

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)

CERTAIN R-134a COOLANT)
(OTHERWISE KNOWN AS 1,1,1,2-)
TETRAFLUOROETHANE))

Investigation No. 337-TA-623
Enforcement Proceeding

Enforcement Initial Determination

This is the administrative law judge's Enforcement Initial Determination (EID), pursuant to the Commission Order of February 18, 2009. The administrative law judge, after a review of the record developed, finds inter alia that the enforcement respondent has not violated the Consent Order issued by the Commission on September 11, 2008. This is also the administrative law judge's recommendation, pursuant to said Order, that no enforcement measures are appropriate should the Commission find a violation of said Consent Order.

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ABBREVIATIONS

CBr	Complainants' Post-Hearing Brief
CDX	Complainants' Demonstrative Exhibit
CFF	Complainants' Proposed Findings of Fact
CORFF	Complainants' Objections To RFF
COSFF	Complainants' Objections To Staff's Proposed Findings of Fact
CRBr	Complainants' Post-Hearing Reply Brief
CRRFF	Complainants' Proposed Rebuttal Findings to RFF
CRSFF	Complainants' Proposed Rebuttal Findings To SFF
CX	Complainants' Exhibit
JX	Joint Exhibit
RBr	Respondent's Post-Hearing Brief
RDX	Respondent's Demonstrative Exhibit
RFF	Respondent's Proposed Findings of Fact
ROCFF	Respondent's Objections To Complainants' Proposed Findings of Fact
ROSFF	Respondent's Objections To Staff's Proposed Findings of Fact
RRBr	Respondent's Post-Hearing Reply Brief
RRCFF	Respondent's Proposed Rebuttal Findings To CFF
RRSFF	Respondent's Proposed Rebuttal Findings To SFF
RX	Respondent's Exhibit
SBr	Staff's Post-Hearing Brief
SFF	Staff's Proposed Findings of Fact

SRBr	Staff's Post-Hearing Reply Brief
SX	Staff's Exhibit
Tr.	Prehearing and Hearing Transcript

I. Procedural History

On December 12, 2008, complainants INEOS Fluor Holdings Ltd., INEOS Fluor Ltd., and INEOS Fluor America L.L.C. (INEOS) filed a complaint, requesting that the Commission institute a formal enforcement proceeding under Commission rule 210.75 to investigate an alleged violation of a September 11, 2008 Consent Order relating to an “old” process, and involving (1) an accused shipment of the coolant R-134a and (2) facilities in China. The complaint named a single respondent, Sinochem Environmental Protection Chemicals (Taicang) Co. Ltd. (Sinochem Taicang). By notice, which issued on February 18, 2009, the Commission instituted a formal enforcement proceeding relating to said September 11, 2008 Consent Order. The following private entities were named as parties to the formal enforcement proceeding: (1) complainants and (2) respondent Sinochem Taicang.

In the ORDER accompanying said notice, the Commission stated, inter alia:

3. The formal enforcement proceeding is hereby certified to the chief ALJ, Chief Judge Paul J. Luckern, who shall designate a presiding ALJ for this proceeding for issuance of an enforcement initial determination (“EID”). The presiding ALJ is directed to set a target date for completion of these proceedings within forty-five (45) days of institution in accordance with 19 C.F.R. § 210.5 l(a).
4. The presiding ALJ, in his discretion, may conduct any proceedings he deems necessary, including issuing a protective order, holding hearings, taking evidence, and ordering discovery consistent with Commission rules to issue his EID. The EID will rule on the question of whether Sinochem (Taicang) has violated the September 11, 2008 consent order issued in the above-captioned investigation. All defenses not barred by claim preclusion may be raised in this proceeding. The presiding ALJ shall also recommend to the Commission what enforcement measures are appropriate if Sinochem (Taicang) is found to violate the Commission’s consent order. The presiding ALJ, in his discretion, may also conduct any proceedings he deems necessary, including taking evidence and

ordering discovery, to issue his recommendations on appropriate enforcement measures.

The Chief Judge was designated the presiding administrative law judge for issuance of the EID and any recommended enforcement measures.

As to the origin of the September 11, 2008 consent order, Sinochem Modern Environmental Protection Chemicals (Xi'an) Co., Ltd., Sinochem Environmental Protection Chemicals (Taicang) Co., Ltd., Sinochem Ningbo Ltd., and Sinochem (U.S.A.), Inc., parties who were respondents in the underlying "violation phase" investigation, filed Motion No. 623-28 titled "Motion For Partial Termination Based Upon a Consent Order" in said underlying investigation on August 11, 2008. Motion No. 623-28, inter alia, defined a "new" process and an "old" process and requested termination of the underlying investigation with respect to the "old" process. A document titled "Consent Order Stipulations" was filed concurrently on August 11, 2008 by said respondents. On August 13, 2008, complainants advised the administrative law judge that "the parties have had extensive discussions in order to fashion a proposed consent order and consent order stipulation that complainants would not oppose. The parties have reached agreement as to the language of the order and stipulation..." (Complainants' Response to Motion No. 623-28.) Also on August 13, 2008, the staff filed a response to Motion No. 623-28 in support of a "revised" proposed Consent Order and Consent Order Stipulations. (Staff's Response to Motion No. 623-28 at 2.) On August 15, 2008, said respondents filed Motion No. 623-30, titled "Unopposed Motion for Partial Termination of Investigation Based On Entry of Consent Order Specific to the Old Process," which Motion No. 623-30 also contained a document titled "Consent Order Stipulations." On August 18, 2008, said respondents filed a

public version of Motion No. 623-30, which public version contained a version of the document titled Consent Order Stipulations dated August 18, 2008. Filed concurrently with said public version, on August 18, 2008, was a confidential version of the Consent Order Stipulations and Confidential Appendix IA, IB, and II to the Unopposed Motion for Partial Termination of Investigation Based on Entry of Consent Order Specific to the “Old” Process. Said confidential August 18, 2008 version of the Consent Order Stipulations (Consent Order Stipulations), which the parties to the formal enforcement proceeding rely on, is included in CX-1003. Said Consent Order Stipulations mentions conversion to the New Process in the following language in a “whereas” clause in the preamble:

