In the Matter of

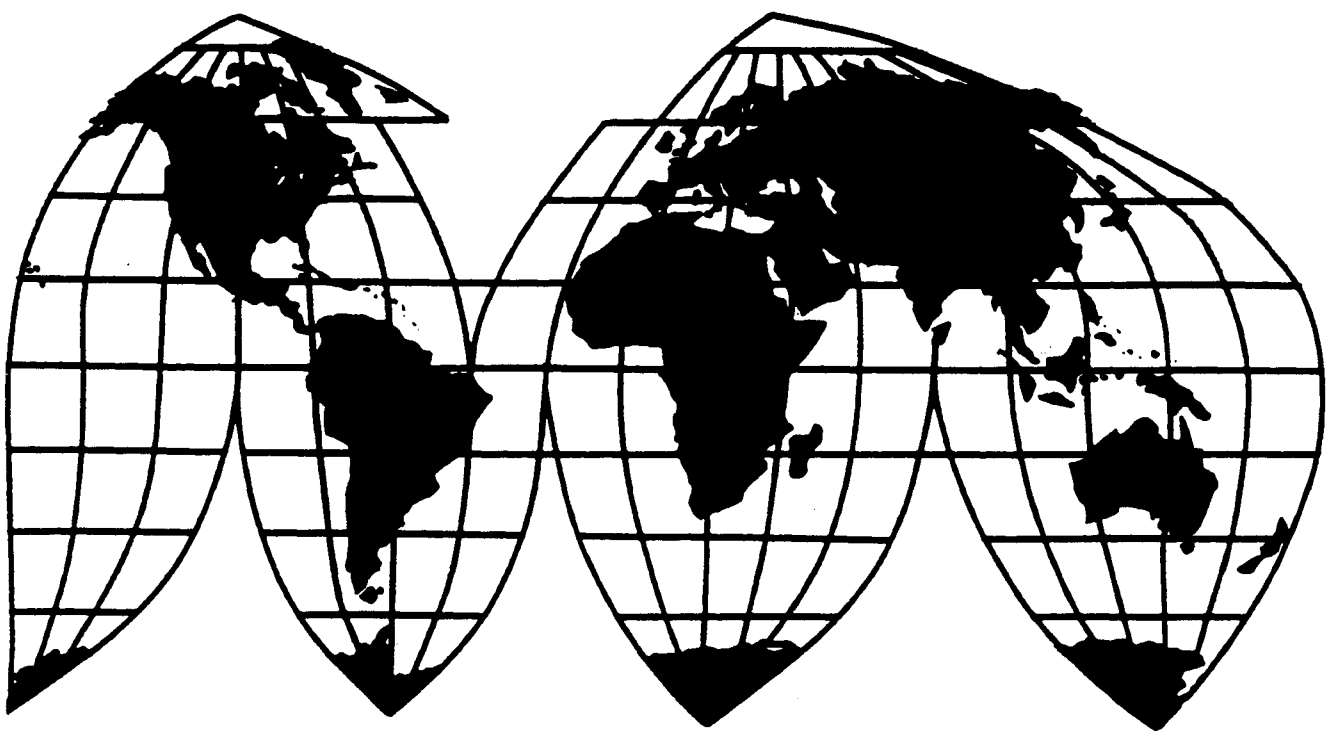
Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product

Investigation No. 337-TA-148/169

Petitions for modification of
Limited Exclusion Order

Publication 2812 **September 1994**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Peter S. Watson, Chairman
Janet A. Nuzum, Vice Chairman
David B. Rohr
Don E. Newquist
Carol T. Crawford
Lynn M. Bragg

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436

In the Matter of

Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product

Publication 2812

September 1994

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	Investigations Nos. 337-TA-148/169
CERTAIN PROCESSES FOR THE MANUFACTURE OF SKINLESS SAUSAGE CASINGS AND RESULTING PRODUCT	

NOTICE OF COMMISSION DETERMINATION DENYING TWO PETITIONS FOR MODIFICATION OF EXCLUSION ORDER AND REQUEST FOR ORDER COMPELLING FULL ACCOUNTING

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to deny two petitions for modification of the limited exclusion order issued November 26, 1984, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Judith M. Czako, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3093.

SUPPLEMENTARY INFORMATION: On January 18, 1994, counsel for Viskase Corporation, successor in interest to complainant in the above-captioned investigation, filed a petition requesting, inter alia, modification of the limited exclusion order issued at the conclusion of the investigation. Specifically, the petition requested that the Commission extend the term of the limited exclusion order in order to remedy alleged violations of that order by Viscofan, S.A., respondent in the original investigation. On February 24, 1994, counsel for Teepak, Inc., also filed a petition requesting, inter alia, modification of that exclusion order to extend its term. The Commission determined to apply a revised procedure, similar to the procedure

set forth in proposed final rule 210.76, published in the Federal Register on November 5, 1992 (57 FR 52830, 52883), to its consideration of the two petitions. The revised procedure provided that any person might file a response to the two petitions. Numerous requests for leave to file submissions beyond those provided for in the revised procedure were received by the Commission. The Commission denied those requests. In addition, an allegation concerning disclosure of confidential business information was made by counsel on behalf of Teepak. The Commission, having investigated the allegation, determined that no confidential business information was disclosed in the filings in this proceeding.

Having considered the petitions for modification, and the responses thereto, the Commission has determined to deny the petitions. The Commission will shortly issue its views regarding this matter.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337, 19 U.S.C. § 1335), and section 211.57 of the Commission's Interim Rules of Practice and Procedure (19 CFR § 211.57).

Copies of the Commission's Order and opinion, the petitions and responses thereto, and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

By order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: July 22, 1994

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of CERTAIN PROCESSES FOR THE MANUFACTURE OF SKINLESS SAUSAGE CASINGS AND RESULTING PRODUCT	Investigations Nos. 337-TA-148/169

ORDER

On January 18, 1994, counsel for Viskase Corporation, successor in interest to complainant in the above-captioned investigation, filed a petition requesting, inter alia, modification of the limited exclusion order issued at the conclusion of the investigation. Specifically, the petition requested that the Commission extend the term of the limited exclusion order in order to remedy alleged violations of that order by Viscofan, S.A., respondent in the original investigation. On February 24, 1994, counsel for Teepak, Inc., also filed a petition requesting, inter alia, modification of that exclusion order to extend its term.

