SLIP OP. 03–117

BEFORE: RICHARD K. EATON, JUDGE

RESER'S FINE FOODS, INC., D/B/A SIDARI'S ITALIAN FOODS, PLAINTIFF, v. UNITED STATES, DEFENDANT.

COURT NO. 00–00021

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

Dated: September 5, 2003

Fitch, King and Caffentzis (*James Caffentzis*), for plaintiff Reser's Fine Foods, Inc., d/b/a Sidari's Italian Foods.

Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, United States Department of Justice; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office (*Mikki Graves Walser*); Michael W. Heydrich, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant United States.

OPINION

EATON, *Judge*: Before the court are cross-motions for summary judgment pursuant to USCIT R. 56. By its motion Reser's Fine Foods, Inc., d/b/a Sidari's Italian Foods ("Plaintiff") challenges the United States Customs Service's ("Customs")[1] classification of certain entries of merchandise as "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006 . . . Other vegetables and mixtures of vegetables . . . Artichokes," under subheading 2005.90.80 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1998) and subject to a tariff rate of 15.8 percent *ad valorum*. Plaintiff argues that the merchandise is properly classifiable under HTSUS subhead-

[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Reorganization Plan Modification for the Dep't of Homeland Security, H.R. Doc. 108–32, at 4 (2003).

ing 0711.90.60 as "Vegetables provisionally preserved (for example, by sulfur dioxide gas, in brine, in sulfur water or in other preservative solutions), but unsuitable in that state for immediate consumption . . . Other vegetables; mixtures of vegetables . . . Other vegetables; mixtures of vegetables," subject to a tariff rate of 9.1 percent *ad valorum*. By its cross-motion the United States ("Government"), on behalf of Customs, maintains that the merchandise is properly classifiable under HTSUS subheading 2005.90.80 and asks the court to deny Plaintiff's motion and dismiss this action. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000). Where jurisdiction is predicated on 28 U.S.C. § 1581(a), Customs's interpretation of an HTSUS tariff term, a question of law, is subject to *de novo* review. *See* 28 U.S.C. § 2640; *E.T. Horn Co. v. United States*, 27 C.I.T. ___ , ___ , Slip Op. 03–20 at 4 (Feb. 27, 2003) (quoting *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998)).

This court may resolve a classification issue by means of summary judgment. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." USCIT R. 56(c). Summary judgment of a classification issue "is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365 (citing *Nissho Iwai Am. Corp. v. United States* 143 F.3d 1470, 1472 (Fed. Cir. 1998); *IKO Indus., Ltd. v. United States*, 105 F.3d 624, 626–27 (Fed. Cir. 1997); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994)). Here, the parties are in agreement that: (1) "[t]he merchandise . . . was imported from Spain [and] consists of 88-1/5 ounces of quartered artichoke hearts in a solution of water and acetic acid (0.1%), salt (1.2%) and citric acid (0.6%) packaged in No. 10 cans. The pH of the solution in the imported cans is 3.97″; (2) "citric acid is used to enhance flavors, increase preservative effectiveness, retard discoloration and conserve energy by reducing heat-processing requirements in vegetable processing"; (3) "[i]n Spain, the merchandise . . . is packed in cans which are [then] subjected to a thermal process which expels air, [and] then [are] hermetically sealed and further heated for the purpose of rendering the product commercially sterile"; and (4) "[n]o lactic fermentation occurred prior to exportation from Spain." Parties' Joint Statement of Material Facts as to Which There Are No Genuine Issues to be Tried ¶¶6–9 ("Joint Statement"). The court finds that this action is not ripe for summary judgment as there are material facts in dispute as to whether the merchandise is: (1) "provisionally preserved" and (2) "unsuitable for immediate consumption." The court examines each in turn.

DISCUSSION

1. *Provisionally preserved*

Plaintiff argues that the merchandise is properly classifiable under Heading 0711 because it was "provisionally preserved." Specifically, Plaintiff argues that "[t]he merchandise before the Court consists of quartered artichokes in cans, exported from Spain, which have been provisionally preserved in a water, salt and citric acid solution." Pl.'s Mem. Supp. Mot. Summ. J. at 2 ("Pl.'s Mem."). Plaintiff further states that "[b]y definition a provisional solution is of a temporary nature. In the context of this dispute, the Customs Service did not find to the contrary." *Id.* at 9. Furthermore, Plaintiff states that "[Customs] did not dispute the fact that the artichokes were preserved. The subsequent Customs laboratory analysis . . . confirms the presence of a preservative solution." *Id.* at 10. In response, the Government argues that "[t]he imported artichokes are not classifiable in Heading 0711, HTSUS. . . . These artichokes have been permanently preserved inasmuch as they have been cooked, pasteurized and canned." Def.'s Mem. Opp'n to Pl.'s Mot. Summ. J. and Support Def.'s Cross-Mot. Cross-Mot. Summ. J at 5–6 ("Def.'s Mem."). While the Government agrees that the term "provisionally preserved" is not defined, *see id.* at 11, the Government disagrees that the merchandise was provisionally preserved.

Although the term "provisionally preserved" is not defined by statute or regulation, Customs has addressed the meaning of this term as used in Heading 0711 by means of a headquarters ruling letter ("HRL"). Customs stated that

> [l]egal Note 1(a) of Chapter 20, HTSUSA, specifies, as hereto pertinent, that vegetables prepared or preserved by the processing specified in Chapter 7, HTSUSA, are not covered by the provisions of Chapter 20. We reviewed the various provisions of Chapter 7 as to the preparation or preservation procedures therein. Those provisions generally describe vegetables which are fresh, chilled, steamed or dried. . . .
>
> Provisional preservation is a means of preserving fruits or vegetables and preventing undesirable deterioration, for a short time period. It is employed when fruits or vegetables are awaiting further processing, usually during transportation to, or in the storage areas of, processing facilities. In order to prevent spoilage, a variety of methods are employed, among them immersion in high-salt brines, application of chemical preservations, etc. Regardless of the method used, in order to prevent microbiological spoilage, the preservative substance is necessarily applied in a quantity that would render the fruit or vegetable unpalatable. When the product is brought to the processing plant, the provisional preservative substance is removed

> (usually by washing with water), and final processing, preservation, and packaging is completed.
>
> Provisional preservation may be utilized for fruits or vegetables at various stages. Freshly harvested products may be provisionally preserved to immediately arrest deterioration. For example, a processing plant may not have the capacity to handle a large crop in a short harvest season, and rather than lose product, provisional preservation is used to "hold" the fruit or vegetable until it can be used. On the other hand . . . provisional preservation may be used to halt microbiological fermentation after it has reached a desired level. At this point, the fruit or vegetable is placed in a "holding" condition as above. In either case, the fruit or vegetable has been provisionally preserved.
>
> In considering whether these vegetables would be considered as provisionally preserved under the Harmonized System we consulted the Explanatory Notes (EN) to the Harmonized System which represent the opinion of the tariff classification experts at the international level. The relative explanatory note (EN 70.11), specifies that vegetables which have been treated solely to ensure their provisionally [sic] preservation during transport or storage prior to use are included in Heading 0711 of the Harmonized Tariff System provided they remain unsuitable for immediate consumption in that state. The EN excludes items which, in addition to having been provisionally preserved in brine, have been specially treated (e.g., by soda solution, by lactic fermentation).