WHEREAS, Respondents agree that, upon entry of the Consent Order, Respondent Sinochem Taicang will convert all of its plants for the manufacture of R-134a to the New Process and that only R-134a coolant manufactured by Sinochem Taicang using the New Process will be imported into the United States, sold for importation, or sold after importation within the United States and that any R-134a product manufactured by Sinochem Xi’an will not be made available for introduction into the United States unless and until all its plants for the manufacture of R-134a at Sinochem Xi’an are converted to the New Process;¹

Following said “whereas” clause, the Consent Order Stipulations states:

NOW THEREFORE, pursuant to Commission Rule 210.21(c)(1)(ii) and (c)(3)(i), the Respondents stipulate and agree as follows in connection with their motion to Terminate the investigation in part based on a Consent Order:

There then follows actual stipulations which include:

¹ The contents of the WHEREAS clause regarding conversion of the respondent’s plants in the preamble of the Consent Order Stipulations did not change substantively in any of Motion Nos. 623-28 filed August 11, 2008, 623-30 filed August 15, 2008 and the public version of 623-30 filed August 18, 2008.

(3) Effective immediately upon entry of the Consent Order, Respondents, including their officers, directors, employees, agents, and subsidiary entities that they control, agree, upon entry of the Consent Order, that they will not directly or indirectly import into the United States, sell for importation into the United States, sell within the United States after importation or knowingly aid, abet, encourage, participate in, or induce the sale for importation, importation into the United States or sale in the United States after importation of R-134a coolant manufactured by the old process.

(CX-1003.)

On August 20, 2008, an Initial Determination (Order No. 25) issued in the violation phase of Investigation No. 337-TA-623 which granted said respondents' unopposed Motion No. 623-28 and terminated the investigation with respect to the Old Process. Order No. 25 stated that "[e]ntry of the proposed [Consent] Order ... renders moot the dispute between the parties with respect to the relief sought from the Commission by complainants with respect to the Old Process" and that "both complainants and respondents agree to the termination of the investigation as to said OLD Process." (Order No. 25 at 2-3.) The Commission determined not to review Order No. 25 and issued the subject Consent Order on September 11, 2008. CX-1002 is the Consent Order issued by the Commission.²

In the Enforcement Proceeding, Order No. 31, which issued on March 9, 2009, a procedural schedule proposed by the parties was adopted. Order No. 32, which issued on March

² The Consent Order (CX-1002) includes a stipulation that says:

(11) Respondents expressly reserve the right to sell for importation to the United States, import, or sell for importation within the United States R-134a coolant manufactured by the respondents' New Process (as defined in the Consent Order Stipulation).

(CX-1002.002.)

3, 2009, set a target date of January 21, 2010 which meant that the EID referenced in the Commission Order of February 18, 2009 should be filed no later than September 21, 2009.

A prehearing conference and an evidentiary hearing were conducted on June 22, 2009 with all parties participating. At the prehearing conference, respondent's Motion In Limine No. 623-48 to exclude testimony of Geosits³ was mooted (Tr. at 27), respondent's Motion In Limine No. 623-47 involving Geosits was denied (Tr. at 32), respondent's Motion In Limine No. 623-49 to exclude arguments and evidence relating to nonconversion of respondent's plant was denied (Tr. at 39), and complainants' Motion In Limine No. 623-51 and respondent's Motion In Limine No. 623-50 involving preclusion of certain proffered evidence were mooted (Tr. at 47). Post-hearing submissions have been made by all parties. The matter is now ready for a final decision.

The EID is based on the record compiled at the hearing and the exhibits admitted into evidence. The administrative law judge has also taken into account his observation of the witnesses who appeared before him during the hearing. Proposed findings of fact submitted by the parties not herein adopted, in the form submitted or in substance, are rejected as either not supported by the evidence or as involving immaterial matters and/or as irrelevant. Certain findings of fact included herein have references to supporting evidence in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting said findings.

³ Peter Geosits is the Americas' Commercial Director for INEOS Fluor Americas LLC. (CFF 51 (undisputed).)

II. Jurisdiction

As recited in the confidential Consent Order Stipulations, “[t]he Commission has in rem jurisdiction over, inter alia, R-134a coolant made by [Sinochem Taicang’s] Old Process, which is a subject of this [violation phase] investigation and the Commission has in personam jurisdiction over [Sinochem Taicang] for purposes of this Consent Order.” (CX-1003C.003.)

III. Experts

Frank Reynolds was qualified as respondent’s expert in customs and international trade matters. (Tr. at 206.) No other expert was qualified.

IV. The Accused Shipment

With respect to the accused shipment of the coolant R-134a, complainants, in support of their enforcement complaint, argued that Sinochem Taicang and Stoner, Inc. (Stoner) entered into a sales contract for the purchase of R-134a manufactured using Sinochem Taicang’s “old” process; that a shipment of R-134a manufactured by Sinochem Taicang using the “old” process was imported on September 11, 2008 and delivered to Stoner’s facility on September 15, 2008; that the Stoner shipment was delivered “DDP Quarryville”⁴ and thus Sinochem Taicang was

⁴ According to a document titled “Incoterms 2000: ICC Official Rules for the Interpretation of Trade Terms” (JX-52), “DDP” is an acronym for Delivery Duty Paid, which means:

[t]hat the seller delivers the goods to the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the applicable costs and risks involved in bringing the goods thereto including, where applicable, any “duty” (which term includes the responsibility for and the risks of the carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import into the country of destination.

responsible for the shipment until it reached Stoner on September 15, 2008; and that title over the Stoner shipment did not transfer from Sinochem Taicang to Stoner until the shipment was delivered on September 15, 2008, which is after the issuance of the consent order on September 11, 2008. (CBr at 17-27.)

