classifiable under heading 4202, HTSUS based on “[t]he physical construction of the merchandise, the ability of the merchandise to protect as well as store jewelry, the design and marketing of the merchandise, the expectation of both jewelry retailers and the ultimate purchaser that these boxes will survive repeated handling,” and other facts revealed at trial. *Id.* at 104. The Federal Circuit affirmed. *Jewelpak III*, 297 F.3d at 1337.

Citizen contends that items are “suitable for long-term use” only if they are “designed to have a durability comparable to that of the articles for which they are intended” by analogy to the Explanatory Note to GRI 5(a) and under the commercial meaning of the phrase. Mem. Law Supp. Pl.'s Mot. Summ. J. (“Pl.'s Br.”) 12–15. The witnesses for both parties agree that the imported watch boxes do not have such durability. *See* Fuller Decl. ¶ 8; Zuckerman Decl. ¶ 5; Singh Dep. 127:22–25; Hamill Dep. 51:15–24, Apr. 17, 2008, *available at* Smithweiss Decl. Ex. D. Citizen's legal contention, however, lacks merit.

GRI 5(a), HTSUS states:

Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith.⁷

⁷ GRI 5(a) also applies to jewelry boxes presented with the articles for which they are intended. Explanatory Note GRI 5(a)(II)(1), at 7.

This provision is not applicable here because the boxes are not entered with the watches. The Explanatory Note to GRI 5(a) states that containers “are suitable for long-term use” if “they are designed to have a durability comparable to that of the articles for which they are intended.” Explanatory Note GRI 5(a)(I)(2), at 7.

GRI 5(a) and its accompanying notes do not compel the conclusion that containers under heading 4202 must be designed to have a durability comparable to that of the articles for which they are intended. Because Explanatory Notes are not statutes and are not binding, the principles of statutory construction that identical phrases within the same statute should normally be given the same meaning, *see Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007), and that statutes addressing the same subject matter generally should be read *in pari materia* as if they were one law, *see Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006), do not apply. Indeed, as the Government suggests, the fact that the drafters of the Explanatory Notes further defined the term “suitable for long-term use” in the Explanatory Note to GRI 5(a) but not in Explanatory Note 42.02 may signify that the drafters intended a different interpretation.⁸ *See* Def.’s Br. 18. The only link between the two Explanatory Notes is found in a commentary to an amendment to Explanatory Note 42.02, which states that the drafters “had regard . . . to the Explanatory Note to [GRI] 5(a), which indicates that jewellery boxes and cases are a type of container which is specially shaped *or fitted* to contain jewellery and which is suitable for long-term use.” Customs Co-operation Council, Amendment to the Explanatory Notes Concerning the Definition of Jewellery Boxes 2 (July 5, 1989), *available at* Smithweiss Decl. Ex. B. This statement does not mention that containers under the Explanatory Note to GRI 5(a) must be designed to have a durability comparable to that of the articles for which they are intended, and it does not bind the court. *See Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1293 (Fed. Cir. 2008).

Citizen also cites the expert witnesses’ testimony and a glossary of packaging terms published by The Packaging Institute, U.S.A. and Packaging Machinery Manufacturers Institute for the proposition that in the packaging industry, “suitable for long-term use” means that a container will last as long as the item it is designed to contain.

⁸ The court, however, does not find helpful the testimony of a Customs official that the meaning of “suitable for long-term use” in Explanatory Note 42.02 is different from similar words in the Explanatory Note to GRI 5(a) “because of the context [of] the phrase, and when taken as a whole the explanatory note in 42.02 refers to a term which is to mean not only the traditional jewelry box, but the presentation box as well.” Hamill Dep. 56:7–23, Apr. 17, 2008, *available at* Def.’s Br. Ex. N.

See Pl.'s Br. 14–15. This evidence of the commercial meaning of the term is problematic. The testimony of Citizen's expert witness, Peter Fuller, that a container must be designed to have a durability comparable to that of the articles it contains contradicts his testimony in *Jewelpak* that a jewelry box can be suitable for long-term use but need not last as long as the piece of jewelry it contains. See Fuller Decl. ¶ 8; Fuller Dep. 63:19–22, Mar. 30, 1999, *available at* Def.'s Br. Ex. H. The testimony of the Government's expert witness, Dr. Sher Paul Singh, and the glossary of packaging terms appear to refer to shipping containers, not containers similar to jewelry boxes. See American National Standard, Glossary of Packaging Terms: Standard Definitions of Trade Terms Commonly Used in Packaging 47 (5th ed. 1979), *available at* Smithweiss Decl. Ex. E; Singh Dep. 127:8–128:22, 161:3–10.