HRL 952738 (Jan. 27, 1993); *see also* HRL 959361 (Apr. 17, 1997) (citing HRL 952738) ("In general, vegetables are provisionally preserved by being placed into a medium or subjected to a treatment that, for a limited time, halts or significantly reduces undesirable microbiological deterioration. The purpose of provisional preservation is to prevent the loss of the product while in transit or awaiting processing."); HRL 956850 (Mar. 22, 1996) (citing HRL 952738). Indeed, both parties agree that Customs's interpretation of the term "provisionally prepared" refers to a temporary condition. *See* Def.'s Mem. at 13 (quoting HRL 952738); Pl.'s Mem. Opp'n Def.'s Cross-Mot. Summ. J. at 4 (citing HRL 952738 and stating "Customs Headquarters ruling . . . appears to support the position taken by plaintiff on the meaning of 'provisional preservation.' "). Thus, all sources and parties are in agreement that the term "provisionally preserved" refers to a type of preservation that is temporary in nature.

Whether or not the merchandise has been "temporarily" preserved is a genuine issue of material fact in dispute. Specifically, while the parties agree that the merchandise has been rendered "commercially sterile," *see* Joint Statement ¶8, they nowhere address the temporal

state of preservation of the merchandise.[2] In other words, the court must know how long the merchandise would be preserved were it to remain canned.

2. *Unsuitable for immediate consumption*

Plaintiff also contends that the merchandise is properly classifiable under Heading 0711 in part because it is "unsuitable for immediate consumption." Plaintiff states that

> [t]he imported artichokes are used by plaintiff as an ingredient in its vegetable salads and appetizers. . . . The imported artichokes cannot be used in the manufacture of plaintiff's salads until they are first processed in its Cleveland production facility. The reason for this is that the preservative packing solution imparts a harsh and bitter, disagreeable taste to the artichokes, thereby rendering them unsuitable for their intended use as an ingredient in the finished product. In order to be rendered suitable for use, the excessive preservative solution must be removed.

Pl.'s Mem. at 6 (citing Aff. of Mr. Martin Goellnitz, Pl.'s Mem. Attach. 1 ("Goellnitz Aff."); Aff. of Mr. James O'Malley, Pl.'s Mem. Attach. 2 ("O'Malley Aff.")). Plaintiff then describes the processing the merchandise undergoes:

> Processing begins with the placement of the cans of the vegetables on the can opener conveyor line. The can opener removes the lid, turns the can upside down, thereby causing the contents to fall unto the conveyor belt. At the same time, the preservative solution is drained from the artichokes. The conveyor line moves the artichokes towards a mixing station. As the product moves on the conveyor belt, it passes under a series of eleven high-powered jets which spray water in a fan shape over the product . . . to remove preservative solution absorbed by the artichokes.

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[2] Although the parties nowhere address the definition of the term "commercially sterile," as stated by one authority: "canned foods are 'commercially sterile,' which means that they are safe from a public health standpoint and the few organisms that do survive the heat treatment normally will not multiply and spoil the food over a period of 2 yrs or more." 2 ARNOLD H. JOHNSON & MARTIN S. PETERSON, ENCYCLOPEDIA OF FOOD TECHNOLOGY 442 (1974); *see* 2 MILTON E. PARKER *et al.*, ELEMENTS OF FOOD ENGINEERING 266 (1954) (citing 3 C.O. BALL, FOOD RESEARCH 13–52 (1938)) ("The term 'commercially sterilizing' is used in the sense . . . that 'canned food may contain viable spores of a type . . . which will not develop under conditions that are normally maintained during storage of the food'. For, to sterilize in the sense of the absolute destruction of all living organisms, it would probably be necessary to overcook most foods to such an extent that they would be unsuitable for sale."). While it appears that, with reference to these definitions, merchandise that has been rendered "commercially sterile" would be in a more permanent state of preservation than that contemplated by Heading 0711, absent further factual development on this matter the court will not second-guess the parties' intent with respect to the meaning of this term.

> After the artichokes have been cleansed, they fall from the conveyor belt into a mixing sink. Any remaining solution drains through a grating located in the middle of the mixing sink. . . . At this point, all of the excess preservative solution has been removed from the artichokes and they are in condition ready for use as an ingredient in the final product.
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> Once all of the excess preservative solution has been removed, the artichokes are mixed with other ingredients, peppers. To this, plaintiff adds corn oil, lemon juice, water, garlic, parsley, oregano, potassium sorbate and sodium benzoate. In addition to serving as a flavoring agent, along with the oils and herbs, the lemon juice acts as an anti-oxidant to prevent discoloration of the artichokes and increases the shelf life of the salad by increasing its acidity.

Pl.'s Mem. at 6–7; *see* Goellnitz Aff. ¶¶3–4, 7–8; O'Malley Aff. ¶¶5–8, 10–11. Plaintiff concludes that

> it has demonstrated that the imported artichokes have unacceptable levels of preservative solution which renders them unfit for their intended use. . . . [P]laintiff has shown that the excess preservative solution must be removed by processing the artichokes after importation. This intermediate processing is a necessary step in making the artichokes suitable for their intended use as an ingredient in artichoke salads.

Pl.'s Mem. at 7–8. The Government counters that Plaintiff admits the merchandise is edible in its imported condition, but that it is only "unsuitable for immediate consumption" as an ingredient in Plaintiff's salads. *See* Def.'s Mem. at 18 (citing Goellnitz Aff. ¶9).[3]

The court finds that whether the merchandise is "unsuitable for immediate consumption" to be a genuine issue of material fact in dispute. Specifically, while Plaintiff argues that the merchandise is unsuitable for immediate consumption *in its salads* and is only made suitable for that purpose through further processing, Plaintiff makes no argument that the merchandise is not generally suitable for immediate consumption. Indeed, although it seems to acknowledge that the merchandise has a "disagreeable taste" prior to processing, the Government appears to argue that the merchandise is suitable for immediate consumption in some situations. As such a material issue of fact remains with respect to this issue.[4]

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[3] By this affidavit Plaintiffs state that "[t]he artichokes are edible in their imported condition, but have a disagreeable taste which prevents them from being put to their intended use without further processing by Sidari's."

