



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2012-017

Oceaneering Canada Limited

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Wednesday, February 19, 2014*

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IN THE MATTER OF an appeal heard on October 31, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 13, 2012, with respect to a request for a further re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**OCEANEERING CANADA LIMITED**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is allowed.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 31, 2013  
Tribunal Member: Jason W. Downey, Presiding Member  
Counsel for the Tribunal: Anja Grabundzija  
Kalyn Eadie (student-at-law)  
Acting Manager, Registrar Programs and Services: Lindsay Vincelli  
Registrar Officer: Haley Raynor

**PARTICIPANTS:****Appellant**

Oceaneering Canada Limited

**Counsel/Representatives**Roderick H. Rogers  
Ian J. Breneman**Respondent**

President of the Canada Border Services Agency

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**WITNESS:**Kevin Kerins  
Senior Vice-President, Remotely Operated Vehicles  
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed by Oceaneering Canada Limited (Oceaneering) on August 1, 2012, pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a further re-determination by the President of the Canada Border Services Agency (CBSA), dated June 13, 2012, pursuant to subsection 60(4).

2. The appeal concerns the tariff classification of a Hydra™ Magnum Plus 170 remotely operated vehicle, imported together with a cage-type tether management system (together, the goods in issue), used to carry out inspection, repair and maintenance on underwater structures. The CBSA determined that the goods in issue are properly classified under tariff item No. 8905.90.90 of the schedule to the *Customs Tariff*<sup>2</sup> as other vessels the navigability of which is subsidiary to their main function. Oceaneering argued that they should be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions. In the alternative, Oceaneering argued that the goods in issue may be classified under tariff item No. 8525.80.00 as television cameras.

### PROCEDURAL HISTORY

3. On September 11, 2009, the goods in issue were imported under tariff item No. 8479.89.90.<sup>3</sup>

4. On November 2, 2011, following an audit of a number of Oceaneering's importations, the CBSA issued a Detailed Adjustment Statement (DAS) re-determining the classification of the goods in issue as television cameras under tariff item No. 8525.80.00.<sup>4</sup>

5. Following Oceaneering's request on December 20, 2011, for a further re-determination that the goods in issue be classified under tariff item No. 8479.89.90,<sup>5</sup> the CBSA issued a letter on April 4, 2012, indicating its preliminary decision that the proper classification of the goods in issue is in fact under tariff item No. 8905.90.90.<sup>6</sup> On June 13, 2012, the CBSA issued a DAS confirming its preliminary decision.<sup>7</sup>

6. On August 1, 2012, Oceaneering filed this appeal.<sup>8</sup> Following a first appearance before the Tribunal and subsequent delays, a public hearing was held on October 31, 2013.

### GOODS IN ISSUE

7. The Tribunal had the opportunity to hear the testimony of Oceaneering's witness, Mr. Kevin Kerins, and was also shown three videos, which presented in detail the underwater *and on-board* functioning of remotely operated vehicle systems generally, and of the Hydra™ Magnum Plus 170 remotely operated vehicle (ROV) and its related components in particular. The CBSA presented no witnesses and Mr. Kerins' testimony was not rebutted. On the basis of this testimony and the documentary evidence on the record, the Tribunal understands the following to be an accurate description of the ROV and its associated components.

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1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].
  2. S.C. 1997, c. 36.
  3. Exhibit AP-2012-017-04B at 25.
  4. *Ibid.* at 28.
  5. *Ibid.* at 34.
  6. *Ibid.* at 39.
  7. *Ibid.* at 51.
  8. Exhibit AP-2012-017-01.

8. The ROV is an unmanned, highly manoeuvrable underwater vehicle piloted from the surface and used to perform various tasks on underwater structures. Most ROVs deployed by Oceaneering are used in the oil and gas exploitation industry.<sup>9</sup> The ROV operates within an integrated system<sup>10</sup> that is commonly found both on oil drilling platforms (rigs) and aboard ships.<sup>11</sup> The system consists of the ROV itself, a control console, the cage-type tether management system and power units (together, the ROV system). All of the components of the system ultimately serve the ROV and allow it to function at depths of 3,000-4,000 metres below sea level.<sup>12</sup>

9. The ROV has a square tubular frame. The lower portion of the vehicle contains the electronics, mechanics and thrusters necessary for the ROV to propel itself through the water.<sup>13</sup> The top part of the vehicle is covered in foam blocks, which provide buoyancy to help counteract the weight of the vehicle and its equipment.<sup>14</sup> This results in overall buoyancy of the ROV that is slightly negative, to ensure that the ROV sinks, rather than floats away, if it accidentally becomes detached from its tether.<sup>15</sup>

10. The ROV is also equipped with lighting, video cameras, navigation instruments, dual manipulator arms and work tools.<sup>16</sup>

11. The ROV is launched into the sea from a side-entry tubular aluminum cage (cage) and is recovered the same way.<sup>17</sup> The cage allows for safe and fast descent of the ROV to its working depth.<sup>18</sup>

12. The cage is connected to the ship or rig from which it is launched by an armored umbilical cable.<sup>19</sup> In addition to anchoring the cage to the ship or rig, the umbilical cable transmits all power and communication signals to the cage.<sup>20</sup> The ROV itself is attached to the cage by a tether cable (flying tether), which is similar in form and function to the umbilical cable, but smaller in diameter and non-armored.<sup>21</sup>

13. The cage includes a tether management system (TMS). “Tether management” refers to the ability of the TMS to pay out or recover tether as commanded by the pilot, preventing entanglement.<sup>22</sup>

14. The cage also carries hydraulic components along with some lights and limited electronic equipment.<sup>23</sup> An ROV and its cage weigh approximately 10,000 pounds.<sup>24</sup>

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9. *Transcript of Public Hearing*, 31 October 2013, at 7.