The Commission determined to apply a revised procedure, similar to the procedure set forth in proposed final rule 210.76, published in the Federal Register on November 5, 1992 (57 FR 52830, 52883), to its consideration of the two petitions. The revised procedure provided that any person might file a response to the two petitions. Numerous requests for leave to file submissions beyond those provided for in the revised procedure were received by the Commission. The Commission has determined to deny those requests.

In addition, an allegation concerning disclosure of confidential business information was made by counsel on behalf of Teepak. The Commission,

having investigated the allegation, determined that no confidential business information was disclosed in the filings in this proceeding.

Having considered the petitions for modification, and the responses thereto, the Commission determined to deny the petitions. The Commission will shortly issue its views regarding this matter.

Accordingly, it is hereby **ORDERED** --

1. Leave to file any and all replies or sur-replies to the petitions for modification is hereby **DENIED**. The record with regard to the petitions for modification comprises the petitions for modification filed January 18, 1994 and February 18, 1994, by Viskase Corporation and Teepak, Inc., respectively; the responses to those petitions filed February 22, 1994, and April 8, 1994, by Viscofan, S.A.; and the response to those petitions filed April 13, 1994, by the Commission's Office of Unfair Import Investigations. Any other or further pleadings which have been submitted to the Secretary for filing in this matter shall be stricken from the record.

2. The petitions for modification are hereby **DENIED**.

3. The Secretary shall serve copies of this ORDER, and the Commission Opinion to be issued in support thereof, upon each party of record to this investigation, and shall publish notice thereof in the Federal Register.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: July 22, 1994

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	)	
	)	**Investigations Nos. 337-TA-148/169**
CERTAIN PROCESSES FOR THE MANUFACTURE OF SKINLESS SAUSAGE CASINGS AND RESULTING PRODUCT	)	**(Petitions for modification of Limited Exclusion Order)**

COMMISSION OPINION

INTRODUCTION

On January 18, 1994, counsel for Viskase Corp. ("Viskase"), successor in interest to complainant Union Carbide in the above-captioned investigations (hereinafter "Sausage Casings"), filed a petition with the Commission requesting modification of the limited exclusion order issued at the conclusion of the investigations in 1984. Specifically, the petition requested that the Commission extend the period of the exclusion order. A second petition for modification of the Sausage Casings order was filed by Teepak, Inc. ("Teepak"), the other original complainant in the Sausage Casings investigations, on February 24, 1994. The Teepak petition was based on the same facts and circumstances outlined in the petition for modification filed by Viskase Corp., and supported that petition.

Responses to the petitions were filed, as were requests for leave to file replies and surreplies. On July 22, 1994, the Commission issued an Order denying the requests for leave to file replies and surreplies, finding that there was no disclosure of confidential information, and denying the petitions for modification. This opinion sets forth the reasons underlying the Commission's Order.

BACKGROUND

The investigations underlying the limited exclusion order of which modification was sought were instituted in May and October of 1983, and subsequently consolidated. In the original investigations, complainant Teepak alleged that Viscofan S.A. ("Viscofan"), a Spanish corporation, infringed several of Teepak's patents in the manufacture of skinless sausage casings imported into the United States, and complainant Union Carbide, predecessor in interest to Viskase, alleged that Viscofan was using misappropriated Union Carbide trade secrets, and infringed certain of its patents, in the manufacture of skinless sausage casings imported into the United States.

Following an evidentiary hearing, the presiding ALJ (Judge Duvall) issued, on August 1, 1984, an initial determination (ID) finding that there was a violation of section 337. Specifically, the ALJ determined that Viscofan infringed the Teepak patent at issue, and that Viscofan had misappropriated

Union Carbide trade secrets.[1] The Commission declined to review the bulk of the ID, which thus became the determination of the Commission. Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Invs. Nos. 337-TA-148/169, USITC Pub. 1624 (December 1984).

The Commission issued a general exclusion order as a remedy for the infringement of Teepak's patent. That order excluded from "entry into the United States" small caliber skinless sausage casings manufactured abroad in accordance with a method which, if practiced in the United States, would infringe Teepak's patent.[2] The general exclusion order issued on the basis of Teepak's patent expired on August 19, 1986, when the patent on which it was based expired.

With respect to the misappropriation of Union Carbide's trade secrets, the Commission issued a limited exclusion order barring from entry into the United States, for a period of ten years from the date of the Commission's order (November 26, 1984), small caliber skinless sausage casings manufactured by Viscofan.[3] The duration of the limited order was based on the time it would have taken Viscofan independently to develop the technology using lawful means. The limited exclusion order, which is the subject of the petitions for modification, is due to expire on November 25, 1994.[4]

In 1993, counsel for Teepak and counsel for Viskase became aware, based on information reported in the Journal of Commerce, that Viscofan sausage casings were being shipped to Mexico through the port of Houston, although none were alleged to be sold or consumed in the United States. Both counsel requested that the U.S. Customs Service ("Customs") investigate the matter.[5] Customs did so, and responded that its data did not indicate that any Viscofan sausage casings had entered the United States for consumption, although such casings may have been shipped through U.S. ports, under bond, in transit to Mexico. Customs then wrote to the General Counsel of the Commission for advice concerning the coverage of the Commission's limited exclusion order.[6] Customs sought advice and clarification concerning whether sausage casings manufactured by Viscofan that "appear to have only entered the Customs territory of the United States temporarily for purposes of discharge and then transit to another country" fall within the scope of the exclusion order.[7] On November 3, 1993, the Commission's Secretary

---

[1] During the course of the investigations, all but one of Teepak's patent allegations were dropped from its complaint. Union Carbide's patent allegations were also dropped from its complaint.

[2] Id., Commission Opinion (Public Version) at 14-18.

[3] Id. at 18-22, Commission Action and Order at 6, ¶ 2.

[4] Viscofan appealed the Commission's determination on the issue reviewed, and the limited exclusion order, to the United States Court of Appeals for the Federal Circuit, which affirmed the Commission's determination. Viscofan, S.A. v. United States Int'l Trade Commission, 787 F.2d 544 (Fed. Cir. 1986).