Respondent argued that the accused shipment did not violate the consent order. In support, it is argued that the sale and importation took place before September 11, 2008; that “DDP” and other Incoterms⁵ do not govern transfer of title; and that any assertion that said sale was not complete by September 11, 2008 is wrong. (RBr at 21-7.)

The staff argued that the shipment at issue did not constitute a consent order violation. (SBr at 2-8.)

Referring to the accused shipment, during January and February 2008, Stoner, located in Quarryville, PA, entered into negotiations with respondent for the purchase of R-134a (CX-1114C at 001-2).⁶ It is undisputed that on March 19, 2008 a contract was executed between

(JX-52 at 122; see also CFF 135; RFF.III.20.)

⁵ Incoterms are a series of scenarios that describe obligations that buyers and sellers have to each other in the sale of tangible, portable goods; they describe what obligations the seller has to the buyer and what obligations the buyer has to the seller. (RFF.III.23 (undisputed).)

⁶ CX-1114C is an e-mail between a Mr. Zechman and Dave Dillon regarding the purchase and shipment of R-134a from respondent. (CFF 107 (undisputed).) Zechman is Stoner’s Chief Operating Officer and testified on behalf of Stoner and himself. (CFF 96, 97 (all undisputed).) Zechman testified that he is involved in deciding from which sources Stoner purchases R-134a:

{

}

Stoner and the respondent for the sale of R-134a (1,1,1,2-tetrafluoroethane), which was a master contract for several deliveries; and that said sales contract between the respondent and Stoner has a section called “property rights” (at JX-54C.002) which states that “the goods remain the property of the seller until the complete payment of the price or as otherwise agreed.” (SFF I.9, I.10, RFF. III.1 (all undisputed).)⁷

The administrative law judge finds that the coolant R-134a involved in said shipment was shipped from China, and the shipment arrived in the United States all prior to September 11, 2008. See JX-54C (March 10, 2008 sales contract); RX-506C (July 18, 2008 purchase order for accused shipment); RX-543C (July 29, 2008 letter of credit for{ } for the accused shipment); JX-59C (July 30, 2008 commercial invoice for the accused shipment); JX-58C (July 30, 2008 packing list for the accused shipment); JX-60C (bill of lading showing shipment loaded on vessel on August 4, 2008, freight prepaid through to Quarryville, PA); RX-505C (National Penn Bank shows Stoner’s account debited for draft amount of{ } for accused shipment on August 18, 2008); RX-547C (credit advice showing{ } (less banking charges) put into respondent’s account on August 19, 2008); JX-62C (Customs “Entry/Immediate Delivery” form showing release of the accused shipment by Customs on September 5, 2008, an entry date of

{ }

(JX-66C (Zechman Dep.) at 10.) He further testified that Stoner started purchasing R-134a from Sinochem { } (JX-66C (Zechman Dep.) at 11, 17.) He also testified that Stoner became aware that respondent manufactured R-134a when Stoner was { } (JX-66C (Zechman Dep.) at 11.)

⁷ Stoner does not { } (CFF 101, 102 (all undisputed).)

September 5, 2008, and an arrival date of September 9, 2008); JX-61C (September 19, 2008 “Entry Summary” Customs form showing an export date of August 4, 2008, an entry date of September 5, 2008, and an import date of September 9, 2008 for accused shipment); RX-564 (“Trade Inflo” report showing September 9, 2008 arrival date). The only dispute revolves around whether the transaction involving said shipment was or was not completed before the issuance of the September 11, 2008 Consent Order.

Complainants, in support of their allegations in CRRFF III.2A through CRRFF III.2I, asserted that the “Terms of Payment” in the March 19, 2008 contract contemplate that complete payment for any shipment is not due until {

} citing JX-54C at 001; that the term{

}citing JX-54C at 002-3; that

international sales contracts are governed by the law chosen by the parties; that said March contract specified that{

} that the CISG does not address the transfer of title; that according to Article 133 of the Contract Law of the People’s Republic of China “[t]he title of the object shall be transferred upon the delivery of the object unless other laws have a different provision or the parties have a different agreement”; and that consistent with Chinese Law, Sinochem Taicang’s customary practice is to structure its contracts so that transfer of title occurs at delivery.

It is a fact that the March 19, 2008 contract specifically stated under the language “Property rights” that “[t]he goods remain the property of the Seller until the complete payment of the price, or as otherwise agreed.” (JX54C.002 (emphasis added).) There is also unrefuted hearing testimony that respondent and Stoner did not have any agreement to change the default operation of the cited “Property rights” language. Thus Ma Bin, general manager of respondent Sinochem Taicang (Tr at 308) testified:

Q. What is this document?

A. This is a sales contract signed between Sinochem Taicang and Stoner concerning the product 134a.

Q. What is the date of this document?

A. The final signing date of this document is March 10th of 2008.

Q. Turning to the second page of the document, at the sentence under the heading property rights, it states, "the goods remain the property of the seller until the complete payment of the price or as otherwise agreed." What does Sinochem Taicang understand that sentence to mean?

A. According to the owners of Sinochem Taicang, after the full payment from Stoner has been made, the property of the goods will be transferred to the buyers.