10. *Ibid.* at 14.

11. *Ibid.* at 22.

12. Exhibit AP-2012-017-04B at 67.

13. The ROV is well illustrated and its components are discussed in Exhibit AP-2012-017-04B respectively at 115 and 120-45.

14. *Ibid.* at 116.

15. *Transcript of Public Hearing*, 31 October 2013, at 51.

16. See Exhibit AP-2012-017-04B at 67-68 for an overview of the specifications of the ROV.

17. *Transcript of Public Hearing*, 31 October 2013, at 26. A depiction of an ROV within the cage is shown in Exhibit AP-2012-017-04B at 87.

18. *Transcript of Public Hearing*, 31 October 2013, at 25-26.

19. *Ibid.* at 19-20.

20. Exhibit AP-2012-017-A-01, ROV Tutorial, Section 3: System Overview – Main Lift Umbilical.

21. *Transcript of Public Hearing*, 31 October 2013, at 61-63; Exhibit AP-2012-017-04B at 67.

22. *Ibid.* at 88.

23. *Ibid.* at 87-111 for a description of the cage and TMS.

24. *Transcript of Public Hearing*, 31 October 2013, at 76.

15. Although it is possible to operate the ROV without the cage and instead have the ROV connected directly to the ship via the tether (known as “free swimming”), this is not the normal arrangement.<sup>25</sup>

16. Once in the water, the cage and ROV sink to their required depth very quickly, due to the weight of the cage and its specific design which ensures quick flooding.<sup>26</sup> From there, the ROV deploys, or “swims”, out of the cage to the work site, which is typically laterally located at a distance of 50 to 100 feet, although the ROV is usually equipped with 300 metres of flying tether.<sup>27</sup>

17. The ROV serves as an inspection tool through its camera function,<sup>28</sup> or otherwise performs almost innumerable tasks through its robotic arms and tools.<sup>29</sup> Oceaneering’s tooling catalog accounts for hundreds of different items.<sup>30</sup> Oceaneering also has a custom tooling shop, which designs tools for special functions.<sup>31</sup>

18. The remaining components of the ROV system are found on the ship or rig itself. Affixed to the deck with steel framing is a hydraulic power unit, which operates a large A-frame unit that swings out and drops the cage and ROV into the water. The A-frame also serves to retrieve the cage and ROV and store the unit on a deck skid between deployments. On deck can also be found the main lift winch, which holds the 3,000-4,000 metres of armored umbilical cable.<sup>32</sup>

19. In addition, on the ship or rig one would typically find two shipping container-size modules, one of which houses a 200 kVA power generator.<sup>33</sup> The other module is known as the control van and holds all of the control components for the operation of the ROV. The control van is usually manned by a crew of three: a supervisor, a mechanical technician and an electronic technician, one of whom pilots the ROV.<sup>34</sup>

20. It is important to underline that the goods in issue in this appeal are the cage and the ROV itself, which were imported in a separate transaction without the other components of the ROV system.<sup>35</sup> Mr. Kerins testified that the cage and the ROV are usually shipped in finished form (with thrusters, lights, robotic arms, hydraulics, etc.); however, they are at the time of shipping stripped of “jewellery”, such as expensive cameras, sonar equipment and other specialized electronics, in order to prevent theft of these items during shipping.<sup>36</sup>

## ANALYSIS

### Legal Framework

21. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System)

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25. *Ibid.* at 57.

26. *Ibid.* at 25-26, 45.

27. *Ibid.* at 44-46.

28. *Ibid.* at 64.

29. *Ibid.* at 32-33.

30. Exhibit AP-2012-017-04B at 591-810.

31. *Ibid.* at 598. As an example, during the course of the Deepwater Horizon BP Oil Spill event of 2010, Oceaneering designed 140 custom tools in order to achieve their mission on this well. See *Transcript of Public Hearing*, 31 October 2013, at 36.

32. Exhibit AP-2012-017-A-01, ROV Tutorial, Section 3: System Overview – Surface Handling.

33. *Ibid.*

34. *Transcript of Public Hearing*, 31 October 2013, at 39.

35. *Ibid.* at 89.

36. *Ibid.* at 88-89.

developed by the World Customs Organization (WCO).<sup>37</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

22. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>38</sup> and the *Canadian Rules*<sup>39</sup> set out in the schedule.

23. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

24. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>40</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>41</sup> published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>42</sup>

25. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.<sup>43</sup>

26. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.<sup>44</sup> The final step is to determine the proper tariff item.<sup>45</sup>

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37. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

38. S.C. 1997, c. 36, schedule [*General Rules*].

39. S.C. 1997, c. 36, schedule.

40. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

41. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

42. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.

43. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

44. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

45. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” *Classification Opinions* and *Explanatory Notes* do not apply to classification at the tariff item level.



**Tariff Classification of the Goods in Issue**

27. The CBSA classified the goods in issue under tariff item No. 8905.90.90, which reads as follows:

**Section XVII****VEHICLES, AIRCRAFT, VESSELS  
AND ASSOCIATED TRANSPORT EQUIPMENT**

...

**Chapter 89****SHIPS, BOATS AND FLOATING STRUCTURES**

...

**89.05** Light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function; floating docks; floating or submersible drilling or production platforms.

...

**8905.90** -Other

...

8905.90.90 -- -Other

28. Oceaneering contends that the goods in issue should be classified under tariff item No. 8479.89.90, which reads as follows:

**Section XVI****MACHINERY AND MECHANICAL APPLIANCES;  
ELECTRICAL EQUIPMENT; PARTS THEREOF;  
SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE  
AND SOUND RECORDERS AND REPRODUCERS, AND PARTS  
AND ACCESSORIES OF SUCH ARTICLES**

...

**Chapter 84****NUCLEAR REACTORS, BOILERS, MACHINERY  
AND MECHANICAL APPLIANCES; PARTS THEREOF**

...

**84.79** Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

...

**8479.89** -Other

...

8479.89.90 -- -Other

29. The parties agree that the main issue facing the Tribunal is the classification of the goods in issue at the heading level, using Rule 1 of the *General Rules*, which essentially depends on whether these goods are vessels or machines within the meaning of the terms of the relevant headings and the applicable legal and explanatory notes.<sup>46</sup> In addition, since legal note 1(1) to Section XVI specifies that that section does not cover articles of Section XVII, it follows that if the goods in issue can be classified as vessels of heading No. 89.05, they cannot be classified as machines of heading No. 84.79.

30. The Tribunal will thus begin its analysis by determining whether the goods in issue are described by the word “vessel” as it is used in heading No. 89.05. After determining the appropriate heading for the goods in issue, the Tribunal will then classify them at the subheading and tariff item level.

Whether the Goods in Issue Are “Other Vessels” of Heading No. 89.05

31. Oceaneering submitted that the goods in issue are not vessels of heading No. 89.05, in light of the ordinary meaning of the term “vessel”—i.e. “ship”—and the types of vessels described in the explanatory notes to that heading.

32. Oceaneering submitted that vessels are distinguishable from other floating structures covered by Chapter 89 and, therefore, the fact that such other floating structures are included in Chapter 89 does not support the CBSA’s argument that the concept of “vessel” in Chapter 89 is broader than the ordinary meaning of that word.

33. In particular, Oceaneering submitted that the goods in issue do not look like a ship or any of the types of vessels described in heading No. 89.05 and that, contrary to vessels, they are not water-tight, do not have a hull, are unmanned, cannot be said to either float or navigate on water, and have no power source independent from the ship or rig on which they are carried.

34. The CBSA submitted that Chapter 89 is broad, as confirmed by the spectrum of structures described in headings No. 89.01 through 89.08 and the explanatory notes. In particular, the CBSA added that the explanatory notes to heading 89.05 show that the scope of “other vessels” is broader than the ordinary definition of the word “vessel”.<sup>47</sup> On this basis, the CBSA submitted that, as long as an apparatus operates or moves on or in water, it falls within the purview of Chapter 89, whether it be navigable or not, manned or unmanned, or with or without a traditional hull.<sup>48</sup>

35. The CBSA argued that the ROV has the ability to move through water and that it is therefore a vessel. Finally, the CBSA recognized that, for the purposes of tariff classification, the ROV and the cage have to be considered together, as imported, and further submitted that the goods in issue do navigate. In this regard, the CBSA submitted that it can be considered either that (1) the cage and the ROV together move through water, by gravity or by tow, and therefore navigate, or, in the alternative, (2) it is the ROV that provides the determinative characteristic, even though the cage is included in the goods in issue, and since the ROV propels itself in water when it leaves the cage, the goods in issue navigate.<sup>49</sup>

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46. *Transcript of Public Hearing*, 31 October 2013, at 150.

47. *Ibid.* at 158.

48. See, for example, Exhibit AP-2012-017-12A at para. 32.

49. *Transcript of Public Hearing*, 31 October 2013, at 160-63.

36. It is well established in law that tariff classification is to be determined on the basis of an examination of the goods in issue as presented at the time of their importation into Canada.<sup>50</sup> Accordingly, the Tribunal needs to determine the appropriate tariff classification of the cage and the ROV. However, as noted above, the evidence shows that the ROV (i.e. the vehicle itself) operates within an integrated system,<sup>51</sup> which comprises the cage, in addition to on-board components, which were not part of the import transaction in issue.<sup>52</sup> Accordingly, the Tribunal needs to determine the appropriate tariff classification of the ROV and cage together, while also having in mind that they are parts of a larger integrated system.