[5] Counsel for Viskase also wrote to the Commission, describing the circumstances at issue. Viskase argued that use of U.S. port and transportation facilities in Houston and Laredo afforded Viscofan sausage casings a competitive advantage (less breakage, less pilferage, and/or better delivery schedules) in Mexico vis-a-vis Viskase sausage casings, and that Viscofan would not enjoy this advantage if its casings were imported directly into Mexico. Since, in Viskase's view, the purpose of section 337 is "to prevent foreign companies from using the United States to gain a competitive advantage over U.S. companies," Viskase urged that Customs be advised that the sausage casings in question are covered by the Commission's exclusion order.

[6] Letter from Harvey Fox, Director, Office of Regulations and Rulings, U.S. Customs Service, Sept. 3, 1993.

[7] Id. at 1.

informed Customs, on behalf of the Commission, that the sausage casings at issue fell within the scope of the exclusion order.[8] Viskase and Teepak then filed their petitions for modification of the exclusion order.

The petitions for modification and responses thereto

Both petitions for modification are based on the premise that, in view of the Commission's response to Customs' inquiry concerning the scope of the exclusion order in this case, Viscofan's practice of transhipping sausage casings under bond through U.S. ports for delivery to Mexico constitutes a series of violations of the limited exclusion order.

Both petitions argue that the Commission should extend the term of the limited exclusion order, in order to give full measure to the intended period of relief, and to penalize the violation of the order.[9]

Viscofan opposes extension of the exclusion order.[10] It admits that shipments to Mexico through U.S. ports were made during the period of exclusion, but argues that it did so in reasonable reliance on Customs' practice of allowing such under bond, in-transit shipments to continue. It also asserts that it had not, since the exclusion order issued, imported skinless sausage casings for sale or consumption in the United States.[11]

The Commission's Office of Unfair Import Investigations ("OUII") also opposes the petitions for modification of the exclusion order. OUII points out that, prior to the 1993 letter to Customs, the Commission had not addressed whether "entries" such as the Viscofan shipments at issue in this matter are within the scope of Commission exclusion orders. OUII notes that Customs appeared to have consistently equated "entry" with "entry for consumption," and thus had not precluded Viscofan sausage casings from

---

[8] Letter from Donna R. Koehnke, Secretary, U.S. International Trade Commission, to Harvey Fox, Director, Office of Regulations and Rulings, U.S. Customs Service, November 3, 1993. The basis for the Commission's advice was that "the term 'entry' is not limited to only certain types of entry, and would appear to cover articles that have, in the words of [Customs'] letter, 'only entered the Customs territory of the United States temporarily for purposes of discharge and then transit to another country.'" Id. Former Chairman Newquist and Commissioner Rohr dissented from this conclusion, and so informed Customs in a separate letter. Letter from Don E. Newquist, Chairman, and David B. Rohr, Commissioner, U.S. International Trade Commission, to Harvey Fox, Director, Office of Regulations and Rulings, U.S. Customs Service, November 2, 1993. See their Separate Views, which follow.

[9] Viskase sought at least one month of extension for each month that Viscofan entered sausage casings in violation of the order. Teepak asserted that Viscofan has been violating the order for eight and three-quarter years (since at least April, 1985), and requested extension of the limited exclusion order for that period. Both petitioners also sought a full accounting from Viscofan of all shipments of sausage casings to the United States since issuance of the exclusion order.

[10] Viscofan also asserts that Teepak lacks standing to seek modification of the limited exclusion order, which was based on the misappropriation of union Carbide's trade secrets, and not the infringement of Teepak's patent. We do not agree. Commission interim rule 211.57(a) specifically provides that "any person" may file a petition with the Commission requesting modification of a final Commission order when he or she "believes that conditions of fact or law, or the public interest," require such modification. 19 CFR 211.57(a). Thus, there is no issue of standing with respect to Teepak's ability to file its petition in this case.

[11] Viscofan also argued that to penalize it for those shipments, based on the Commission's 1993 determination concerning the definition of "entry," would deprive it of due process by retroactively concluding that its actions were in violation of the exclusion order, despite the fact that Customs had allowed such shipments to continue. Viscofan alleged that it made in-transit shipments to Mexico through U.S. ports during the period the investigation was pending, during the period of Presidential review of the exclusion order, and since that time. It asserted that it stopped all such shipments upon learning of the Commission's 1993 determination concerning "entry."

entering the United States under bond, in-transit to Mexico. OUII argues that it was unclear, at the time the Viscofan shipments were made, that such shipments violated the Commission's exclusion order. In addition, OUII notes that there were no allegations that Viscofan acted in bad faith, or attempted to commit a fraud on Customs in making those shipments. Consequently, OUII argues that the equities do not favor extending the period of the exclusion order, and that the Commission should deny the petitions.

Letter from Chief Counsel, U.S. Customs Service

While the petitions were pending before the Commission, we received an unsolicited letter from Michael T. Schmitz, Chief Counsel, U.S. Customs Service, addressing whether merchandise subject to a Commission exclusion order is precluded from entry under bond in transit to a third country destination.[12] Customs' Chief Counsel concluded, based on his interpretation of section 337 and statutes regarding Customs' responsibilities over foreign goods in the United States, that merchandise transported through the United States in bond does not "enter" the United States, and is thus excluded from entry, in compliance with the Commission's exclusion order.[13] Finally, he noted that Customs has consistently applied this interpretation of its own statutory and regulatory obligations to the sausage casings at issue in this case, allowing them to be transported through the United States in bond, en route to Mexico.[14, 15]

The views of the Chief Counsel of Customs present new arguments and legal analysis that were not before the Commission at the time it responded to Customs' inquiry.[16] At that time, a majority of the Commission took the view that the terms of the exclusion order, as well as the plain meaning of the statute, were not limited to certain types of "entries." The arguments presented by Chief Counsel persuade us that there may be other reasonable interpretations of the statute. They do not, however, require the conclusion that the Commission's original advice was erroneous. Moreover, we note that there are proceedings now pending at the Commission that may involve similar issues. Should these matters come before us for resolution we would have the benefit of briefing and argument from interested parties. We therefore decline to adopt a different interpretation of the statute and the exclusion order in this case at this time.[17]

---

[12] Letter from Michael T. Schmitz, Chief Counsel, U.S. Customs Service, June 22, 1994.