Q. You said the property of the goods. What do you mean by that?

A. That means who owns the goods.

Q. That sentence on the second page of the sales contract that we just read concludes with the phrase "or as otherwise agreed."

Did the parties otherwise agree?

A. No, we do not have otherwise agreed.

Q. When was the last sale under this contract made?

A. By the end of July of 2008.

Q. Is it your understanding that this last sale to Stoner is the sale at issue in this proceeding?

A. Yes.

Q. How was this transaction for this last sale to Stoner started?

A. Well, around 20th of July of 2008, Stoner contacted Sinochem Taicang about whether Taicang can provide or deliver XO tank -- ISO tank of 134a on 8th of September of 2008.

Q. How did you receive that notice?

A. They used e-mail to notify me.

Q. Please turn to the Exhibit CX-1019 in your binder. Are these e-mails related to that requested by Stoner?

A. Yes.

Q. What did Sinochem Taicang do in response to that request from Stoner?

A. After we have received the request from Stoner, we contacted shipping company right away, and the answer we get from the shipping company is that as long as the groups can be uploaded on to the ship on 8th of August of 2008, it can guarantee the delivery on 8th of September of 2008.

Q. Did you contact Stoner with that information?

A. We forwarded this information to the company Stoner, and asked them that they can prepare the letter of credit.

Q. Did you receive such a letter of credit?

A. Yes, we have received a letter of credit.

Q. Please turn to Exhibit RX-543C in your binder. What is this

document?

A. This is notification of documentary credit.

Q. Is the letter of credit attached to this notification of documentary credit?

A. Yes.

Q. What is the date of the letter of credit?

A. The letter of credit has been issued on 29th of July of 2008 and has been received on 30th of July of 2008.

Q. What is the number of the letter of credit?

A. The number on the letter of credit is 20800050.

Q. What do you understand are the requirements for payments set out in the letter of credit?

A. According to the payment requirements in the letter of credit, we need to provide a bill of lading, packing list, commercial invoices, and inspection certificate.

Q. Did Sinochem Taicang prepare that documentation?

A. Yes, we have prepared all of that.

Q. I would like you to turn to Exhibit JX-58C in your binder. What is this document?

A. This is a packing list from Sinochem Taicang.

Q. Does this have any connection to the letter of credit we just reviewed?

A. This is a packing list related with this letter of credit.

Q. How do you know it is related with the letter of credit that we just reviewed, which is Exhibit Number RX-543C?

A. On this packing list, there is a number of the letter of credit

which corresponds with the original number of letter of credit, which is 20800050.

Q. What is the date of this document?

A. 30th of July of 2008.

Q. This document was prepared by Sinochem Taicang according to the instructions of the letter of credit?

A. Yes.

Q. I would like you to turn to the tab JX-59C in your binder. What is this document?

A. This is the commercial invoice of Sinochem Taicang.

Q. Is this related to the letter of credit that we viewed a few minutes ago, RX-543C?

A. Yes, this is related with the letter of the credit as is required by the letter of credit.

Q. What is the date of this document?

A. 30th of July of 2008.

Q. When did the shipment to Stoner leave Sinochem Taicang's facility?

A. Approximately by the end of July of 2008.

Q. So where was it first transmitted?

A. First they have been shifted to the shipping company at the port of Shanghai.

Q. Then what happened to the shipment?

A. Then the goods have been uploaded on the shipping vessel and then have been shipped to the United States.

Q. Did you receive any documentation in connection with the

shipment to the United States?

A. Yes, we have received a bill of lading.

Q. Did Sinochem Taicang have any additional involvement with the delivery of the product to Stoner after the shipment left China?

A. No.

Q. I will ask you to turn to tab JX-16 in the binder that you have. What is this document?

A. Bill of lading.

Q. What does it show with respect to the date that the product was shipped from China to the United States?

A. 4th of August of 2008.

Q. How did Sinochem Taicang use this bill of lading in connection with getting paid for this last shipment to Stoner?

A. We have submitted the original bill of lading, packing list, commercial invoice and -- and also the letter of credit to the bank for payment.

Q. When were the originals of those documents delivered to the bank for payment?

A. Should be on 8th or 9th of August of 2008, or maybe even at earlier time.

Q. I would like you to turn to tab RX-547C in your binder. What is this document?

A. This is a payment notice from the bank.

Q.

JUDGE LUCKERN: This was 547C? I have got it. Fine, go ahead, Mr. Menchaca.

BY MR. MENCHACA:

Q. Does this payment notice have any connection to the letter of credit we reviewed earlier, RX-543C?

A. This is the payment notice under the letter of credit numbered 20800050 signed by Sinochem Taicang and Stoner.

Q. When was Sinochem Taicang paid for this last shipment to Stoner?

A. We have received payment on 19th of August of 2008.

(Tr. at 310-17 (emphasis added).) In addition, as respondent's expert Reynolds credibly testified:

Q. Let me show you what has been marked as JX-54C, entitled sales contract. Can you identify that document for me, please?

A. I can. That's a sales contract between Sinochem the Respondent and Stoner, Inc. It was executed on March 19th, 2008, as I see from page 54C.003.

Q. Would you take another look at the date. I think you said the 19th.

A. March 19th, 2008. That is the date it was signed by Mr. Zechman.

Q. Very good. Thank you.

A. The document date was March 10th, 2008. It describes a contract for R-134a. It talks about, I believe it is{ }pounds. My copy is a little blurry here. It gives a price. It gives the term PDD Quarryville, Pennsylvania. It describes the payment as a letter of credit or a deposit. It gives time of shipment that individual notices to ship will be issued.