[4] Plaintiff also states that "[u]pon arrival in this country, the artichokes are stored in our dry warehouse. The average time that the cans of artichokes remained in warehouse was one month." Goellnitz Aff. ¶4. The court understands Plaintiff's point to be that the mer-

CONCLUSION

Although the parties are in agreement that there are no material facts in dispute in this matter, the court does not concur. By the facts now before the court it is not possible to ascertain whether the merchandise is "provisionally preserved" or "unsuitable for immediate consumption" within the meaning of HTSUS Heading 0711. Thus, summary judgment is not appropriate for either party pursuant to USCIT R. 56(c). Therefore, the court denies both Plaintiff's motion for summary judgment and the Government's cross-motion for the same.

Richard K. Eaton

Dated: September 5, 2003
New York, New York

Slip Op. 03–118

USINOR INDUSTEEL, S.A., DUFERCO CLABECQ, S.A., AG der DILLINGER HÜTTENWERKE, SALZGITTER AG STAHL und TECHNOLOGIE, and THYSSEN KRUPP STAHL AG, PLAINTIFFS, v. THE UNITED STATES, DEFENDANT, and BETHLEHEM STEEL CORPORATION and U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS.

Consolidated Court No. 01–00006

Public Version

[ITC Second Remand Determination sustained.]

Dated: September 8, 2003

Barnes, Richardson, & Colburn (Gunter von Conrad and Stephen W. Brophy) and DeKiefer and Horgan (James Kevin Horgan) for plaintiff Usinor Industeel, S.A.

White and Case LLP (Walter J. Spak, Lyle B. Vander Schaaf, Frank H. Morgan, Joseph H. Heckendorn and Corey Norton) for plaintiff Duferco Clabecq, S.A.

DeKieffer and Horgan (Marc E. Montalbine and Merritt R. Blakeslee) for plaintiffs AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and Thyssen Krupp Stahl AG.

Lyn M. Schlitt, General Counsel, James M. Lyons, Deputy General Counsel, United States International Trade Commission (Rhonda M. Hughes and Michael Diehl) for defendant.

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chandise was only "temporarily" stored in cans at its warehouse. While this may be true, there is no indication of how long the merchandise was *actually* in the cans, i.e., including time spent at the manufacturer's warehouse, during transport from Spain, and at any interim stopping points along the way.

Dewey Ballantine LLP (Alan Wm. Wolff, Kevin M. Dempsey and Rory F. Quirk) and Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, and James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corporation.

OPINION

RESTANI, Judge: This matter is before the court following a series of decisions regarding the final determination of the United States International Trade Commission ("Commission" or "ITC") in its five-year sunset review of antidumping and countervailing duty orders on cut-to-length carbon steel plate ("CTL plate") in Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom, 65 Fed. Reg. 75,301 (Int'l Trade Comm'n 2000) [hereinafter Final Determination]. See, e.g., Usinor Industeel, S.A. v. United States, No. 01–00006, Slip Op. 02–39 (Ct. Int'l Trade Apr. 29, 2002) ("Usinor I") (finding, inter alia, that the ITC had not applied the proper "likelihood of material injury" standard under 19 U.S.C. § 1675a(a) in conducting its sunset review analysis and remanding for further explanation regarding changes in the European Union ("EU")); Usinor Industeel, S.A. v. United States, No. 01–00006, Slip Op. 02–75 (Ct. Int'l Trade July 30, 2002) ("Usinor II") (denying the ITC's motion to certify the "likelihood of material injury" issue for interlocutory appeal). Familiarity with those decisions is presumed.

In Usinor Industeel, S.A. v. United States, No. 01–00006, Slip Op. 02–152 (Ct. Int'l Trade Dec. 20, 2002) ("Usinor III"), the court largely sustained the Commission's remand determination; but, in the light of Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) (excluding floor plate from the scope of this investigation), the court remanded the matter to the Commission to "recalculate its findings regarding capacity, production, and export orientation without consideration of floor plate data." Usinor III, Slip Op. 02–152 at 9. The essential issues on remand were (1) whether, in view of Duferco, Belgian imports should continue to be cumulated with other imports from other subject countries pursuant to 19 U.S.C. § 1675a(a)(7); and (2) whether the absence of floor plate has an impact on the Commission's overall analysis after cumulation.

In its second remand determination, the Commission concluded again, that despite the absence of floor plate data, subject imports from Belgium were not likely to have no discernible adverse impact on the domestic industry if the orders were revoked and again elected to include Belgium in its cumulated analysis. As to its overall determination, the Commission determined that the exclusion of floor plate from the scope did not change the record significantly and adopted its findings from the original Final Determination and First Remand Determination. Plaintiffs Usinor Industeel, S.A. ("Usinor")

and Duferco Clabecq, S.A. ("Duferco") contest the Commission's March 12, 2003 Second Remand Determination.

DISCUSSION

In the context of sunset review, the ITC must "determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1) (2003).[1] In determining the likelihood of continuation or recurrence of material injury "the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries . . . if such imports would be likely to compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1675a(a)(7) (2003). The Commission may not cumulate if it finds that imports from a particular country "are likely to have no discernible adverse impact on the domestic industry." Id.[2]

In both the initial Final Determination and First Remand Determination, the Commission cumulated the likely volume and effect of subject imports from eleven (11) countries, including Belgium.[3] In the interim, the Court of Appeals for the Federal Circuit ("CAFC") found that Commerce improperly interpreted its 1993 final scope orders to include floor plate. Duferco Steel, 296 F.3d at 1098. It is undisputed that the ITC treated floor plate as subject merchandise in its Final Determination and First Remand Determination. Staff Report at Plate–II–9. Because [ ] of Belgium's subject imports during the period of review ("POR") were floor plate, the court again remanded the matter to the ITC to review both its decision to cumulate as well as its larger likelihood of material injury determination — without consideration of floor plate. are met."

Upon remand, the Commission reopened the administrative record, requested specific information from the Belgian producers pertaining to CTL plate exclusive of floor plate, and permitted the

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[1] The full text of 19 U.S.C. § 1675a(a)(7) reads:

> For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

[2] Plaintiffs argue the statute permits cumulation "only when certain conditions are met." Duferco Br. at 2. A better summary description of the statute would be that the Commission has discretion to cumulate unless certain limited conditions occur.

[3] The ITC did not cumulate subject imports from Canada because it found significant differences in conditions of competition with respect to Canadian CTL plate. Final Determination at 22–23; First Remand Determination at 15. The ITC's decision to exclude Canadian subject imports is not challenged here.

parties to comment on the data. The court notes from the outset that the Commission concedes that there were [ ] U.S. imports of subject plate from Belgium during the POR. Second Remand Determination at 3. Nevertheless, the Commission concluded that the removal of floor plate data did not "change the overall body of data significantly, as floor plate accounted for a very small share of overall Belgian plate production and shipments" during the original investigation and relevant period of review. Id. As such, the Commission again cumulated subject imports from eleven (11) countries, including Belgium, and made an affirmative likely injury determination in this review. Plaintiffs challenge both.