37. In this regard, the explanatory notes to Chapter 89 provide that Chapter 89 includes incomplete vessels.<sup>53</sup> Therefore, the ROV and cage, even presented without some of the components of the integrated system, are eligible to be classified in that chapter. The question, of course, is whether the ROV and cage can in fact be described as an incomplete vessel.

38. Heading No. 89.05 covers, in relevant part, “light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function”. Although the heading goes on to include “floating docks” and “floating or submersible drilling or production platforms”, in the Tribunal’s view, these constitute product descriptions separate from the description of “other vessels”, as evidenced by the semicolons separating the three phrases.<sup>54</sup>

39. The term “vessel” is not defined in the *Customs Tariff* or in any legal or explanatory notes. The term “vessel” must therefore be understood in its ordinary meaning and consistently with the context in which it is found.<sup>55</sup>

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50. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366, wherein the Supreme Court of Canada indicated that the time for determining tariff classification was at the time of entry of the goods into Canada. While the Supreme Court of Canada reached its conclusion on the basis of the wording of Canada’s customs legislation of 1955, it is the Tribunal’s view that the principle set out in that case remains valid today despite various amendments by Parliament to Canada’s customs legislation in the intervening years. See, in this regard, *Deputy M.N.R.C.E. v. Ferguson Industries Ltd.*, [1973] S.C.R. 21, wherein the Supreme Court of Canada affirmed its earlier ruling on this point in the above-mentioned case. See also *Sealand of the Pacific Ltd. v. Deputy M.N.R.* (11 July 1989), 3042 (CITT); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Evenflo Canada Inc. v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) at para. 29; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) [*Philips*] at para. 29; *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 22.

51. *Transcript of Public Hearing*, 31 October 2013, at 14.

52. This notion was not controversial. Indeed, the CBSA accepted the integrated character of all the components of the ROV system. See, for example, Exhibit AP-2012-017-12A at para. 12, where the CBSA states that “[t]he ROV consists of the underwater vehicle, the tether management system (TMS) and the control console.”

53. The explanatory notes to Chapter 89 read as follows, in relevant part: “The Chapter also includes: (A) Unfinished or incomplete vessels (e.g., those not equipped with their propelling machinery, navigational instruments, lifting or handling machinery or interior furnishings).”

54. That semicolon usage can have the grammatical effect of creating a full stop and, accordingly, independent product descriptions have been previously recognized by the Tribunal. See, for example, *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041, at 45; *Boss Lubricants v. Deputy M.N.R.* (3 September 1997), AP-95-276 and AP-95-307 (CITT); *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (23 November 2011), AP-2010-069 (CITT) at para. 40 and footnote 31.

55. The parties submitted much jurisprudence that they argued could offer guidance to the Tribunal in the present case. However, although it is possible to analogize the situations presented in these cases to the present appeal, they do not deal with tariff classification issues and concern statutory schemes with definitions and contexts which are proper to them and are not applicable to the *Customs Tariff*.

40. A “vessel” is defined as “a watercraft bigger than a rowboat; *esp* : SHIP 1”;<sup>56</sup> “a ship or boat, esp. a large one”.<sup>57</sup> The parties supplied the Tribunal with similar definitions of “vessel”:

A craft for traveling on water, now usually one larger than an ordinary rowboat; a ship or boat.<sup>58</sup>

A craft, esp. one larger than a rowboat, designed to navigate on water.<sup>59</sup>

A ship, brig, sloop, or other craft used — or capable of being used — to navigate on water.<sup>60</sup>

41. The common elements of the above definitions are the references to the words “boat” and “ship”. Accordingly, the Tribunal finds that the term “vessel” is largely synonymous with the words “boat” or “ship”.

42. Furthermore, in accordance with the quoted definitions for “vessel”, as well as the ordinary, well-known concepts of “boat” and “ship”,<sup>61</sup> the Tribunal is of the view that the term “vessel” commonly designates craft that can *float* and *navigate* on water.

43. This understanding of the term “vessel” as a craft that can, at the basis, float and navigate is supported by the context in which it is used in the schedule to the *Customs Tariff*. Heading No. 89.05 expressly refers to the idea of navigability, although, as the heading specifies, the capacity to navigate is not the main function of the vessels of that heading.

44. Further, the generic phrase “other vessels” appears in heading No. 89.05 at the end of an enumeration of specific types of vessels, namely, “light-vessels, fire-floats, dredgers, floating cranes”. These specifically identified vessels are all essentially boats or ships equipped with specialized tools; they are all, at the core, craft that float and navigate.<sup>62</sup> In this context, “other vessels” must be interpreted *ejusdem generis* to refer to other, unspecified types of craft that float and navigate, the navigability of which is subsidiary to their main function.

45. The Tribunal finds further support for this interpretation of the term “vessel” in the explanatory notes to heading No. 89.05, which give other examples of vessels covered by that heading. The relevant part reads as follows:

This heading covers:

- (A) **Light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function.**

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56. *Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “vessel”.