[13] Id. at 8. He distinguished between "importation," which he defined as the arrival of goods in the United States and "entry," which he defined as the documentation required to secure the release of merchandise from Customs' custody in order to allow the importer to bring the merchandise into the United States. Id. at 4, 6. He observed that the statute provides, in pertinent part, that if the Commissions finds a violation of section 337, "the articles concerned, imported by any person violating [section 337], be excluded from entry into the United States." Id. at 3-4, quoting 19 U.S.C. § 1337(d)(emphasis added).

[14] Id.

[15] Commissioner Rohr and Commissioner Newquist do not join in the remainder of this opinion, except as noted in their Separate Views, which follow.

[16] Given the informal nature of the request, the Commission neither requested nor received any briefs or argument on the issues prior to providing its original advice in response to Customs' inquiry.

[17] We are cognizant of the uncertainties which may arise as a result of different interpretations of the word "entry" in Commission exclusion orders and Customs practice. Therefore, we intend to draft exclusion orders in the future that will avoid such uncertainties. We intend to seek input from Customs, and parties to Commission investigations, concerning how this goal may be accomplished.

DISPOSITION OF PROCEDURAL ISSUES AND THE PETITIONS FOR MODIFICATION

Subsequent filings and allegation of disclosure of confidential information

Before turning to the petitions for modification, we address two procedural issues that arose during the pendency of these petitions. The Federal Register notice establishing modified procedures for considering this matter provided only for filing of responses to the Viskase and Teepak petitions.[18] The parties made numerous requests for leave to file various further documents.[19] The Commission did not request, nor did it specifically provide for, any of these subsequent filings. Therefore, in order to maintain orderly procedure, we denied all the requests for leave to file further submissions beyond the petitions and responses, and did not consider any of those further submissions in making our determination. Merely because the Commission had not yet addressed the substance of the petitions does not require us to allow parties to continue to file submissions that are not called for by the procedures established in the Commission's notice.

We note that the allegation of disclosure of confidential business information is in a somewhat different posture, as the Commission would, under normal circumstances, accept for filing a letter raising such allegations even if there were no on-going proceeding in an investigation. We reviewed the allegation, and the response of counsel for Viscofan, and determined that there was no disclosure of confidential business information.

Disposition of the petitions for modification

Turning to the merits of the petitions for modification, we concluded that extension of the period of the exclusion order is neither a necessary nor an appropriate remedy in the circumstances of this case. The Commission has now addressed the definition of "entry" in Commission exclusion orders, and determined that entries in bond for transshipment to a third country are in fact within the scope of the exclusion order.[20] Viscofan does not deny that it has made such entries. Moreover, Viscofan has acknowledged the Commission's authority to make such a determination, and has instructed its shippers to avoid U.S. ports in shipping Viscofan sausage casings to any destination until the exclusion order has expired. Thus, we concluded that Viscofan has violated the exclusion order by its practice of transshipping

---

[18] 59 FR 13743 (Mar. 23, 1994).

[19] Specifically, (1) Viskase sought leave to reply to Viscofan's opposition to the Viskase petition (3-16-94). Viscofan opposed this request (4-11-94). (2) Teepak sought leave to reply to Viscofan's opposition to the Viskase petition (3-21-94). Viscofan opposed this request (4-8-94). (3) Viskase sought leave to reply to OUII's response to the petitions (4-25-94). OUII opposed this request (5-13-94). Viscofan opposed this request (5-3-94). (4) Teepak sought leave to reply to Viscofan's opposition to the Teepak petition (5-6-94). Viscofan opposed this request (5-18-94) Teepak's filing also alleged disclosure of confidential business information, and requests a Commission inquiry. Viscofan's opposition responded to the allegation of disclosure of confidential business information. Counsel for Teepak filed a letter (5-9-94) referring to the allegation of disclosure of confidential business information, and indicating that he was continuing to investigate the matter with counsel for Viscofan, and undertaking to notify the Commission of the outcome of that investigation. (5) Teepak sought leave to file a surreply to Viscofan's opposition to Teepak's motion to reply to Viscofan's response to the Teepak petition (5-25-94) Viscofan opposed this request, and requested the Commission to strike it (6-7-94).

[20] Commissioner Bragg notes that she was not a member of the Commission at the time of Customs' original inquiry. However, she has considered the inquiry, and agrees with the Commission's November, 1993 response.

through the United States.[21] Contrary to Viscofan's argument, the Commission has the authority to extend the term of the exclusion order as a remedy for violation of that order.[22]

However, a finding that Viscofan violated the exclusion order does not require the Commission to penalize Viscofan, and most particularly does not require the specific penalty advocated by Teepak and Viskase, extension of the exclusion order for a period of time.[23] There is no indication, and petitioners do not allege, that Viscofan attempted to hide its practice of transshipping sausage casings through the United States to third country destinations.[24] Indeed, Viscofan states that it has engaged in this practice since at least 1983, throughout the period the Commission investigation was pending, and immediately before and following the exclusion order, while it ceased shipping sausage casings to the United States for sale or consumption in the U.S. market in 1983, after the investigation commenced.

It is clear that Customs did not treat entries of sausage casings in-transit to third country destinations as "entries" subject to exclusion pursuant to the Commission exclusion order until after the Commission's 1993 letter.[25] Given Customs' direct responsibility for enforcing exclusion orders,[26] and the fact that it did not exclude the particular "entries" at issue here, i.e. entries of Viscofan sausage casings under bond, in-transit to a third country destination, it was not, in our view, unreasonable for Viscofan to conclude that those entries were legitimate. We therefore conclude that Viscofan reasonably relied on Customs' practice allowing such entries to continue transporting sausage casings to Mexico through the United States under bond.

Contrary to arguments made by Viskase and Teepak, we do not believe that Viscofan was under an affirmative obligation to seek a specific ruling from either the Commission or Customs on the question of whether its practice was in violation of the exclusion order. Nor do we believe that failure to request such a ruling evidences a lack of good faith on Viscofan's part. There is no indication, and petitioners do not even allege that Viscofan acted in bad faith in relying on Customs' failure to exclude its transshipped entries to continue its practice. Viscofan's good faith in relying on Customs' allowing Viscofan sausage casings to enter under bond in transit to Mexico was reasonable, and weighs against modification of the exclusion order by extending its term.