Apparently, the court in the *Jewelpak* cases was not asked to determine whether the jewelry boxes were designed to have a durability comparable to that of the jewelry for which they were intended when it decided whether the boxes were suitable for long-term use. In ruling letter HQ 951028, Customs determined that jewelry boxes need not be designed to have a durability comparable to that of articles for which they are intended to be suitable for long-term use under heading 4202. HQ 951028, *available at* 1993 WL 126634, at *4–5. Rather, jewelry boxes are suitable for long-term use under heading 4202 if they are “sufficiently well constructed to provide durability adequate” to store and protect an item for many years after sale. *Id.* at *4–5. This ruling letter is entitled to deference relative to its “power to persuade.” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The court finds the ruling letter's conclusion persuasive. It is consistent with the *Jewelpak II* factors and the essential characteristic of suitability for long-term repeated use that the exemplars of heading 4202 share. As Customs noted in HQ 951028, the notion that presentation boxes for jewelry and similar articles, made of leather, composition leather, sheeting of plastics, textile materials, vulcanized fiber, or paperboard, must have a durability comparable to those articles, which may have a life expectancy of decades or centuries, is untenable. See HQ 951028, *available at* 1993 WL 126634, at *4–5. Even a hard plastic hinged ring presentation box covered with textile material will not last as long as the diamond ring it contains, but it may last for many years.

D. The undisputed evidence demonstrates that Citizen's watch boxes are not suitable for long-term use.

Thus, the imported watch boxes are suitable for long term use if they are “sufficiently well constructed to provide durability adequate” to store and protect an item for many years after sale. *Id.* at *4–5. In making this determination, the court looks to: (1) “[t]he physical construction of the merchandise,” (2) “the ability of the merchandise to protect as well as store” watches, (3) “the design and marketing of the merchandise,” and (4) “the expectation of both jewelry retailers and the ultimate purchaser that these boxes will survive repeated handling.” *Jewelpak II*, 131 F. Supp. 2d at 104. The undisputed evidence related to each of these factors indicates that the imported watch boxes are not suitable for long-term use.

1. The physical construction of the merchandise

The witnesses for both parties agree that boxes constructed with paper on the outside generally are not intended for long-term use. *See* Singh Dep. 57:2–5; Leavey Dep. 20:20–24; 22:3–5; Fuller Decl. ¶ 9. Charles Leavey, a jewelry retailer, testified that the imported watch boxes are not suitable for long-term use because of their paper covering, quality, and odd sizes. Leavey Dep. 22:6–11. Citizen's expert, Fuller, also concluded that the imported watch boxes are not suitable for long-term use based on their physical construction and materials. Fuller Decl. ¶¶ 5, 12. According to Fuller, boxes that are suitable for long-term use generally have metal, hard plastic, or wood frames, unlike the cardboard frames here, and lids with hinges made of heavy gauge steel to withstand repeated openings and closings, unlike the removable lids here. Fuller Decl. ¶ 9, Ex. A, at 3. Fuller also testified that the imported watch boxes' paper covering lacks a protective coating necessary to prevent staining and wear from repeated use. *Id.* ¶ 5, Ex. A, at 2–3. The Government's expert, Singh, agreed that a protective coating would be more appropriate and would help prevent staining and wear from repeated use. Singh Dep. 112:5–18, Sept. 23, 2008, *available at* Def.'s Br. Ex. D.