It covers insurance to be effected by the seller. It has payment conditions. We will see that the payment condition that was selected was a letter of credit.

It has a section called property rights, which is the fourth bullet down on the second page. That is JX-54C.002. Under property rights, 1, 2, it says, "the goods remain the property of the seller until the complete payment of the price or as otherwise

agreed."

Q. Let me stop you there. Did you observe any evidence of an agreement otherwise?

A. I did not.

Q. Now, the contract on page 3, item number 3.

A. Yes.

Q. That references Incoterms. And I will read that it says any reference made in trade terms is deemed to be made to the relevant term of Incoterms published by the International Chamber of Commerce. Is that the publication with which you are involved?

A. It is.

Q. Were you a delegate on behalf of the United States?

A. I was the sole U.S. delegate of that revision.

Q. And you participated in the preparation of Incoterms?

A. I served on the drafting committee for the Incoterms 2000.

Q. Let me reference up above, it says there is a reference to the United Nations Convention on Contracts for the International Sale of Goods, hereinafter referred to as CISG. Do you see that?

A. Yes, I do.

Q. And of what relevance is that?

A. That says that the CISG, which is a treaty between the United Nations and a number of states, including China and the United States, that the treaty covers contracts for the sale of -- for the international sale of goods and that the provisions of that treaty would apply.

Q. Okay. Does the CISG govern property rights and the goods or passage of title?

A. Article 4 of the CISG disclaims property rights of goods and the passage of title.

Q. Now, the Incoterms -- first of all, what is the purpose of Incoterms?

A. Incoterms are a series of scenarios that describe obligations that buyers and sellers have to each other in the sale of tangible, portable goods. They describe what obligations the seller has to the buyer and what obligations the buyer has to the seller.

Q. Do Incoterms govern the transfer of title?

A. Incoterms do not speak to the transfer of title.

Q. Let me direct your attention to JX-52. It says Incoterms 2000.

A. That's correct.

Q. I am putting it here on the ELMO. That's the publication with which you were involved in the preparation of?

A. It is.

Q. Does that publication address the issue of whether Incoterms govern the transfer of title?

A. It addresses the issue and it states that Incoterms do not address the issue of title.

Q. Would you direct us to the page?

A. Yes. It would be JX-52.007, second paragraph, about the sentence beginning "although, Incoterms are extremely important for the implementation of the contract of sale, a great number of problems which may occur in such a contract are not dealt with at all, like a transfer of ownership and other property rights, breaches of contract," and then it goes on from there.

Q. Let me show you publication RX-563 if I could, please. You have a copy in your binder there?

A. I do.

Q. Can you identify what RX-563 is?

A. This is a commentary on Incoterms called ICC Guide to Incoterms 2000. It is written by professor Jan Ramberg and published by the International Chamber of Commerce.

Q. Do you find it is reliable?

A. Yes.

Q. Does the publication 563 address the manner of whether Incoterms govern the transfer of title?

A. It does.

Q. What page?

A. RX-56300011, about the middle of the page, what Incoterms cannot do for you. "Incoterms do not deal with transfer of property rights in the goods."

Q. So what documents in your opinion govern the transfer of ownership with respect to the sale at issue here?

A. My opinion would be that the sales contract itself would and the transportation document, main carriage transportation document, which in this case would be an ocean bill of lading.

(Tr. at 219-25 (emphasis added).) Moreover, as indicated by the testimony of Ma Bin, supra, payment was made to respondent by August 19, 2008. See also RX-547C. Complainants, in CORFF III.10, objected to respondent's proposed finding RFF.III.10 which made reference to payment to respondent by August 19, 2008 on the ground that said finding is "not relevant to any issue in this investigation." In support of CRRFF III.9A, complainants relied on testimony of respondent's expert Reynolds, who testified that "[w]hen property passes, will depend entirely on the contract of sale." (Reynolds, Tr. at 278.) The administrative law judge finds that it is clear from the precise language of the sales contract, as supported by the expert testimony of Reynolds,

supra, that when complete payment to the seller has been made, the goods no longer remain the property of the seller, which in this case would be respondent Sinochem Taicang. (JX-54C.)

Complainants argued that an article by Reynolds explains that “[d]elivery on the buyer’s side means deferred revenue recognition. It also theoretically implies tracing every shipment to determine the date physical delivery takes place.” (CFF 209; see also CX-1048 at 002.)

However, CX-1048, titled “How Choice of Incoterms Affects Revenue Recognition,” is an article directed to accounting and SEC matters. It further states that “Incoterms are silent on ownership transfer.” (CX-1048.001.)

Complainants also argued that even if the administrative law judge were to determine that title over the accused shipment of R-134a passed to Stoner prior to September 11, 2008, that fact would not negate Sinochem Taicang’s violation of the Consent Order; that nowhere in the Consent Order does it say that ownership of the imported R-134a is determinative of whether a violation exists; that on the contrary, the terms of the Consent Order are much broader, and prohibit a wide variety of activities on the part of the Sinochem Taicang; and that specifically, provision (3) of the September 11, 2008 Consent Order states, in relevant part, that:

Respondents, including their officers, directors, employees, agents, and subsidiary entities that they control, agree that, upon entry of the Consent order, that they will not directly or indirectly import into the United States, ... participate in, or induce the sale for importation, importation into the United States or sale in the United States after importation of R-134a coolant manufactured by the Old Process without the consent or agreement of Complainants.

(CBr at 20-21 (emphasis added by complainants).) However, as respondent’s expert Reynolds testified:

Q. All right. Now, you mentioned the term DDP. Can you

explain what that is?

A. Delivery duty paid is an Incoterm. Deliver duty paid says the seller is responsible for all costs through the point, the agreed point of delivery. And the seller is responsible for the delivery of the goods for the agreed point of delivery.