The Commission's exclusion order is in the nature of an injunction. Certain Inclined Field Acceleration Tubes and Components Thereof, 337-TA-67 (1980) at 13. As a rule, injunctive relief is guided by principles of equity.[27] While injury to the domestic industry is not a prerequisite to relief under

---

[21] Viskase and Teepak cite a series of cases arguing that a good faith, but erroneous, interpretation of the limited exclusion order by Viscofan is not a defense to an allegation of violation of the order. This is true. However, Viscofan does not dispute that it undertook the activities which are at issue here, and thus, effectively does not dispute the allegation of violation. Viscofan's good faith in continuing its practice of transshipping sausage casings under bond through the United States is relevant to the issue of what, if any, remedy should be issued, which is a matter committed to the Commission's discretion.

[22] While the statute does not give the Commission responsibility for enforcement of exclusion orders, those orders are issued by the Commission, and remain subject to modification by the Commission. See Interim rule 211.57, and paragraph 6 of the limited exclusion order in this case.

[23] We note that the ten year period of exclusion was based on the Commission's assessment of the time it would have taken Viscofan independently to develop the technology it was found to have misappropriated from Union Carbide, and thus was remedial in nature. That time period is unaffected by Viscofan's subsequent actions violating the exclusion order. Thus, the modification of extension of the term of exclusion would be a punishment for the violations, and not a remedy for the original unfair act.

[24] Indeed, Viscofan alleges that both Viskase and Teepak had knowledge of these facts well before the instant petitions were filed. Viscofan asserts that the Viskase petition is motivated by a desire to continue to keep it out of the U.S. market as Viskase emerges from Chapter 11 bankruptcy reorganization.

[25] Letter from Michael T. Schmitz, Chief Counsel, U.S. Customs Service, at 4, n.2.

[26] 19 U.S.S. § 1337(d) ("the Secretary [of the Treasury] shall, through the proper officers, continue to exclude such entry.")

section 337, relative harm to the parties is a relevant consideration in the grant or denial of injunctive relief, and we believe it warrants consideration here. Viskase and Teepak argue that Viscofan has benefitted from taking advantage of allegedly superior U.S. port facilities, and assert that this benefit is contrary to the intent of the Commission's limited exclusion order. However, neither asserts that it was in any way injured by Viscofan's practice of shipping sausage casings under bond through the United States in transit to Mexico. By contrast, extension of the period of the limited exclusion order in this case would clearly be to Viscofan's detriment. Considering all the circumstances in this case, we determined that the extension of the limited exclusion order in this case as a remedy for Viscofan's violations of that order is neither appropriate or necessary, and therefore denied the petitions for modification.

(...continued)
[27] Indeed, in determining whether to issue an exclusion order in the first instance, the Commission is required by statute to determine whether the public interest outweighs a party's interest in relief under section 337, so as to preclude issuance of an exclusion order in the first instance. Similarly, in deciding whether temporary relief under section 337 is warranted, the Commission considers factors similar to those considered by U.S. courts in determining whether to issue preliminary injunctions.

SEPARATE VIEWS OF COMMISSIONER ROHR AND COMMISSIONER NEWQUIST

While we concur with our colleagues' ultimate conclusion that remedial action in this investigation is not warranted, the means by which we reach this end are substantially different.[28] In particular, we believe that there has not been a violation of the exclusion order. Consequently, in our opinion, there is nothing to be "remedied," and the petitions for modification must be denied.

As noted in our colleagues' discussion of the background of this matter, on November 3, 1993, the Secretary of the Commission advised the Director, Office of Regulations and Rulings, U.S. Customs Service, that, in the view of a majority of the Commission, entry of sausage casings for the sole purpose of reexportation was within the scope of the Commission's exclusion order.[29] We disagreed with our colleagues' interpretation of the order and relevant statutory authority and, under separate cover, so advised the Director.[30]

Subsequently, on June 22, 1994, the Chief Counsel of the Customs Service advised the Commission's General Counsel that, in the view of the Customs Service, "merchandise which is transported in bond for exportation is excluded."[31] Consequently, the importation of Viscofan's sausage casings for reexportation did not violate the Commission's exclusion order.

Pursuant to the statute, if the Commission determines that there has been a violation of 19 U.S.C. § 1337, it shall direct the exclusion of the infringing articles by notifying the Secretary of the Treasury of its determination. 19 U.S.C. § 1337(d). Accordingly, it is the Customs Service which administers any Commission exclusion order throughout its duration. In the event a person aggrieved by a specific Customs action excluding goods seeks redress from that action, it is the Customs Service which must defend the propriety of the exclusion.

In this instance, the issue is whether a "transshipment entry" is prohibited under a Commission exclusion order. The answer to this question is not, in our view, solely within the Commission's expertise. Resolution of this issue implicates terms of art under the Customs laws of the United States -- specifically, "entry," "exclusion," and "importation" -- matters clearly falling within the experience and province of the Customs Service.[32] Although we recognize and maintain the Commission's independence in conducting section 337 investigations and issuing exclusion orders, we believe that, for purposes of administration of the instant exclusion order, deference should be given to the Customs Service's interpretation of the relevant terms of art, which leads to the conclusion that transshipment entries such as those at issue here do not violate the order.

Having concluded that Viscofan sausage casings have not entered the United States in violation of the Commission's exclusion order, there is nothing in this case to be remedied. Consequently, we would deny the petitions for modification on that basis.

---

[28] We also concur in the disposition of issues involving subsequent filings and the allegation of disclosure of confidential information, for the reasons stated in our colleagues' views.

[29] Letter from Donna R. Koehnke, Secretary, U.S. International Trade Commission, to Harvey Fox, Director, Office of Regulations and Rulings, U.S. Customs Service, November 3, 1993.

[30] Letter from Don E. Newquist, Chairman, and David B. Rohr, Commissioner, U.S. International Trade Commission, to Harvey Fox, Director, Office of Regulations and Rulings, U.S. Customs Service, November 2, 1993.