I. Cumulation

A. No Discernible Adverse Impact

In challenging the Commission's decision to cumulate subject imports from Belgium with those from other countries, Plaintiffs first dispute the Commission's determination that it cannot find that there would likely be no discernible adverse impact upon revocation of the antidumping and countervailing duty orders.[4] As discussed in Usinor I, there is no statutory provision enumerating the factors to be considered in determining whether subject imports from a particular country are likely to have no discernible impact. Usinor I, Slip Op. 02–39 at 9–10. The Statement of Administrative Action ("SAA") accompanying H.R.Rep. No. 103–826(I), at 887, reprinted in 1994 U.S.C.C.A.N. 4040, 4212, issued in connection with the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), is equally silent. In the absence of specific guidance from Congress, the Commission generally considers "likely volume of the subject imports and likely impact of those imports on the domestic industry within a reasonably foreseeable time." Usinor II, Slip Op. 02–75 at 5 (quoting Final Determination at 22). The Commission considers these factors in the context of the prevalent conditions of competition.[5]

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[4] The court notes that while Plaintiffs again contend that the Commission has not applied the proper likelihood of material injury standard in this case, what Plaintiffs actually argue is that there is insufficient evidence to support the Commission's findings under the correct standard. At this point, all parties are clear on the standard and the court will not again address the matter.

[5] With respect to the conditions of competition relevant here, the Commission found that (1) subject imports from Belgium would be substitutable for, and competitive with, domestically produced plate; (2) CTL plate is a commodity product that competes primarily on the basis of price; and (3) there has been a consolidation in the number of steel service centers, which resulted in their gaining increased pricing leverage, thus increasing the likelihood they would make large import purchases of subject plate in the absence of discipline. The Commission concluded that, under these conditions, even a modest volume of subject imports from Belgium would have a discernible adverse impact. Second Remand Determination.

Throughout their objections to the Second Remand Determination, Plaintiffs repeatedly challenge the Commission's findings regarding likely volume. Because the Commission cannot cumulate if it finds there likely will be no discernible adverse impact and because the Commission has looked at likely volume, Plaintiffs have mistakenly concluded that the Commission must provide substantial evidence to prove that significant volume is likely. See Duferco Br. at 7. Put another way, Plaintiffs seem to argue that the same evidence necessary to support an overall affirmative likelihood of material injury finding is required in order to cumulate. The government argues that it need not show significant volume because "even modest volumes can result in a discernible adverse impact given the weakened state of the domestic industry." Gov't Br. at 17.[6] The court agrees.

An adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury.[7] The different standards reflect the nature of the cumulation analysis. Certain imports are to be cumulated to assess causation of material injury, but the no "discernible impact" provision provides a safe harbor of sorts for certain imports viewed in isolation. See, e.g., Neenah Foundry Co. v. United States, 155 F. Supp. 2d 766, 772–73 (Ct. Int'l Trade 2001). Plaintiffs' theory would defeat the purpose of cumulation, i.e., to guard against the "hammering" effect of imports which, in isolation, do not cause material injury. Id. at 773. As such, the substantial evidence necessary to support an affirmative material injury determination is greater than that necessary to find there will not likely be no discernible adverse impact from imports of a particular country. Consequently, Plaintiffs' argument that the Commission has failed to provide substantial evidence of likely "significant" volume is not determinative as the Commission is not required to make such a showing of a particular level of imports, e.g., the level needed for a material injury analysis.[8]

Nevertheless, the Commission has looked at likely volume as it relates to "no discernible adverse impact" and a review of its findings is required. As discussed, while the Commission need not show a particular likely volume in order to cumulate, even the Commission concedes that "the record must indicate some appreciable volume of

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[6] Plaintiffs do not contest that the domestic industry was in a weakened state.

[7] "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

[8] The cumulation provision gives the Commission discretion to consider the effects of "imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury." Neenah Foundry, 155 F. Supp. 2d at 771 (quoting H.R. Rep. No. 98–725, p.37 (1984)). "[C]ompetition from unfairly traded imports from several countries simultaneously often has a hammering effect on the domestic industry [that] may . . . not be adequately addressed if the impact of the imports are analyzed separately on the basis of their country of origin." H.R. Rep. No. 100–40, part 1, at 130 (1987).

subject imports in order for the Commission to conclude that subject imports are not likely to have no discernible adverse impact on the domestic industry." Gov't Br. at 11. In evaluating the likely volume of imports of subject plate in the larger sunset review, the Commission considers "any likely increase in production capacity or existing unused production capacity" as well as "the potential for product-shifting." 19 U.S.C. § 1675a(a)(2)(A), (D). In assessing the likely volume here, the Commission considered the size and capacity of the Belgian plate industry including its actual production of subject plate as well as similar plate products, the Belgian industry's export orientation and ability to redirect and increase production, and the weakened state of the U.S. industry.

1. **Size and Capacity of the Belgian Producers**

Although the Commission acknowledged that there were [ ] to the U.S. during the POR, the Commission found that the Belgian producers nonetheless remain heavily dependent on subject products.[9] The Commission found that the plate capacity of the Belgian industry in 1999, the last full year of the POR, was significant compared to U.S. apparent consumption in the same year.[10] In addition, the Commission noted that Belgian capacity utilization fell steadily over the POR.[11] The Commission found that the unused capacity in 1999 was substantial.[12] The Commission determined that the Belgian plate industry can shift production in both directions between subject and non-subject plate and that the Belgian industry had allocated substantial capacity to plate products that are similar to subject plate.[13] Based upon the size of the Belgian industry and its capacity to produce subject and non-subject plate, the Commission

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[9] The Commission conceded that there were [ ] from Belgium during the POR but pointed out that subject plate accounted for roughly [ ] percent of Belgian production since 1997. Second Remand Determination at 3. The Commission found that floor plate accounted for only [ ] percent of Belgium's total production of all CTL floor plate in 1998, [ ] percent in 1999, and [ ] percent in the first quarter of 2000. Staff Report at II– 9.

[10] Belgian plate capacity in 1999 was [ ] short tons, or [ ] percent of the United States apparent consumption ([ ]). In 1999, Belgian capacity to produce subject plate was [ ] short tons, [ ] percent of apparent U.S. consumption. Second Remand Determination at 6 & n.15.