Q. Now, does DDP govern the passage of title?

A. It does not.

(Reynolds, Tr. at 231 (emphasis added).) Also, as Reynolds, further testified, “Incoterms do not speak to the transfer of title.” (See supra.) Moreover, the administrative law judge finds that the record establishes that respondent did not directly or indirectly participate in importation or sale after issuance of the Consent Order, even assuming, arguendo, sale or importation of the accused product was not technically complete at the time the Consent Order issued. Thus, Sinochem Taicang purchased the required insurance for the accused shipment prior to loading and shipping the goods. (Ma Bin, Tr. at 360.) The accused shipment left Sinochem Taicang’s facility by the end of July 2008. (SFF I.24 (undisputed).) On August 4, 2008, the accused shipment was loaded on a vessel at Shanghai, China and left China. (SFF I.33 (undisputed).) Respondent had no involvement with delivery of the accused shipment to Stoner after the shipment left China. (Ma Bin, Tr. at 315-16.) RX-505C shows that National Penn Bank, which was the bank that issued the letter of credit for the accused shipment, is claiming on August 18, 2008 that Stoner’s account was debited for a gross amount of{ } was the draft amount, and references letter of credit number 20800050. (RX-505C; Reynolds, Tr. at 240; see also SFF I.36 (undisputed in relevant part).) The bill of lading was no longer available to Sinochem Taicang as of August 19, 2008 because payment was made through the letter of credit and the letter of credit

stipulated that the original bills of lading had to be presented to the bank to trigger payment under the letter of credit. (Reynolds, Tr. at 242; see also SFF I.41 (undisputed in relevant part).) Respondent further understood that once the commercial invoice, bill of lading, and letter of credit were submitted to the bank for payment on August 8 or 9, 2008, respondent could no longer request return of the accused shipment. (Ma Bin, Tr. at 318.) Respondent could not have stopped the accused shipment as of August 19, 2008, because once the original documents were out of respondent's control, respondent could not stop the shipment and the carrier would make the goods available only to the named consignee shown in field 2 of the bill of lading, which was Stoner. See Reynolds, Tr. at 242; JX-60C; see also SFF I.42 (undisputed in relevant part). As Reynolds testified, respondent no longer owned the accused shipment after payment was received on August 19, 2008. (Reynolds, Tr. at 214-15.) Moreover, respondent understood that, pursuant to the sales contract (JX-54C), after the full payment was made by Stoner, ownership of the goods transferred to the buyer, Stoner (JX-54C; Ma Bin, Tr. at 310-11, 317-318) and respondent believed that the sale to Stoner was completed on August 19, 2008 when the full payment was received. (Ma Bin, Tr. at 320-21.) Moreover, Stoner, the other party to the contract, also believed that the sale was complete after payment was completed. (See JX-66 (Zechman Dep.) at 62-63.) Thus, the administrative law judge finds that all actions taken by respondent with respect to the shipment in issue were completed in August, and in fact no actions could have been taken by respondent to cancel or alter the shipment after August 19, 2009. Hence, he finds that complainants have not established that the accused shipment violated the Consent Order in issue.

V. Facilities In China

Regarding facilities in China, complainants argued that the Commission issued the

Consent Order with respect to the “Old” process based on the terms of the Consent Order Stipulations and proposed Consent Order; that “Sinochem Taicang never converted any of its facilities” to the manufacture of R-134a by the “New” process; and that Sinochem Taicang’s failure to abide by the terms of the Consent Order Stipulations is a violation because under basic principles of contract law the Consent Order Stipulations document is part of the Consent Order and independently enforceable, and the only way to sufficiently protect INEOS’ intellectual property rights is by enforcing the Consent Order and Consent Order Stipulations. (CBr at 7-17.)

Respondent argued that the Consent Order does not require respondent to convert to the new process; and that as a matter of law there can be no violation resulting from the alleged failure to convert because the Commission does not enforce Consent Order Stipulations, by civil fine or otherwise, and the Commission does not have the statutory authority and jurisdiction to enforce such extraterritorial conversion. (RBr at 29-35.)

The staff argued that while complainants assert that Sinochem Taicang violated the Consent Order by failing to abide by one of the Consent Order Stipulations, which recited that respondent would convert the Taicang facility from the “old process” to the “new process,” the Commission enforces consent orders, “the Commission itself does not enforce private agreements such as settlement agreements and consent order stipulations” citing Certain Digital Multimeters, and Products with Multimeter Functionality, Inv. No. 337-TA-588, Order No. 17 (unreviewed Initial Determination) (June 14, 2007) (emphasis added), citing Commission rule 210.75 (Digital). (SBr at 8.)

This enforcement proceeding is directed to whether or not a violation of the Consent Order, itself, has occurred. See February 18, 2009 Notice of Institution (“The Commission has

determined to institute a formal enforcement proceeding to determine whether Sinochem (Taicang) is in violation of the Commission's consent order . . . and what, if any, enforcement measures are appropriate."'). It is a fact that the Consent Order does not recite that respondent must convert its Chinese plant to the New Process. (CX-1002.) Rather, complainants argued that a "whereas" clause recited in the Consent Order Stipulations (CX-1003C) (see Procedural History, supra) must be read into the later explicitly stated "stipulations" and further that those "stipulations," as rewritten, should then be read into the Consent Order itself. Thus, complainants point to said "whereas" clause that precedes the actual "stipulations" in the Consent Order Stipulations. (See CX-103C.002-03.) However, as the plain language of the Consent Order Stipulations recites, it is only after the "whereas" clause that the actual "stipulations" begin with the language:

NOW, THEREFORE, pursuant to Commission Rule 210.21 (c)(1)(ii) and (c)(3)(i), the Respondents stipulate and agree as follows in connection with their motion to Terminate this investigation in part based on a Consent Order:

(CX-1003C.003 (emphasis added).) The administrative law judge finds that the Consent Order itself, the entry of which complainants did not oppose, summarizes the set of stipulations on which it is based before reciting the operative provisions of the Order. Significantly, the plant conversion is not recited in the Consent Order's summary of the stipulations. See Consent Order at JX-51C.014-.017.⁸ The stipulation regarding the plant conversion is, in fact, absent from the

⁸ Moreover, the stipulations in the Consent Order are the same as those in the Consent Order Stipulations, and not only do not require respondent to convert any of its plants to any New Process but also does not even mention anything about conversion to any New Process. (CX-1002.001-004.)