[31] Letter from Michael T. Schmitz, Chief Counsel, U.S. Customs Service, June 22, 1994, at 9.

[32] In this regard, we adopt and incorporate by reference in its entirety the attached letter from Michael T. Schmitz, Chief Counsel, U.S. Customs Service.

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
OFFICE OF CHIEF COUNSEL

JUN 22 1994

TL-94-161
CC: ED

The Honorable Lynn Schlitt
General Counsel
U.S. International Trade Commission
500 E Street S.W.
Washington D.C. 20436

Dear Ms. Schlitt,

By letter dated November 3, 1993, the Commission provided further advice to the Director, Office of Regulations and Rulings, U.S. Customs Service, regarding the scope of the exclusion order issued by the Commission at the conclusion of Inv. No. 337-TA-148/169, which related to certain skinless sausage casings. After receiving a copy of the November 3 letter, attorneys representing Viscofan, the exporters of those casings, contacted the Chief, Intellectual Property Rights Branch, Office of Regulations and Rulings, seeking a clarification of Customs position. On April 21, 1994, the Office of Inspection and Control, U.S. Customs Service, requested legal advice from this office regarding Customs position. Until that point, this office had not been consulted regarding the matter.

In reviewing the background materials for the purpose of providing the requested legal advice, we were struck by the disconnect between the Customs issue which arises under 19 U.S.C. 1553 and the advice provided by the Commission regarding 19 U.S.C. 1337. This letter summarizes our understanding of the tortuous history that resulted in the Commission's November 3 letter and sets forth the legal rationale for Customs position under 19 U.S.C. 1553 and its treatment of merchandise subject to the above-referenced exclusion order.

Background

Section 1337(d) provides that "[i]f the Commission determines,...that there is a violation of [section 1337], it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States,..." 19 U.S.C. 1337(d) (Underscoring added). On November 26, 1984, the Commission issued a limited exclusion order "prohibiting entry into the United States, except

under license..." of certain skinless sausage casings for a ten year period. Inv. No. 337-TA-148/169. In the summer of 1993, the Chief, Intellectual Property Rights Branch, (IPR), was contacted by counsel for the complainants in the Commission's investigation, Viskase and Teepak Corporations. The counsel asked whether casings covered by the exclusion order were being entered into the United States in violation of the order.[1] Their inquiry was prompted by a Journal of Commerce publication which indicated that certain artificial sausage casings covered by the exclusion order had been exported to the United States and discharged at Houston, Texas and Miami, Florida. Customs searched its database and, finding no consumption entries, made furtner inquiry of Customs officials in Houston and Miami who confirmed that the casings shipped to those ports were transported "in-bond" to Mexico.

On September 3, 1993, the Director, Office of Regulations and Rulings, sent a letter to you asking the Commission to state its position regarding whether casings that "have only entered the Customs territory of the U.S. temporarily for purposes of discharge and then transit to another country, ... fall within the scope of the exclusion order." That letter indicated that the purpose of seeking this clarification was to enable Customs "to determine if it should take appropriate action to enforce the order...." The letter did not advise the Commission that under the applicable Customs law, section 553 of the Tariff Act of 1930 (19 U.S.C. 1553), Congress provided the Secretary of the Treasury with full, unilateral authority to permit by regulation the activity in question. Furthermore, the letter failed to note that permitting such merchandise, in accordance with 19 U.S.C.

---

[1] Both letters indicate confusion regarding the difference between a prohibition against importation and an order that excludes merchandise from entry into the United States. Counsel for Viskase summarized the Commission's exclusion order as prohibiting "the entry of certain small caliber sausage casings...into the United States..." Thereafter, however, counsel requested Customs to "take action to prevent further importation" of the casings. Letter to Chief, Intellectual Property Rights Branch from Richard E.Young, dated July 15, 1993, at 2. Counsel for Teepak, Viskase's co-complainant indicated that he thought the Journal of Commerce information indicated there were "imports" of the casings "in significant quantities." Letter to Chief, Intellectual Property Rights Branch from James M. Rhodes dated June 22, 1993. Importation is the arrival of merchandise within the Customs territory of the United States. 19 CFR 101.1(h) Importations are not prohibited by the order. The order excludes certain merchandise from entry into the United States. See 19 U.S.C 1337 (d) which provides that the Commission may order articles "imported" by a person who violates 19 U.S.C. 1337 to be "excluded from entry into the United States." The statute by its own language contemplates that the articles may be imported.

1553, to be "entered for transportation in bond through the United States by a bonded carrier ... under such regulations as the Secretary shall prescribe,"(underscoring added) resulted in the merchandise being excluded from entry into the United States. Nor did Customs advise the Commission that Customs had been permitting such transportation of the subject merchandise for nine years pursuant to the authority provided under 19 U.S.C. 1553 and its implementing regulations.

On November 3, 1993, the Commission advised Customs by letter that "[t]he term 'entry' is not limited to only certain types of entry, and would appear to cover [the above described] articles...." Furthermore, a majority of the members of the Commission "concluded that the sausage casings referred to in your [Customs] letter are within the scope of the Commission's exclusion order and should be excluded." Herein lies the disconnect. The sausage casings which were permitted to be transported "in bond" for exportation to Mexico were excluded from "entry into the United States."

On January 18, 1994, the complainants filed with the Commission a Petition for Modification of the Exclusion Order, which, we have been advised, included a reference to the Commission's November 3 letter. On January 26, 1994, counsel for Viscofan, the Spanish exporter of the merchandise, sent a letter to IPR seeking confirmation that at no time during the previous nine years had Customs advised Viscofan that their practice of shipping casings in bond from Houston or Miami to Mexico violated the exclusion order. The counsel for Viscofan noted that another Customs office had advised him that in bond shipments are not "entries into the United States." Since then, the Spanish Ambassador has met with Customs Assistant Commissioner for International Affairs and Spain has complained to the State Department about this case.

We are providing the following brief analysis of the Customs laws regarding the transportation of merchandise in bond for exportation so that the Commission will fully understand the current state of this matter and, hopefully, assist all parties in resolving the unnecessary confusion which currently exists.