[11] Belgian capacity utilization fell from [ ] percent in 1997, to [ ] percent in 1998, to [ ] percent in 1999. Staff Report at Table II–4. The Commission acknowledges that, in the first quarter of 2000, the Belgian operated at an unusual [ ] percent capacity utilization but found that this anomaly was due to [ ] and elected to rely more heavily on the yearly data. Second Remand Determination at 6–7. The court finds no error in this regard.

[12] In 1999, unused capacity to produce subject plate was more than [ ] short tons. Id. at 6.

[13] In 1999, the Belgian industry allocated [ ] short tons of capacity to similar but non-subject plate products. Id. at 7.

found there would likely be sufficient volumes of subject imports to negatively impact the weakened domestic industry.

In response, Duferco argues that it cannot shift production as easily as the Commission suggests. Duferco argues that, because of a large standing contract for the production of [ ][14] and an increased reliance upon production of high-end niche products,[15] they are unable to make sudden shifts to produce subject plate in significant quantities. Plaintiffs also argue that the companies investigated during the period of review are essentially different companies and operate in different ways from those investigated during the original POI.[16] Plaintiffs point out that Belgian production[17] and overall capacity[18] have decreased since the original investigation. Duferco alleges that the decrease in production is a result of the restructuring of the businesses and decreased employment levels.[19] Despite Plaintiffs argument to the contrary, the Commission considered this data "but remained unpersuaded" because "Belgian capacity and the nature of plate production indicate that the Belgian industry has both the ability and the incentive to increase exports of subject plate to the United States." Second Remand Determination at 6.

With regard to the increased focus on [ ], the Commission found that "a significant percentage" of the plate pro-

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[14] Duferco argues that there would be substantial obstacles to shifting production to export subject plate to the United States. Duferco contends that it has [ ] to a related company, Duferco La Louviere. See Duferco Response to Foreign Producer Questionnaire at II–8 and II–9. Under this contract, Duferco is to sell [ ] of slab per year to Duferco La Louviere. See Appendix at 17. The contract is of unlimited duration and requires six-months notice to terminate. Duferco cites this [ ] to show that Duferco intends to focus its sales on the EU. Duferco concedes, however that about [ ] of its capacity is not committed to long term contracts. Some contracts (usually [ ] in duration) may expire at any time. Duferco Br.

[15] According to Duferco, its management has determined that [ ] See Staff Report at Plate–IV–2; see also Duferco Response to Foreign Producer Questionnaire at II–8 and II–9. Duferco argues that it has decided to [ ]. Id.

[16] In 1997, Duferco acquired the assets of the former Forges de Clabecq operations from the Belgian government. Forges de Clabecq accounted for the vast majority of U.S. imports of Belgian plate in the 1993 investigation. Duferco argues that, since that acquisition, Duferco management has operated its mill in a substantially different manner than previous management. As such, Duferco claims not to have the business records of the old business and thus no information prior to 1998. Usinor Industeel, acquired Fabrique de Fer, since the original investigation. Staff Report at Plate–IV–1.

[17] Belgian production of subject plate decreased from [ ] short tons in 1992 to [ ] short tons in 1999, a [ ] percent reduction. According to plaintiffs, Belgian capacity to produce subject plate decreased from [ ] short tons during the POI to [ ] during the POR—a [ ] percent drop. Second Remand Determination at 6 & n.16.

[18] Belgian capacity in 1997 was [ ], [ ] in 1998, and [ ] in 1999. Staff Report at Table II–4.

[19] Duferco claims that employment levels have decreased by [ ] percent. Duferco Br. at 12.

duced by Duferco (the larger of the two Belgian producers) consists of [ ]. Second Remand Determination at 10.[20] With regard to reduced capacity, as discussed, the Commission found that Belgian capacity to produce subject plate was significant in 1999, that capacity utilization "fell steadily" from 1997 to 1999, and that excess capacity to produce subject plate was substantial in 1999. Id. at 6. With regard to the ability to shift products, the Commission found that in addition to the reported capacity allocated to the production of subject plate and floor plate, the Belgian producers allocated an additional substantial capacity[21] in 1999 to the production of cut-to-length alloy steel plate, which could be shifted to the production of subject plate. Id. at 7. As to Plaintiffs' argument that Belgian producers have no incentive to sell to the U.S., the Commission points to Plaintiffs' sales of microalloy CTL plate[22] and now excluded floor plate[23] to the United States. Id. at 9. The court finds that the Commission has properly considered Plaintiffs' claims and presented sufficient evidence to support its findings.

2. Export Orientation and Interest in the U.S. Market

Plaintiffs also challenge the Commission's finding that the CTL industry is export oriented. In the original POI, the Belgian CTL plate industry exported roughly the same percentage of subject plate as it did during the POR.[24] In the original POI, Belgian producers shipped more subject plate to the U.S. than to their domestic market.[25] As such, it makes some sense that export shipments of subject plate may rise to similar levels. Plaintiffs argue that changes in their business strategy to emphasize intra-EU sales would prevent future imports to the U.S.[26] The court has already found that the Commission has shown sufficient support to suggest future U.S. imports despite changes in the EU or sales strategies based on them.

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[20] The Commission noted that [ ] Second Remand Determination at 10.

[21] [ ] tons. Id. at 7.

[22] [ ] short tons shipped to the U.S. between 1997 and 1999. Id. at 9.

[23] [ ] short tons shipped to the U.S. between January 1998 and March 2000. Id.

[24] Belgian producers exported [ ] percent of its total plate shipments in 1992 and [ ] percent of total shipments of CTL (excluding floor plate) in 1999. Id. at 8.

[25] In 1992, [ ] percent of total Belgian shipments of plate were exported to the U.S. while [ ] percent was shipped domestically. Between January 1998 and March 2000, Belgium shipped [ ] short tons of floor plate to the U.S., or [ ] percent of its total shipments. Id. at 8–9.

[26] Plaintiffs spend much time explaining how they have shifted sales to the EU and why it is likely that they will continue to ship subject plate to the EU. The court has largely addressed this issue in Usinor III. While there is support for Plaintiffs' position, there is also support for the Commission's and the court will not revisit the issue.

Nevertheless, in its Second Remand Determination, the Commission acknowledged that much of Belgium's exports are to the EU,[27] but found that the Belgian industry continues to show an interest in exporting similar products, such as microalloyed plates and floor plate, to the U.S.[28]

The presence or level of subject imports during the POR, while important, is not determinative because the imposition of trade discipline "is expected to, and often does, have a significant restraining effect on the volume of subject imports." SAA, H.R. Doc. No. 103–316, vol. 1 at 883–884 (1994). The court finds that the Commission has presented sufficient evidence to support its finding that the Belgian plate industry is export oriented and has an interest in exporting its products to the United States. Overall, the court finds that the Commission has presented sufficient evidence to show that a sizeable Belgian plate industry, with substantial excess capacity to produce subject and non-subject plate products, is likely to export some subject plate to the United States if the orders are revoked and that, because of the undisputed weakened domestic industry, even modest imports would have a discernible adverse impact. As such, the court finds no error with the Commission's no discernible impact finding.