57. *Canadian Oxford Dictionary*, 2nd ed., s.v. “vessel”.

58. Exhibit AP-2012-017-04C at tab 3; Exhibit AP-2012-017-12A at 91.

59. Exhibit AP-2012-017-04C at tab 5.

60. *Ibid.* at tab 4; Exhibit AP-2012-017-12A at 77.

61. A “boat” is defined as “**1 a** : a small vessel for travel on water **b** : SHIP” (*Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “boat”) or “**1** a small vessel propelled on water by an engine, oars, or sails. **2** (in general use) a ship of any size” (*Canadian Oxford Dictionary*, 2nd ed., s.v. “boat”). A “ship”, in turn, is defined as “**1 a** : a large seagoing vessel . . . **2** : BOAT; *esp* : one propelled by power or sail” (*Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “ship”) or “**1 a** a large seagoing vessel propelled by engine or sail (*compare* BOAT)” (*Canadian Oxford Dictionary*, 2nd ed., s.v. “ship”).

62. The CBSA submitted dictionary definitions for these terms in its brief that confirm the idea that the specific vessels can float and navigate. See Exhibit AP-2012-017-12A at paras. 40-43.

These normally perform their main function in a stationary position. They include: light-vessels; drill-ships; fire-floats; dredgers of all kinds (e.g., grab or suction dredgers); salvage ships for the recovery of sunken vessels; permanently moored air-sea rescue floats; bathyscaphes; pontoons fitted with lifting or handling machines (e.g., derricks, cranes, grain elevators) and pontoons clearly designed to serve as a base for these machines.

House-boats, laundry boats and floating mills are also covered by this group.

46. In this regard, the Tribunal disagrees with the CBSA<sup>63</sup> that the mention of bathyscaphes in the explanatory notes indicates that any apparatus capable of operating under water is a vessel for the purposes of heading No. 89.05, without regard to floatability and navigability.

47. Indeed, the dictionary definition submitted by the CBSA states that a “bathyscaphe” is “a type of manned submersible *vessel*”<sup>64</sup> [emphasis added]. This definition merely takes the analysis back to the idea of a *vessel*, adding the information that such a vessel is, in addition, submersible. Other definitions of the term “bathyscaphe” found in common dictionaries confirm more explicitly the idea that bathyscaphes were historically craft capable of *floating* and *navigating*, in addition to being submersible.<sup>65</sup> In other words, the inclusion of bathyscaphes in the explanatory notes to heading No. 89.05 does *not* support the idea that any type of apparatus capable of operating underwater, even without the basic characteristics of a vessel, is covered by that heading.

48. The CBSA also argued that other explanatory notes to heading No. 89.05, as well as the explanatory notes to Chapter 89 and its various headings, indicate that the breadth of the word “vessel” is not restricted to its ordinary meaning, but includes any apparatus that operates or moves in water.<sup>66</sup>

49. However, as pointed out by Oceaneering, in making this argument, the CBSA improperly referred to explanatory note C) to heading No. 89.05, which speaks of “floating or submersible drilling or production platforms” which are mentioned in heading No. 89.05. Such platforms are not identified as vessels in the nomenclature. In addition, as explained above, “floating or submersible drilling or production platforms” is a discrete product description, separate from the description in issue (“light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function”). This is also clear from the structure of the explanatory notes to heading No. 89.05, which are divided into three separate parts corresponding to the three descriptions found in that heading. Accordingly, the apparent characteristics of floating or submersible platforms cannot be ascribed to vessels.

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63. *Ibid.* at paras. 59-60.

64. *Ibid.* at tab 8.

65. For example, a “bathyscaphe” is defined by common dictionaries as “a deep-sea diving apparatus for reaching great depths . . . *without a cable*: it consists of a *navigable, ballasted, submarine-shaped float filled with a fluid lighter than water*, and a steel observation cabin” [emphasis added] (*Webster’s New World College Dictionary*, 4th ed., s.v. “bathyscaph”) and as “a *navigable submersible ship* that is used for deep-sea exploration, has a spherical watertight cabin attached to its underside, and *uses gasoline and shot for ballast*” [emphasis added] (*Webster’s Third New International Dictionary of the English Language Unabridged*, s.v. “bathyscaphe”). The emphasized characteristics allow the Tribunal to conclude that bathyscaphes have the ability to float and to navigate, being also submersible though the use of ballast.

66. See, for example, *Transcript of Public Hearing*, 31 October 2013, at 158, 164. See also Exhibit AP-2012-017-12A at paras. 31-32, 44-45.

50. Similarly, the explanatory notes to Chapter 89 distinguish between “. . . ships, boats and other vessels of all kinds (whether or not self-propelled), *and also floating structures . . .*” [emphasis added], thus implying that vessels are distinguishable from other kinds of floating structures which do not have the characteristics of a vessel. The apparent characteristics of structures covered by Chapter 89 that do not have the characteristics of vessels cannot inform the scope of the word “vessel” in that chapter.