Entry Versus Importation Versus Transportation

From our review of the correspondence between Customs and the Commission it appears that no party addressed some fundamental statutory terminology which, had it been properly briefed, we believe would have served to eliminate much of the conceptual confusion. Congress expressly provided in 19 U.S.C. 1337(d) that the Commission "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States." This statutory language makes two significant statements rather than

one. The articles at issue may be "imported." However, they shall be excluded from "entry into the United States."

Whether interpreted using the normal rules of interpretation, e.g., lexicographic sources, or relying on Customs existing regulatory definition, see e.g., 19 CFR 101, articles are "imported" by arriving in the United States. We assume there is no dispute regarding this common sense understanding of the term. Consequently, all articles for which Government action is required to ensure that the articles shall be "excluded from entry into the United States" will already have arrived in the United States.[2]

However, neither Customs September 3 letter nor the Commission's November 3 response addressed the fact that 1337(d) contemplates that goods covered by the exclusion order will arrive in the United States. Both letters disregarded the difference between importation and entry and focused on the term entry. Consequently, the Commission's advice that "the term 'entry' is not limited to only certain types of entry" is difficult to evaluate. Obviously, the term "entry" is limited to the extent that Congress did not intend it to be interpreted to cover the mere arrival of the articles in the United States, i.e., the importation of articles.

Granted that any goods to be excluded will already have arrived in the United States, the question is what did Congress intend by the phrase "exclude from entry into the United States."[3] In order to analyze this question, it is useful to

---

[2] The Commission's authority under 19 U.S.C. 1337 parallels the Customs laws which distinguish between restricted merchandise, e.g., goods that are excluded from entry into the United States, and prohibited merchandise, i.e., goods that are prohibited from being imported into the United States. Generally speaking, Customs laws allow the importation of restricted merchandise, provided the goods do not enter into the United States during the pendency of the restriction. Restricted merchandise is not subject to seizure upon importation but is subject to exclusion from entry into the United States. If the importation of the merchandise is prohibited, as opposed to restricted, the merchandise is subject to immediate seizure and forfeiture. See e.g., 19 U.S.C. 1595a. The Commission was provided the authority in 19 U.S.C. 1337(i) to prohibit the importation of merchandise.

[3] While we know of no case interpreting that phrase for purposes of 19 U.S.C. 1337(d), we find some useful guidance in the holding of the U.S. District Court for the Eastern District of Louisiana in the attached slip opinion. The court therein was

review the different statutes containing the term "entry." Such a review demonstrates the fact that the term "entry" has different meanings under different statutes. Furthermore, the analysis requires some pragmatism. Once goods have arrived, their exportation requires some form of transportation. Consequently, a bonded transportation movement should be recognized as simply a method of transporting goods to exclude the merchandise from entry into the United States.

Definitions of Entry

The following is a brief analysis of the use of the term "entry" in the context of the following statutes: 19 U.S.C. 1337, 19 U.S.C. 1434, 19 U.S.C. 1484, 19 U.S.C. 1621, and 19 U.S.C. 1553. This review demonstrates that the term "entry" has multiple meanings which are wholly dependent on the purpose to be served by the Congressional requirement being imposed.

In 19 U.S.C. 1337(d), the term "entry" applies only to the subject merchandise to be excluded and it is expressly limited to ensure such merchandise is to be excluded from entry "into the United States."

By contrast, the term "entry" in the context of a vessel entry pursuant to 19 U.S.C. 1434 means the documentation which, within 24 hours of arrival, the master of the vessel must file with Customs, such as the vessel manifest, crew list, foreign clearance documents. 19 U.S.C. 1434. Entry also must be filed in this context before a vessel can be cleared to proceed coastwise or foreign. These "entries" do not apply to the carried merchandise but to the carriers themselves. Clearly, the term "entry" in 19 U.S.C. 1337(d) does not include entries under 19 U.S.C. 1434.

---

faced with a very analogous issue requiring an interpretation of 21 U.S.C. 381 which requires the Government to "refuse admission" of imported adulterated food but authorizes the exportation of such food and 21 U.S.C. 334 which authorizes the Government to seize and destroy adulterated food that is shipped in interstate commerce. The Government argued that it had the right to seize and destroy a shipment of mushrooms that was transported in bond for exportation without giving the owner an opportunity to export the mushrooms. The court specifically rejected the Government's argument that a bonded transportation movement amounted to an introduction of the shipment into interstate commerce. In footnote four, the court cited a Central District of California case for the proposition that "[a] transit bond allows goods to be transported through the United States without clearing Customs." United States v. 2,988 Cases and 3,000 Cases of Food, No. 93-3623, slip op. at 4 (E.D. La. April 18, 1994).

The "entry" of merchandise into the United States is governed generally by 19 U.S.C. 1484. The term "entry," for these purposes, is defined to mean the documentation required to be filed to secure the release of merchandise from Customs custody (so that the importer may take custody and bring the merchandise into the United States) or the act of filing that documentation. 19 CFR 141.0a. See also, Torrington Co. v. U.S., 818 F.Supp. 1563, 1573 (CIT 1993) ("[T]here is no reason to believe that the use of the term 'entry' in the antidumping duty statute refers to anything other than formal entry of merchandise into the United States.")

The vast majority of entries of merchandise into the United States pursuant to 19 U.S.C. 1484 are filed by licensed customs brokers on behalf of importers. Those activities are governed by statute, 19 U.S.C. 1641. In accordance with that statute, other than the importer, only licensed brokers may engage in "those activities involving transactions with the Custom Service involving the entry and admissibility of merchandise..." 19 U.S.C. 1641(a)(2) (underscoring added.), 19 CFR 111.1(c). In its regulations, Customs specifically provides that bonded carriers, who are not customs brokers and, consequently, cannot file an entry for purposes of 19 U.S.C. 1484 or 1641, may file an "entry" for purposes of 19 U.S.C. 1553 for merchandise to be transported in bond. 19 CFR 111.3(d). Therefore, the term "entry" in 19 U.S.C. 1484 and 1641 is limited. It clearly has a different meaning from the term "entry" as used in 19 U.S.C. 1553.

The term "entry" in 19 U.S.C. 1553 applies to imported goods that are going to be transported through the United States without being released from Customs custody. For these purposes, the term "entry" means the documentation that must be filed with Customs for the bonded carrier to transport the merchandise. 19 CFR 18.20-18.24.