B. Competition Overlap

As discussed, in order to cumulate, the Commission must find that Belgian CTL plate is "likely to compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1675a(a)(7). In Usinor I, the court found that the Commission provided sufficient support for its finding that competition overlap existed. In light of Duferco, the court ordered the Commission to review its findings. The four factors considered are: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. On remand, the Commission did not alter its findings as to competition overlap

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[27] Only [ ] percent of Duferco's CTL plate is shipped outside of the EU. Id. at 8.

[28] Microalloyed CTL is a non-subject product, but is considered by the Commission to be similar to subject product. The Commission alleges that the production of Microalloyed CTL may be easily shifted to subject product. Between 1997 and 1999, Belgian producers shipped [ ] short tons of microalloyed cut-to-length plate to the U.S., which accounted for [ ] percent of total Belgian shipments during that period. Id. at 9.

because it found that floor plate made up a very small share of Belgian production[29] and thus the record did not substantially change.

Plaintiffs argue that, the Commission's findings on fungibility, geographic overlap, etc., are irrelevant without a showing of likely volume. Plaintiffs again argue that there is no evidence that Belgian producers will likely [ ] standard subject plate to the United States.[30] As discussed, Duferco argues that there would be substantial obstacles to shifting production to export subject plate to the United States.[31] This is essentially the same argument Duferco made as to the Commission's no discernible impact finding. As discussed, the court found support for the Commission's findings of sufficient volume to show a likely discernible adverse impact. Aside from Plaintiffs' general argument of irrelevance, Plaintiffs specifically challenge only the Commission's findings on simultaneous market presence and geographic overlap.

In Usinor I, the court found that the "Commission provided sufficient support for its findings" of geographic overlap and simultaneous presence in the U.S. market. Usinor I, Slip Op. 02–39 at 16. Plaintiffs argue that, because the Commission relied upon data showing [ ] during the POR, the Commission must revisit that issue. Again, Plaintiffs' argument relates back to its overall claim that the Commission has failed to show evidence of sufficient likely imports. The court has ruled otherwise. In the Second Remand Determination, the Commission found that "[i]n light of the importance of distributors/steel service centers that are dispersed throughout the United States, it is likely that subject imports from Belgium would be simultaneously present in the U.S. market as a whole and in the same geographical markets as other subject imports and the domestic like product." Second Remand Determination at 18–19. The Commission found that the exclusion of floor plate has no effect on the importance of these distribution methods. The court agrees and finds that the Commission has presented substantial evidence to support its competition overlap finding. As such, the court finds no error with the Commission's decision to cumulate subject imports from Belgium.

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[29] During the POI, floor plate accounted for only [ ] percent of subject imports from Belgium in 1990, [ ] percent in 1991, and zero percent in 1992. Staff Report at III–1. During the POR floor plate accounted for [ ] percent of the Belgian industry's total production in 1998, [ ] percent of its production in 1999, and [ ] percent of its production in the first quarter of 2000. Second Remand Determination at 10; Staff Report at II–9.

[30] As discussed, Duferco argues that it exports to the United States [ ]. See discussion supra n.15.

[31] See discussion supra n.14.

II. Likelihood of Material Injury Determination

Plaintiffs have not substantively addressed whether the absence of floor plate alters the Commission's over-all likelihood of material injury determination; rather Plaintiffs generally challenge the Commission's application of the standard, which the court has addressed. Because the absence of floor plate does not substantially change the data as to imports from Belgium, much less the cumulated data, the court finds no error with the Commission's affirmative likelihood of material injury finding.

CONCLUSION

For the foregoing reasons, the court finds that the Commission has presented substantial evidence of the size of the Belgian industry and its capacity to produce subject and non-subject plate products as well as the Belgian industry's interest in exporting subject plate to the United States. As such, the court finds that the Commission's finding that, upon revocation of the applicable antidumping and countervailing duty orders, subject imports from Belgium are not likely to have no discernible adverse impact on the domestic industry is supported by substantial evidence and in accordance with law. In addition, the court finds no error with the Commission's competition overlap analysis and that Plaintiffs remaining arguments, all of which are nearly identical to its "no discernible adverse impact" argument, are without merit. Accordingly, the court sustains the Second Remand Determination.

Jane A. Restani
JUDGE

Dated: New York, New York
This 8th day of September, 2003

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE .
C03/33 7/8/03 Barzilay, J.	Cymbolic Sciences Ltd.	01–00014	CA9017.20.80 or CA9017.20.90 0.5%	9006.10.00 1.2% or at the NAFTA duty rate of 0.3%, if eligible under NAFTA 9006.59.40 4% or at the NAFTA duty rate of 0.4%, if eligible under NAFTA 9010.50.60 Free of duty	Agreed statement of facts	Blaine Various Photoplotters
C03/34 8/18/03 Musgrave, J.	Ganes Chemicals Inc.	01–01041 03–00006 03–00345	3824.90.28 1.8¢/kg + 10% or 1.5¢/kg + 9.3% or 1.1¢/kg + 8.6%	K2922.19.70 Free of duty	Agreed statement of facts	Not stated D-Oxyphene base in toluene
C03/35 8/20/03 Musgrave, J.	Archer Worldwide, Inc.	00–04–00187	4820.10.20 2.4% 9608.10.0000 for "Checkbook/ Organizer" 5.4% + 0.7¢ per piece for pen	4820.10.40 Free of duty	Agreed statement of facts	Not stated "Checkbook/Organizer" with pen
C03/36 8/25/03 Musgrave, J.	Imperial Toy Corp.	02–00293	3926.40.00 5.3% 3926.90.98 5.3% 3926.90.40 2.8%	9503.70.00 Free of duty 9503.90.00 Free of duty for style no. 7434	Agreed statement of facts	Not stated Nail kits
C03/37 8/26/03 Restani, J.	Imperial Toy Corp.	98–09–02899	3926.40.00 5.3% 3926.90.98 5.3% 3926.90.40 2.8%	9503.70.00 Free of duty 9503.90.00 Free of duty for jump ropes	Agreed statement of facts	Not stated Nail kits & jump ropes