Consent Order's recitation of the stipulations which, by contrast, explicitly recites specific stipulations regarding compliance reports and requirements related to invoices. (See JX-51C.014-017.)⁹ In fact, the language regarding plant conversion appears only in the WHEREAS clause of the Consent Order Stipulations.¹⁰

The omission of the plant conversion from the Order is not viewed as a mere oversight, as the Commission does not undertake extraterritorial action. Thus, any plant conversion is not now read into the order. See, e.g., Certain Sildenafil or Any Pharmaceutically Acceptable Salt, Inv. No. 337-TA-489, Order No. 16 (June 20, 2003) (policing conduct outside the U.S. is outside the jurisdiction of the Commission), citing Certain Mechanical Gear Couplings and Components Thereof, Inv. No. 337-TA-343 (Remand), Order No. 18 (unreviewed Initial Determination) (August 20, 1993). Moreover, as the staff has argued, citing Digital, the Commission enforces

⁹ To the contrary, the Consent Order incorporates by reference from the Consent Order Stipulations only the definitions of "Old Process" and "New Process" which appear only in the confidential version of the Consent Order Stipulations. (CX-1002.001-.002.)

¹⁰ With respect to said WHEREAS clause, as Ma Bin testified, when the request for the consent order was filed, Sinochem Taicang intended to convert from the Old Process to the New Process:

- Q. When the request for the consent order was filed, did Sinochem Taicang intend to convert from the old process to the new proces?
- A. We do have our plans for that.
- Q. When did Sinochem Taicang intend to convert?
- A. According to our plan, we were planning to convert our process in December of 2008 or in January of 2009.

(Tr. at 329.)

consent orders, but the Commission itself does not enforce private agreements such as settlement agreements and consent order stipulations.

Based on the foregoing, the administrative law judge finds that respondent's failure to convert the Taicang facility to the "new" process does not constitute a violation of the terms of the Consent Order.

VI. Remedy

Complainants argued that, pursuant to Commission rule 210.75(b)(4)(i) and (iii), upon conclusion of a formal enforcement proceeding, the Commission may "[m]odify a cease and desist order, consent order, and/or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order" and may also "[r]evoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States;" that due to Sinochem Taicang's calculated refusal to abide by the terms of the Consent Order and Consent Order Stipulations and convert its facilities to the "new" process, the Consent Order does not adequately protect INEOS' intellectual property rights; that in its current form, the Consent Order is virtually impossible to police; and that the Commission should issue a permanent limited exclusion order and cease and desist order against Sinochem Taicang pursuant to Commission rule 210.75(b)(4).

Complainants also argued that section 337(f)(2) makes mandatory the imposition of monetary penalties on a party who violates a cease and desist order, citing 19 U.S.C. § 1337 (f)(2); such that penalties can be up to \$100,000 or twice the value of the articles entered or sold, for each day on which the violation occurred (Id.); that the Federal Circuit has held that Section 337(f)(2) applies with equal force to violations of consent orders, citing San Huan, 161 F.3d at

1357; that in determining the amount of such penalty, the Commission has adopted a six factor test: (1) the good or bad faith of the respondent; (2) the injury to the public; (3) the respondent's ability to pay; (4) the extent to which respondent has benefitted from its violations; (5) the need to vindicate the authority of the Commission; and (6) the public interest, citing Certain Agricultural Tractors under 50 Power Take-Off Horsepower, Inv. No. 337-TA-380, Comm'n Op. (Aug. 18, 1999) (Tractors); that each of the six factors supports imposing civil penalties on Sinochem Taicang for its violations off the Consent Order; that specifically, INEOS submits that civil penalties up to \$100,000 per day should be imposed on Sinochem Taicang for each day it violated the Consent Order by failing to convert its facilities from "old" process to "new" process; and that civil penalties up to \$100,000 should also be imposed on Sinochem Taicang for participating in the sale and importation of a shipment of R-134a to Stoner in violation of the Consent Order. (CBr at 27-28.)

Respondent argued that no fine is warranted or appropriate, even assuming any violation. (RBr at 36-49.)

The staff argued that, given that it submits that there has been no violation of the Consent Order, no enforcement measures are appropriate; that even if a violation had arguably occurred, the evidence did not show bad faith¹¹ or intent on the part of respondent, harm to the public, or any significant benefit to respondent with regard to the shipment at issue; and that therefore, even

¹¹ The staff noted that respondent presented credible testimony from Ma Bin indicating that respondent intended to convert its Taicang facility in accordance with the Consent Order Stipulations at the time it moved for the Consent Order (see fn. 10, supra), that respondent has {

} citing Tr. at 321-330, 335, 339-342, 344, 366, 372-375. (SBr at 11, n. 10.)

if a violation were established based on “this shipment,” the evidence does not support the imposition of substantial civil penalties.¹² (SBr at 11.)