Bonded Transportation

Congress recognized that in many cases goods would arrive in the United States on their way to another country. Such goods, having been imported, would need to be transported in order to be exported. The question was how to allow for their transportation for exportation while ensuring against diversion into the United States. The answer was provided by Congress in section 553 of the Tariff Act of 1930 (19 U.S.C. 1553) and its predecessor statutes.

The bonded transportation movements questioned by counsel for Viskase and Teepak were undertaken pursuant to 19 U.S.C. 1553 which provides:

> Any merchandise, other than explosives and merchandise the importation of which is prohibited,

> ...destined to a foreign country, may be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe;....

19 U.S.C. 1553 (Underscoring added).

In accordance with 19 U.S.C. 1623(a) which authorizes Customs to require a bond whenever the Secretary of the Treasury deems a bond necessary "to assure compliance with...an instruction [such as a Commission exclusion order] which the Secretary of the Treasury or the Customs Service may be authorized to enforce," carriers which transport goods through the United States must be bonded. Other Customs statutes authorize transportation movements of imported merchandise by bonded carriers, bonded cartmen, (who transport goods or merchandise within a port) and bonded lightermen (who transport goods or merchandise on a small vessel to or from a vessel within the port or from place to place within a port). 19 U.S.C. 1551, 1551a, 1552 and 1565; 19 CFR Part 112.

Under Customs basic custodial bond, a carrier (or cartman or lighterman) has the obligation to "operate as custodian of any bonded merchandise received and to comply with all regulations regarding the receipt, carriage, safekeeping and disposition" of the merchandise. 19 CFR 113.63. The goods are never released from Customs custody to the owner, but rather are placed in the custody of the carrier (or cartman or lighterman). In the case of merchandise subject to an exclusion order requiring the merchandise to be excluded from entry into the United States, the bond obligates the carrier (or cartman or lighterman) transporting the merchandise to ensure that the merchandise remains excluded from such entry by remaining in the carrier's custody while transiting through the United States.

Thus, if the owner of goods imported into the United States elects to export those goods in accordance with 19 U.S.C. 1553, a bonded carrier must be designated on the documentation filed for transportation and exportation of the merchandise. In accordance with the provisions of that section, the goods are not released from Customs custody to the importer but rather are consigned to the Customs District Director at the port of destination and placed in the custody of the bonded carrier to be delivered to that District Director of Customs. See attached Custom Form 7512.

In order to ensure that a bonded carrier transporting merchandise for exportation abides by its obligation to "operate as custodian ... and to comply with all regulations regarding the receipt, carriage, safekeeping and disposition" of the merchandise, Customs may assess liquidated damages for the full

value of the merchandise if the carrier fails to abide by its obligation. 19 CFR 113.63. The carrier must submit appropriate documentation to Customs at the port of destination. The bonded shipment is subject to Customs inspection upon arrival at the port of destination and Customs supervises the lading of the merchandise for exportation. 19 CFR 18.1 - 18.8 and 19 CFR 18.20 - 18.24. In order to clear Customs, outbound vessels carrying merchandise that has been transported through the United States for exportation must show in their clearance documentation the number, date, and class of the applicable Customs transportation and exportation information. 19 CFR 4.63 (e). All of these requirements ensure that merchandise "entered" for transportation in bond and exportation does not "enter into the United States."

Thus, pursuant to 19 U.S.C. 1553 and its implementing regulations, Customs authorizes "in bond" movements of restricted merchandise. Although it is transported through the United States, the merchandise does not enter into the United States and, is thereby, excluded from the United States.[4]

Customs Application of its 19 U.S.C 1553 Authority in This Case

Since 1984, Customs has enforced the exclusion order at issue in accordance with the Customs authorities outlined above. The subject exclusion order mirrors 19 U.S.C. 1337(d) in that it excludes certain merchandise "from entry into the United States." Because merchandise entered for transportation in bond and exportation does not enter into the United States, Customs, in accordance with 19 U.S.C. 1553, had allowed the merchandise subject to the exclusion order to be transported in bond through

---

[4] It is also important to note that it is not Customs that exercises discretion under 1553 but rather the importer who exercises the option to export the goods in this manner. Thus, provided the actions are taken in accordance with regulations issued by the Secretary of the Treasury, at the option of the importer, goods "may be entered for transportation in bond through the United States" under 19 U.S.C. 1553; or "may be entered for transportation in bond without appraisement to any other port... there to be entered" under 19 U.S.C. 1552; or "may be entered for warehousing..." 19 U.S.C. 1557. However, with respect to goods that are entered for consumption, the statute provides that "one of the parties qualifying as 'importer of record'...shall, using reasonable care--...make entry therefore by filing with the Customs Service such documentation ... as is necessary to enable the Customs Service to determine whether the merchandise should be released from customs custody..." 19 U.S.C. 1484(a) (Underscoring added.) Thus, once the importer elects to enter the imported goods for consumption, i.e., into the United States, the importer's obligations increase.

the United States for exportation.

Conclusion

In its November 3 letter, the Commission advised Customs of its position regarding "the term 'entry'" as contained in its exclusion order and in 19 U.S.C. 1337(d). The Commission made clear that the term entry should not be constrained "to only certain types of entry." Based upon the Commission's broad interpretation of the term "entry" contained in 19 U.S.C. 1337(d), the Commission carefully noted that the term "entry" in the exclusion order "would appear to cover articles that have, in the words of your [Customs] letter, 'only entered the Customs territory of the United States temporarily for purposes of discharge and then transit to another country.'" Consequently, a majority of the Commission concluded that the merchandise at issue "should be excluded."

As we have explained in the preceding pages, merchandise which is transported in bond for exportation is excluded. Therefore, while we appreciate the Commission's response to Customs inquiry, we believe that Customs and the importer's actions in the last nine years have been appropriate and in accordance with the Commission's exclusion order.

Sincerely yours,

Elizabeth B. Andersen

for Michael T. Schmitz

Attachments

CC: Assistant Commissioner (Commercial Operations)
Assistant Commissioner (Inspection and Control)
Assistant Commission (International Affairs)