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE .
C03/38 8/26/03 Restani, J.	Imperial Toy Corp.	99–4–00189	3926.40.00 5.3% 3926.90.98 5.3% 3926.90.40 2.8% 9506.91.00 4.6% for Jump ropes	9503.70.00 Free of duty 9503.90.00 Free of duty for Jump ropes	Agreed statement of facts	Not stated Nail kits & Jump ropes
C03/39 8/26/03 Restani, J.	Imperial Toy Corp.	00–10–00505	3926.40.00 5.3% 3926.90.98 5.3% 3926.90.40 2.8%	9503.70.00 Free of duty 9503.90.00 Free of duty	Agreed statement of facts	Not stated Nail kits
C03/40 8/26/03 Restani, J.	Imperial Toy Corp.	01–00552	3926.40.00 5.3% 3926.90.98 5.3% 3926.90.40 2.8%	9503.70.00 Free of duty 9503.90.00 Free of duty	Agreed statement of facts	Not stated Nail kits

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY & MERCHANDISE .
V03/4 7/8/03 Barzilay, J.	Fabil Mfg. Co.	00–02–00085	Transaction value	With an allowance for defects pursuant to 19 CFR 158.12, at fifty percent (50%) of the entered value	Agreed statement of facts	New York Coca-cola jackets
V03/05 8/25/03 Musgrave, J.	La Peria Fashions, Inc.	02–00554	Transaction value	Invoice price actually paid by LPF to the exporter, Gruppo La Perla, S.p.A. of Italy, a related company	Agreed statement of facts	Newark New York Various articles of apparel

ERRATA for Slip Op. 03–67

tiff's Response, p. 2, n. 3 ("the Government withdraws its jurisdictional objections previously advanced").

As required by Rule 56, plaintiff's motion for summary judgment is accompanied by a statement of the material facts as to which it contends there is no genuine issue to be tried. Included therein are the following averments:

4. The imported merchandise consists of Menadione Sodium Bisulfite (hereinafter "MSB"), Menodione Sodium Bisulfite Complex (hereinafter "MSBC"), Menadione Dimethylpyrimidinol Bisulfite (hereinafter "MPB") and Menadione Nicotinamide Bilsulfite (hereinafter "MNB")* * * *

5. The chemical structure of naturally occurring Vitamin K_1 phylloquinone is 2-methyl-3-phytyl-1, 4-naphthoquinone* * * *

6. The chemical structure of naturally occurring Vitamin K_2 menaquinone is 2-methyl-3-all-trans-polyprenyl-1, 4-naphthoquinone* * * *

7. Vitamin K_1 and vitamin K_2 are vitamins for purposes of the HTSUS and are classified under heading 2936, HTSUS* * * *

* * * * * * *

11. When MSB, MSBC, MPB or MNB is ingested, the menadione in these products is converted into a form of vitamin K_2, specifically vitamin $K_{2(20)}$* * * *

12. The principal use of the imported products is as a component in animal feeds* * * *

13. Customs excluded the imported products from classification under heading 2936 because, as interpreted by Customs, this heading does not include "synthetic substitutes for vitamins" * * * *

14. The phrase "synthetic substitute for a vitamin" does not appear anywhere in the HTSUS statute enacted by Congress* * * *

15. Defendant defines "synthetic substitute for a vitamin" as "a synthesized chemical compound that is not found in nature but has vitamin activity. This differs from a synthetically reproduced vitamin whose structure is found in nature but has been synthesized from other chemicals." * * * *

* * * * * * *

17. The imported MSB was classified by Customs as "Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated or nitrosated

4-naphthoquinone) moiety is the most important component of MPB* * * *

* * * * * * *

32. Nicotinamide is also known as niacinamide* * * *

33. Niacinamide is a vitamin described in heading 2936, HTSUS* * * *

34. The bisulfite portion of MNB is excreted by the body after ingestion* * * *

35. The nicotinamide portion is not excreted by the body after ingestion and provides niacin or niacinamide activity * * * *

36. The nicotinamide portion of MNB is a vitamin, as described in subheading 2936.29.1530, HTSUS* * * *

* * * * * * *

38. Defendant is unaware of any uses of MNB as a component of animal feeds other than as a source of vitamin K activity and niacin* * * * [1]

The defendant admits without any reservation all but one of these averments. *See* Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, pp. 1–4. As for that single, enumerated paragraph, 4, *supra*, the defendant admits it with regard to MSB and MSBC but

> [a]vers that none of the imported merchandise is described on the commercial invoices as MNB, or MPB, or their equivalents.

Id. at 1, para. 4. As for defendant's own statement of material facts in support of its cross-motion, the plaintiff admits the following averments contained therein:

2. MSB, MNB and MSBC are aromatic derivatives of quinones.

3. MPB is an aromatic heterocyclic compound containing a pyrimidine ring.

* * * * * * *

5. Menadione is not the natural precursor of vitamins K_1[ ] in plants and K_2 in bacteria.

6. The Menadione found in nature is not a provitamin of Phylloquinone.[2]

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[1] Plaintiff's Rule 56(i) Statement of Material Facts as to Which No Genuine Dispute Exists (citations in support of each averment omitted).

[2] *Compare* Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to be Tried, p. 1, paras. 2, 3, 5, 6 *with* Plaintiff's Response to Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to be Tried, paras. 2, 3, 5, 6.

> ignores, completely, the Government's key point that while the MSB, MSBC, MPB, and MNB undoubtedly are provitamins (albeit *artificial* provitamins), they assuredly do not reproduce natural provitamins[2], and hence, cannot be described, and are not described, by the language of Heading 2936, HTSUS, which, by its terms, only covers natural vitamins, natural provitamins, reproductions of natural vitamins or provitamins, and derivatives of natural vitamins or provitamins.

Defendant's Reply Brief, pp. 1–2 (emphasis in original, footnote 3 omitted). Footnote 2 to this reply states in part:

> *Reproduce* means to produce a copy of something. Inasmuch as the HTSUS heading, in issue, Heading 2936, provides for "[p]rovitamins and vitamins, natural or reproduced by synthesis," clearly, the only provitamins described by this language are natural provitamins or reproductions of natural provitamins, which MSB, MSBC, MPB, and MNB plainly are not* * * *

Id. at 2, n. 2 (emphasis in original).

III

This reply by the defendant is the crux of the controversy at bar. Having studied the affidavits of Dr. John W. Suttie, Dr. T.M. Frye, and Dr. Mark W. LaVorgna, as well as Binder, Benson & Flath, *Eight 1,4-Naphthoquinones From Juglans*, 28 Phytochemistry, pp. 2799-2801 (1989), and Shils & Young, *Vitamin K*, Modern Nutrition in Health and Disease, ch. 14 (7th ed. 1988), proffered by the plaintiff in support of its instant motion, and having compared their rather esoteric contents with those of the two affidavits of Dr. Robert E. Olson filed on behalf of the defendant, the court is unable to conclude that the parties' cross-motions completely satisfy the requirement that "there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The foregoing material matter articulated by the defendant must be addressed at trial and subjected to cross-examination, "which has been said to be the surest test of truth and a better security than the oath." *The Hanover Ins. Co. v. United States*, 25 CIT ____ , ____ , Slip Op. 01–57, p. 21 (2001).