Singh did not conclude that the imported watch boxes are suitable for long-term use. He merely stated that the construction and materials of the imported watch boxes are “*very similar* to structures and materials used by manufacturers of jewelry boxes,” and the watch boxes are multi-component structures consisting of several layers of glued cardboard and paper that have a high level of strength. Singh

Expert Witness Report (“Singh Report”) 3–5, *available at* Def.’s Reply Br. Ex. P, Ex. A.⁹ The statements, however, do not create a genuine issue of material fact because Singh’s testimony indicates that the watch boxes are only suitable for limited reuse and are capable of ten to fifty cycles of openings and closings. *See* Singh Dep. 113:12–20, *available at* Pl.’s Reply Br. Ex. A. Because the watch boxes are only capable of as little as ten and no more than fifty cycles of openings and closings, they would last less than two months if used on a daily basis and less than a year if used on a weekly basis. Boxes like the imported watch boxes that are only capable of ten to fifty openings and closings are not sufficiently well constructed to provide a durability adequate to last for many years and therefore are not suitable for long-term use. *See Jewelpak II*, 131 F. Supp. 2d at 102, 104 (finding that jewelry boxes with hinges composed of high grade steel, as opposed to a cheaper alternative that would sustain no more than fifty box openings, were suitable for long-term use).

2. *The ability of the merchandise to protect as well as store watches*

Similarly, because imported the watch boxes are capable only of ten to fifty cycles of openings and closings, they are not sufficiently well constructed to provide a durability adequate for protective storage of a watch for many years. The undisputed evidence demonstrates that the boxes can protect and store the watches for a short period of time. *See* Def.’s SMF ¶ 4; Pl.’s Resp. SMF ¶ 4; Leavey Dep. 18:20–25, 22:16–25. As discussed *supra*, watch boxes classifiable under heading 4202 must be suitable for protective storage for years, not merely days, weeks, or months.

⁹ Citizen argues that Singh’s report is inadmissible for consideration on summary judgment under USCIT Rule 56(e) because it is unsworn and that certain paragraphs of the Defendant’s Response to Plaintiff’s Statement of Undisputed Facts are deemed admitted because they rely on the inadmissible report. Pl.’s Reply Br. 2–5. An unsworn statement submitted in support of a summary judgment motion does not meet the requirements of Federal Rule of Civil Procedure 56(e). *Adiches v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970). USCIT Rule 56(e) is identical to Federal Rule of Civil Procedure 56(e) in all relevant respects. Nevertheless, several courts have concluded that the deficiency of an unsworn expert report may be cured for consideration on summary judgment by a later affidavit or deposition reaffirming the report. *See DG&G, Inc. v. FlexSol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 826 (8th Cir. 2009) (citing cases). Here, Singh reaffirmed the opinions contained in his unsworn expert report in an April 2010 affidavit. Singh Aff. ¶¶ 11–12. Accordingly, the unsworn report is acceptable for summary judgment purposes. The court finds no prejudice to Citizen in considering the report, as Citizen had an opportunity to address Singh’s opinions during his September 2008 deposition, and Citizen responded to Singh’s opinions in its summary judgment papers.

3. The design and marketing of the merchandise

Although the evidence indicates that the cylindrical shape, the inclined interior, and the “velvety” feel of the flocked paper of the boxes enhance the display and marketing of Citizen’s watches, and a cylindrical box is more expensive to ship and store than a rectangular box, Citizen has shown that the watch boxes were primarily designed to be recyclable to enhance the marketing of Citizen’s watches as eco-friendly. *See* Def.’s SMF ¶ 25; Pl.’s Resp. SMF ¶ 25; Singh Aff. ¶¶ 16, 21–23; Singh Report 4–5; Zuckerman Decl. ¶ 5. Although the Government denies this, it has presented no evidence to the contrary. Def.’s Resp. SMF ¶ 21; *see* Pl.’s SMF ¶ 21. Rather, its expert testified that the boxes are fully recyclable and ultimately intended to be recycled. Singh Dep. 113:12–21, *available at* Pl.’s Reply Br. Ex. A. Fuller testified that in his experience, “recyclability is never a factor when designing a box intended for long-term use,” Fuller Decl. ¶ 7, and Singh agreed that it is difficult for a recyclable box to be truly durable, Singh Dep. 156:20–22, *available at* Pl.’s Reply Br. Ex. A. Although Customs has stated that actual use after purchase is irrelevant, HQ 966321, *available at* 2003 WL 23303771, at *3, items like the imported watch boxes that are primarily designed to be disposed through recycling after purchase and not to be reused long-term are not classifiable under heading 4202, *see* NY I81233 (May 7, 2002), *available at* 2002 WL 1602858 (classifying a jewelry gift box made of rigid but thin paperboard under heading 4819 rather than heading 4202 because it “is a type of disposable container typically included with a consumer’s jewelry purchase. . . . and is not well suited for long-term use”).