51. When considering the headings of Chapter 89 which do concern vessels and their related explanatory notes, the Tribunal notes that all appear to deal with types of boats or ships, of different sizes and functions, but which share the basic characteristics of *both* floatability and navigability. Accordingly, in the Tribunal’s view, the ability to float and to navigate are indeed two defining characteristics of vessels of Chapter 89, including of “other vessels” of heading No. 89.05.

52. On this basis, the Tribunal will consider whether the goods in issue can be described as vessels.

53. First, in contrast to a boat or a ship, the defining characteristic of the goods in issue is their ability to sink. The cage and ROV weigh over 10,000 pounds and are purposely designed to sink as fast as possible.<sup>67</sup>

54. Furthermore, the ROV, by design, also does not float, but instead requires specialized foam to be added to counteract the compounded weight of the components involved.<sup>68</sup> However, notwithstanding the added buoyancy components, the ROV remains designed to sink, through engineered negative buoyancy, so that it would descend to the ocean bed should it become detached from its tether. As such, no part of the integrated system is designed to float.

55. In addition, the Tribunal finds that, unlike ships and boats, the goods in issue are not capable of navigating, as that concept is ordinarily understood in relation to vessels. The Tribunal disagrees with the CBSA’s suggestion that the ROV and the cage, considered together, navigate, by reason of the fact that they “move through water” when the cage containing the ROV is dropped overboard into the water.<sup>69</sup> The Tribunal rejects the notion that an object that is dropped into water and sinks by gravity thereby “navigates”.

56. The Tribunal also disagrees with the CBSA’s alternative argument, according to which the capacity to navigate should be assessed by reference to the operation of the ROV once it exits the cage and, further, that the movement of the ROV in the water outside of the cage constitutes navigating.<sup>70</sup>

57. To begin, the Tribunal is not convinced that the analysis for the purposes of tariff classification can focus on the ROV alone when all the evidence shows that the ROV operates as part of an integrated system, comprising the cage utilized to lower the ROV to its working depth. Indeed, this was not contested by the CBSA.

58. Furthermore, even assuming that the capacity to navigate can be considered by reference to the ROV alone, in the Tribunal’s view, it can hardly be said that the movement of the ROV in the water constitutes navigation as it is commonly understood in relation to ships and boats.

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67. *Transcript of Public Hearing*, 31 October 2013, at 25-26, 45.

68. Exhibit AP-2012-017-04B at 116.

69. *Transcript of Public Hearing*, 31 October 2013, at 161-62.

70. *Ibid.* at 162-63.

59. The ROV propels itself over limited distances only,<sup>71</sup> which is not typical of vessels in general. In addition, the ROV only propels itself underwater, having no ability to travel on the surface. In contrast, the dictionary definitions of “vessel” show that navigation, in relation to boats and ships, is commonly understood as the ability to travel *on* water. This is consistent with the first defining characteristic of vessels, which is their ability to float.

60. As mentioned earlier, while certain vessels like the bathyscaphes mentioned in explanatory note A) to heading No. 89.05 and the submarines mentioned in the explanatory notes to heading No. 89.06<sup>72</sup> are submersible and thus have the added capability to operate underwater, these types of vessels still can float and are capable of travelling on the surface. Indeed, it is common knowledge that military submarines, for example, can navigate both underwater and on the surface. The definitions of the term “submarine” found in common dictionaries evidence that they are indeed *boats* that have the added capability to operate under water.<sup>73</sup>

61. Having regard to the basic characteristics of vessels, the Tribunal therefore finds that the goods in issue are not “other vessels” of heading No. 89.05.

62. In addition, the Tribunal notes that other indicia support its conclusion.

63. For example, the uncontradicted testimony of Mr. Kerins is that the structure of the ROV does not include what would typically be referred to as a hull.<sup>74</sup> The CBSA did not contest that the ROV does not have a conventional hull, but argued instead that many structures covered by Chapter 89 also do not have hulls. Yet, the CBSA only specifically pointed to the mention of “floating or submersible drilling or production platforms” in heading No. 89.05.<sup>75</sup>

64. For the reasons already explained, these platforms are part of a separate product description in heading No. 89.05 and do not inform the meaning of “other vessels” of that heading. In addition, not being described as vessels, such platforms do not exemplify a vessel of Chapter 89. The CBSA did not point to any examples of a *vessel* of heading No. 89.05 or Chapter 89 that does not have a hull, and none is apparent to the Tribunal.

65. On the contrary, several passages from the legal and explanatory notes to Chapter 89 support the idea that hulls are a characteristic part of vessels. The specific examples identified in the various headings and notes dealing with vessels, as opposed to other floating structures, all appear to have conventional

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71. Mr. Kerins quantified this distance as being typically within the realm of 50 to 100 feet, and it could not, in any case, exceed the length of the tether, which is itself typically restricted to 300 metres. See *Transcript of Public Hearing*, 31 October 2013, at 44-46.