Thus, the parties' cross-motions for summary judgment must be, and they hereby are, denied. Counsel are directed to confer and propose to the court on or before August 1, 2003 a schedule for the necessary preparation for, and conduct of, the trial of those issue(s) of fact which are not already agreed to herein and which cannot be stipulated to in the pretrial order.

So ordered.

Errata for Slip Op. 03–100

II

In the light of this law long settled, come the parties to this action with a Stipulation of Material Facts in Lieu of Trial, which the court has reviewed and approved as having "be[en] submitted for decision in lieu of trial on" its contents.[1] They include the following:

> 4. Plaintiff * * * is the surety on the customs bonds for the entries subject to this action.
>
> 5. The importer of record on the subject entries during the relevant time period[ ] was either Newmet Corporation or Newmet Steel Corporation (collectively referred to as "Newmet").* * *
>
> 6. Newmet was engaged in the business of selling in the United States[ ] finished or semi-finished stainless and electrical steel products which were purchased from foreign steel mills on a scrap conversion basis, meaning that Newmet supplied scrap to the foreign steel mills and paid them for converting the scrap into the imported stainless steel sheets, plates and strips.
>
> 7. Newmet obtained orders for the imported semi-finished or finished stainless steel sheets, plates or strips from steel fabricators in the United States, which such fabricators would further process by straightening, slitting and cutting to size for further sale to manufacturers of a variety of stainless steel products.
>
> * * * * * * *
>
> 9. The imported merchandise consists of stainless steel sheets, plates and strips and are articles of metal other than precious metal.
>
> 10. The merchandise covered by the subject entries * * * [was] processed abroad by foreign steel mills from stainless steel scrap that had been exported from the United States.
>
> 11. The exported scrap (hereinafter also referred to, for purposes of this stipulation, as "prepared scrap") [ ] was the raw material from which the imported products were manufactured * * * by the foreign steel mills.
>
> 12. The subject imported stainless steel sheets, plates and strips were imported into the United States for further processing into various stainless steel products.

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[1] The court's jurisdiction over this consolidated action is pursuant to 28 U.S.C. §§ 1581(a), 2631(a).

In addition to their stipulation, the plaintiff has filed a motion for summary judgment, and the defendant has countered with a motion for judgment upon the stipulation.

scrap yards had laboratories equipped with x-ray spectrometers and atomic absorption analyzers to test tiny pieces of scrap called grindings obtained from drilling a hole in the scrap.* * *

> Large and irregularly-shaped incoming scrap was compacted or crushed before being tested, which allowed for a composite piece * * * for testing. Incoming scrap was sometimes decontaminated or upgraded. Decontamination was the process of cleaning and cutting out sections of non-alloy material from the scrap metal and was performed by cutting with an automatic torch or an abrasive saw. Upgrading was the separating out of non-stainless steel material from mixed shipments of stainless and non-stainless steel scrap received by the * * * yards.* * *
>
> After the * * * alloy content was identified the scrap was sorted into containers corresponding to its grade. There were hundreds of grades.* * *
>
> 25. Sizing was the operation of cutting scrap to a size that would fit in the steel mill's furnaces and depended upon the shape and size of each individual piece of scrap. Sizing includes cutting, crushing, ripping, shearing or shredding.* * * Cutting refers to the cutting of scrap into smaller pieces using an automatic torch. Ripping, which was rarely needed, is the term used to separate stainless steel from non-stainless material. Shearing is the cutting of long strips of scrap into smaller pieces using alligator or heavy shears. Shredding is the cutting of scrap in a shredder into small thin pieces and was occasionally performed on special kinds of incoming scrap. Larger pieces of scrap were put through a crusher to break up big pieces of castings which could not be cut by other methods and could also be subject to another method of cutting, such as shearing and/or cutting, depending upon * * * size.* * *
>
> 26. Packaging was the weighing and accumulating of truck loads or railcar loads of a specific grade of solids or a sufficient amount of briquettes or bales of turnings to comprise a railcar load or truck load, to fill a customer order. Briquetting is the forcing, by using a briquetting machine, of turnings and small solids into blocks no larger than 3 ft. by 5 ft. by 2 ft. for ease of transport and utilization in the customer's furnace. Baling is performed by compressing very thin scrap into small square sized packs for the convenience of handling, transporting and furnace size.

* * * * * * *

> 29. The truck loads and railcar loads of prepared scrap were then exported to foreign steel mills in order to be processed into stainless steel sheets, plates, and strips.

The parties further agree in paragraph 14 of this stipulation that the crux of their controversy is whether or not the merchandise was "manufactured in the United States or subjected to a process of manufacture in the United States" within the meaning of TSUS item 806.30, *supra*, and that "[a]ll other conditions of [that] item * * * are met."

A

The imports underlying this action, as described in their entry papers and also in the foregoing stipulation, were stainless steel sheets, plates, and strips produced overseas. And those products were "manufactured" there within any definition of that term. That is, plaintiff's exported pieces of metal underwent transformation, resulting in new and different articles, having distinctive names, characters or uses of the kind contemplated by *Anheuser-Busch*, *supra*, and other cases. Nothing which occurred in the United States prior thereto, as stipulated above by the parties, amounted to such manufacture.

The plaintiff does not argue otherwise, but it does contend that the afore-described preparation of the scrap for shipment for that foreign transformation was itself manufacture—in this country. Its briefs characterize the incoming metal as "junk"[2], perhaps in the hope that this court could and therefore would divine transformation into scrap. The court cannot do so on the evidence adduced, although at least some sources of that metal surely could satisfy someone's definition of junk[3]. But that definition would not necessarily differ materially from that for scrap[4]. Whichever definition, the substance of interest which entered the Newmet yard(s) remained that substance upon exit for export, including some originally from other lands. In short, the court is unable to conclude that Newmet's preparation of the articles of metal for export was "manufacture[ ] in the United States" in satisfaction of the statutory standard to support, if not save, dissipating U.S. industry.

This action thus comes down to consideration of whether that preparation subjected those articles to a "process of manufacture in the United States". On this issue, the plaintiff argues that,

> in enacting item 806.30, TSUS, Congress did not intend the phrases "manufactured in the United States" and "subject to a process of manufacture in the United States" to mean the same.

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[2] Memorandum in Support of Plaintiff's Motion for Summary Judgment [hereinafter "Plaintiff's Memorandum"], pp. 1, 2, 7, 12, 15; Plaintiff's Memorandum in Reply, pp. 2, 7, 15, 19.

[3] *See, e.g.*, Webster's Third New International Dictionary of the English Language Unabridged, pp. 1226–27 (1981).

[4] *Compare, e.g., id. with id.* at 2039.