As for complainants’ request for issuance of a permanent limited exclusion order and cease and desist order against respondent Sinochem Taicang, the following testimony of respondent’s employee Ma Bin is unrefuted:

- Q. After the date of the consent order, September 11, 2008, did Sinochem Taicang do anything to ensure compliance with the order?
- A. Yes, first is that we have stopped any SIMS activity of relevant products to the United States.
- Q. Anything else?
- A. The second measure we have taken is that we have -- we required all the documents relevant documents we have with our clients to be stated clearly that any products from Sinochem Taicang cannot be sell -- cannot be sold or resold to the United States. Thirdly, we stopped to provide any quotation to the United States. And fourth measure we have taken is that we decided not to participate in AHR trade exhibition in January of 2009.

(Tr. 321-22.) Thus, pursuant to Commission rule 210.75(b)(4), after the September 11, 2008 date of the Consent Order, the administrative law judge finds that respondent stopped any sales activity of relevant products to the United States; that respondent required all the relevant

¹² The staff noted that respondent has requested a “dismissal with prejudice” rather than just a finding of no violation, citing respondent’s Pre-Hearing Statement at 2. However, it further noted that it is unclear whether respondent (1) seeks to bar further proceedings based on the single shipment at issue herein, or (2) more broadly seeks to bar subsequent enforcement proceedings based on potential future shipments; that, at least in the context of a violation proceeding, the Commission has previously held that a “dismissal with prejudice” is not permitted citing Certain Bar Clamps, Bar Clamp Pads, and Related Packaging, Displays, and Other Materials, Inv. No. 337-TA-429, Commission Determination (Dec. 3, 2001), citing Commission Opinion at 5 (Jan. 4, 2001); and that a “dismissal” with prejudice does not seem appropriate because there will be a final determination in this proceeding with regard to the shipment at issue, and it would be overly broad to bar future enforcement proceedings based on different facts. (SBr at 11-12, n. 11.) The administrative law judge agrees.

documents respondent had with its clients to be stated clearly that any products from Sinochem Taicang cannot be sold or resold to the United States; and that respondent decided not to participate in an “AHR” trade exhibition in January of 2009. In addition, the Commission also has recently found that claim 1 of the ‘276 patent is invalid. (Commission Opinion at 10, Inv. No. 337-TA-623 (Remand) (August 10, 2009).)

Based on the foregoing, complainants’ request for issuance of a permanent limited exclusion order and a cease and desist order against respondent Sinochem Taicang is denied.

Regarding complainants’ argument for imposition of monetary penalties, the administrative law judge has found, supra, that neither the accused shipment nor the failure of respondent to convert to the “new” process violated the Consent Order in issue. Thus, he finds no monetary penalties are warranted. Moreover, the administrative law judge agrees with the staff that even if a violation of the Consent Order in issue had arguably occurred, the record is lacking any evidence of bad faith or intent on the part of respondent, harm to the public, or any significant benefit to respondent.

CONCLUSIONS OF LAW

1. The Commission has in personam jurisdiction and subject matter jurisdiction.
2. There has been no violation of the Consent Order issued by the Commission on September 11, 2008.
3. Should a Consent Order violation is found, the record does not support any enforcement measures.

ORDER

Based on the foregoing, and the record as a whole, it is the administrative law judge's Enforcement Initial Determination (EID) that the enforcement respondent did not violate the Consent Order issued by the Commission on September 11, 2008. It is also the administrative law judge's recommendation that no enforcement measures are appropriate should the Commission find a violation of said Consent Order.

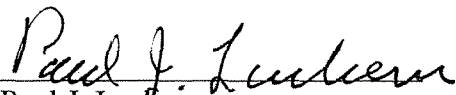
The administrative law judge CERTIFIES to the Commission his EID including his recommendation regarding enforcement measures. The submissions of the parties filed with the Secretary are not certified, since they are already in the Commission's possession in accordance with Commission rules.

Further it is ORDERED that:

1. In accordance with Commission rule 210.39, all material heretofore marked in camera because of business, financial and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission rule 201.6(a), is to be given in camera treatment continuing after the date this investigation is terminated.
2. Counsel for the parties shall have in the hands of the administrative law judge

those portions of the EID including a recommendation for any enforcement measures which contain bracketed confidential business information to be deleted from any public version of said filing, no later than October 5, 2009. Any such bracketed version shall not be served via facsimile on the administrative law judge. If no such bracketed version is received from a party, it will mean that the party has no objection to removing the confidential status, in its entirety, from said filings.

3. Pursuant to the Commission Order of February 18, 2009, petitions for review of the EID may be filed within fourteen (14) days of service of the EID. Responses to any petitions for review may be filed within seven (7) days of service of any petitions for review. Notwithstanding Commission rule 210.75(b)(3), the EID shall become the Commission's final determination sixty (60) days after service of the EID, unless the Commission orders review or changes the deadline for determining whether to review it.


Paul J. Luckern
Chief Administrative Law Judge

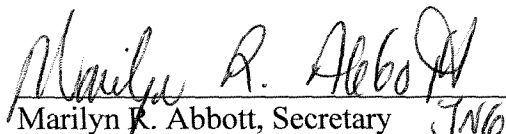
Issued: September 21, 2009

**CERTAIN R-134a COOLANT (OTHERWISE KNOWN
AS 1,1,1,2-TETRAFLUOROETHANE)**

**Investigation No. 337-TA-623
Enforcement Proceeding**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Enforcement Initial Determination** was served upon Heidi E. Strain, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on October 7, 2009.


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**CERTAIN R-134a COOLANT (OTHERWISE KNOWN
AS 1,1,1,2-TETRAFLUOROETHANE)**

**Investigation No. 337-TA-623
Enforcement Proceeding**

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