72. Heading No. 89.06 covers “other vessels, including warships and lifeboats other than rowing boats”.

73. A “submarine” is defined by common dictionaries as “a vessel capable of operating under water” (*Canadian Oxford Dictionary*, 2nd ed., s.v. “submarine”) and as “a boat so designed that it can be submerged, and propelled when under water . . .” (*The Oxford English Dictionary*, 2nd ed., Vol. XVII, s.v. “submarine boat”).

74. See *Transcript of Public Hearing*, 31 October 2013, at 50 and Exhibit AP-2012-017-04B at 115-19. A “hull” is defined as “the body or frame of a ship, airship, flying boat, etc.” (*Canadian Oxford Dictionary*, 2nd ed., s.v. “hull”).

75. *Transcript of Public Hearing*, 31 October 2013, 157-58.

hulls.<sup>76</sup> In addition, the term “hull” is used in relation to the term “vessel” several times within the legal and explanatory notes to Chapter 89. For instance, note 1) to Chapter 89 reads in part as follows:

A *hull*, an unfinished or incomplete *vessel*, assembled, unassembled or disassembled, or a complete vessel unassembled or disassembled, is to be classified in heading 89.06 if it does not have the essential character of a vessel of a particular kind.

[Emphasis added]

66. Further, the explanatory notes to Chapter 89 provide the following:

The Chapter also includes:

- (A) Unfinished or incomplete vessels (e.g., those not equipped with their propelling machinery, navigational instruments, lifting or handling machinery or interior furnishings).
- (B) Hulls of any material.

67. The explanatory notes to Chapter 89 then go on to specify that “. . . this Chapter **excludes** all separately presented parts (*other than hulls*) . . .” [emphasis added].

68. Read together, these notes are particularly informative, in that they indicate that the hull is such an important part of a vessel that, contrary to any other separately presented parts, it is treated similarly to an incomplete vessel or a disassembled vessel. This supports the view that the presence of a hull is a defining feature of a vessel.

69. ROVs therefore also lack this typical feature of vessels.

70. Finally, the Tribunal finds it instructive that the only specific definition of an ROV on the record, found in a scientific and technical dictionary, differentiates between a *vehicle*, being the ROV, and a *vessel*, to which the ROV is attached: it defines an ROV as “[a] crewless submersible vehicle that is tethered to a vessel on the surface by a cable . . . .”<sup>77</sup>

71. For all of these reasons, the Tribunal finds that the goods in issue are not vessels for the purposes of heading No. 89.05 of the *Customs Tariff*.

#### Whether the Goods in Issue Are “Machines” of Tariff Item No. 8479.89.90

72. The Tribunal will now determine whether the goods in issue can be classified under tariff item No. 8479.89.90 as other machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

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76. For example, in addition to the vessels covered by heading No. 89.05, the Tribunal considered heading No. 89.01, which covers “cruise ships, excursion boats, ferry-boats, cargo ships, barges and similar vessels for the transport of persons or goods”; heading No. 89.02, which covers “fishing vessels; factory ships and other vessels for processing or preserving fishery products”; heading No. 89.03, which covers “yachts and other vessels for pleasure or sports; rowing boats and canoes”; heading No. 89.04, which covers “tugs and pusher craft”; and heading No. 89.06, which covers “other vessels, including warships and lifeboats other than rowing boats”. These examples, as well as the numerous further examples provided in the relevant explanatory notes, all implicitly include hulls. The idea of a hull is explicit in the explanatory notes to heading No. 89.04, which specify that tugs are “. . . *distinguishable from other vessels by their specially shaped and strengthened hulls* . . .” [emphasis added], thus implying that vessels indeed have hulls, and that different kinds of vessels vary not according to the presence or absence of one, but rather on the basis of the shape, strength or other characteristics of their hull.

77. Exhibit AP-2012-017-12A at 85.



73. Oceaneering submitted that the goods in issue are equipment for ships and that they should be classified in heading No. 84.79. Oceaneering accepted the CBSA's determination that the principal function of the goods in issue is to work on structures in the sea. Further, Oceaneering submitted that machines having this function are not specified or included elsewhere than in heading No. 84.79.

74. Oceaneering also argued that the goods in issue have individual functions, as they are mounted on a ship or rig but execute tasks clearly distinguishable from those of a ship or rig. Oceaneering added that the goods in issue are similar to diving bells, which fall within this heading, as specified in the explanatory notes to heading No. 84.79.

75. Finally, Oceaneering submitted that since the goods in issue are not described in any of the subheadings, they must be classified in subheading No. 8479.89, and further, under tariff item No. 8479.89.90.

76. The CBSA essentially opposed Oceaneering's argument that the goods in issue should be classified in heading No. 84.79 on the sole basis that they are vessels, and note 1 to Section XVI (to which Chapter 84 pertains) excludes from that section articles of Section XVII. Furthermore, while admitting that the point was not directly relevant, the CBSA stressed that the explanatory notes to heading No. 84.30 state that machines mounted on pontoons and floating structures are classified in Chapter 89, and argued that this gives a further insight that an apparatus used at sea, on or in water, is intended to be classified as a vessel.

77. A preliminary issue arises as to the proper point of reference for the classification in Chapter 84, due to the fact, noted above, that the goods in issue are part of a larger integrated system, but were imported separately from the remaining components of that system.