4. The expectation of jewelry retailers and ultimate purchasers that the boxes will survive repeated handling

The only evidence of the expectation of jewelry retailers regarding the imported watch boxes’ ability to survive repeated handling is Leavey’s testimony that Citizen’s watch boxes have the same durability as the shiny-coated square paper boxes with cotton inside that contain lower-end, less expensive merchandise and merely serve as packaging for a consumer to bring a watch home. Leavey Dep. 17:1–18:6, 18:12–15. Although the parties dispute the durability of the flocked paper and the ability of the boxes to withstand high humidity, the undisputed evidence, including the testimony of the Government’s expert, indicates that the watch boxes will suffer wear and tear through ordinary handling and are only suitable for limited

reuse of ten to fifty cycles of openings and closings.¹⁰ Def.'s SMF ¶¶ 12, 15; Pl.'s Resp. SMF ¶¶ 10–12, 15; Singh Dep. 113:12–20, 156:15–17, *available at* Pl.'s Reply Br. Ex. A; Fuller Decl. ¶ 5. As discussed *supra*, an item that can withstand only such limited repeated handling is not suitable for long-term use and is not classifiable under heading 4202. *See Jewelpak II*, 131 F. Supp. 2d at 102–04 (finding that jewelry presentation boxes that were capable of more than fifty openings and could be handled thousands of times or indefinitely were suitable for long-term use).

II. Heading 4819

Heading 4819, HTSUS provides for “packing containers, of paper[or] paperboard.” It “covers containers of various kinds and sizes generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value.” Explanatory Note 48.19(A), at 893. The undisputed evidence indicates that the imported watch boxes may be used for the packing, transport, storage, and sale of watches. *See* Leavey Dep. 19:2–22, 22:16–25; Singh Report 4–6. The Government has offered no evidence to support its denial of Citizen's assertion that the boxes can facilitate transportation and serve as fancy packaging. *See* Pl.'s SMF ¶ 19; Def.'s Resp. SMF ¶ 19. Rather, the Government's evidence demonstrates that the boxes are a somewhat inefficient form of packaging. Def.'s Resp. SMF ¶ 19. The parties agree that the boxes are of the kind that retailers generally provide to consumers to transport and carry their recently purchased watches out of the store. Pl.'s SMF ¶ 18; Def.'s Resp. SMF ¶ 18; Def.'s SMF ¶ 7; Pl.'s Resp. SMF ¶ 7. Accordingly, the boxes are classifiable under heading 4819.¹¹ Subheading 4819.50.40, HTSUS, which provides for “Other packing containers, including record sleeves: Other,” accurately describes the imported watch boxes.

¹⁰ Additionally, the Government agrees that the paper covering the boxes is susceptible to water damage and has not presented any evidence to counter Citizen's evidence that the edges of the paper covering of the boxes can lift and buckle with repeated handling, the boxes can be stained or dented, and the frames of the boxes may warp due to heat. *See* Pl.'s SMF ¶¶ 12–15; Def.'s Resp. SMF ¶¶ 12–15; Fuller Decl. ¶ 5.

¹¹ According to two European Community Binding Tariff Information (“BTI”) rulings, the British customs authority has classified Citizen's watch boxes under heading 4819, apparently because the boxes are uncoated and intended to be recycled. BTI GB 115445294 (May 17, 2006), *available at* Smithweiss Decl. Ex. F; BTI GB 115445196 (May 17, 2006), *available at* Smithweiss Decl. Ex. F. Although the court is not bound by those decisions, they may “be entitled to respectful consideration,” as promoting uniformity and predictability in international commerce is important. *Wilton Indus., Inc. v. United States*, 493 F. Supp. 2d 1294, 1317 n.32 (CIT 2007).

CONCLUSION

The proper classification of the imported merchandise, therefore, is under subheading 4819.50.40, HTSUS. The plaintiff's motion for summary judgment is GRANTED, and the defendant's cross-motion for summary judgment is DENIED.

Dated: This 18th day of August, 2010.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI

Chief Judge