78. In this respect, legal note 4 to Section XVI directs that, "[w]here a machine . . . consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 . . . then the whole falls to be classified in the heading appropriate to that function."

79. It is clear in this case that all the components of the ROV system contribute and, indeed, are indispensable to serve the same ultimate function, and it is therefore the function of the ROV system as a whole that is relevant for tariff classification in Chapter 84.

80. In addition, legal note 2 to Section XVI provides that, subject to certain conditions which do not apply in this case, parts of machines ". . . are to be classified according to the following rules: . . . (b) Other parts, if suitable for use solely or principally with a particular kind of machine . . . are to be classified with the machines of that kind . . ." The Tribunal is satisfied that the ROV and cage are parts of the ROV system and are solely suitable for use with the integrated system.

81. Accordingly, classification in Chapter 84 must be determined by considering the functioning of the ROV system as a whole, understanding that the ROV and cage, as parts suitable for use solely with that system, must be classified in the same heading as the complete system would be.

82. Heading No. 84.79 covers machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84. Accordingly, in order for the goods in issue to fall in heading No. 84.79, the Tribunal must be satisfied that they are either machines or mechanical appliances having individual functions, and that they are not specified or included elsewhere.<sup>78</sup>

83. With respect to the first requirement, the Tribunal has previously stated that the terms “machine” or “mechanical appliance” are interchangeable.<sup>79</sup> Consistent with previous jurisprudence, the Tribunal considers that, for goods to be machines or mechanical appliances, they must (1) “do work through some combination of moving parts” and must (2) “produce, modify or transmit force to an external body”.<sup>80</sup> This is in line with supplementary note 1 to Section XVI, which reads as follows:

In this Section the term “mechanically operated” refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

84. The Tribunal finds that the documentary evidence and the testimony of Mr. Kerins clearly establish that the integrated ROV system is a machine or mechanical appliance.

85. The system is an assemblage of multiple mechanical parts, each with a specific function, that interact, and as a whole are used by the operators to descend to depths, swim to immediate destinations, visualize their environment and perform, through specialized tools, the necessary operations in order to accomplish the assigned tasks on underwater structures.

86. Accordingly, the ROV system is a complex assembly of moving parts, which are able to perform work. In addition, whether it is through the thrusters, which provide motion, or through special attachments, such as arms and tools which move about to accomplish their individual tasks, the goods in issue produce or transmit force and motion.

87. Turning to the question of whether the goods in issue are parts of a machine or mechanical appliance having individual functions, the Tribunal notes that the explanatory notes to heading No. 84.79 provide further detail as to what constitutes individual functions, as follows:

For this purpose the following are to be regarded as having “individual functions”:

...

(B) Mechanical devices which cannot perform their function unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, **provided** that this function:

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78. See, for example, *Philips* at para. 44.

79. See, for example, *Canadian Tire Corporation Limited v. President of the Canadian Border Services Agency* (29 November 2007), AP-2006-041 (CITT) at para. 26; *Philips* at para. 46. The definition of the term “mechanical” in the *Shorter Oxford English Dictionary*, 5th ed., includes the following: “**2** Of the nature of a machine or machines . . .” The term “machine” is defined as “**4** An apparatus, an appliance; a device for applying mechanical power and having a number of interconnected parts, each with a definite function, *esp.* one that does not utilize human strength . . . . Any instrument that transmits force or directs its application.” Similarly, *Merriam-Webster’s Collegiate Dictionary*, 11th ed., defines “machine” to include the following: “**e** (1) : an assemblage of parts that transmit forces, motion, and energy one to another in a predetermined manner.” Further, the term “appliance” is defined as “**2 a** : a piece of equipment for adapting a tool or machine to a special purpose . . .” and the *Oxford Canadian Dictionary*, 2nd ed., defines it as “**1** an electrical or gas-powered device or piece of equipment used for a specific task . . .”

80. *Philips* at para. 49.

- (i) is distinct from that which is performed by the machine or appliance whereon they are to be mounted, or by the entity wherein they are to be incorporated, and
- (ii) does not play an integral and inseparable part in the operation of such machine, appliance or entity.

...

88. As submitted by Oceaneering, the Tribunal finds that ROV systems are equipment for ships or rigs. Further, the Tribunal finds that the ship or rig on which the ROV system is carried is essential for the use of the system, in that it supports or conveys it to its work site. The ROV system could not perform its main function of working on structures in the sea<sup>81</sup> unless installed on a ship or rig.

89. Nevertheless, the ROV system can be said to have a function that is distinct from that of the ship or rig upon which it is mounted and which is individual to the ROV system. Specifically, the main function of the ROV system is distinguishable from the purpose of a ship or rig, which is usually to navigate or to exploit petroleum deposits, respectively.

90. In addition, ROV systems do not play an integral or inseparable part in the operation of a ship or rig. While the role of an ROV system can be complementary to the functioning of a ship or rig, their roles remain independent from each other; a ship is able to navigate and a rig is able to exploit petroleum deposits without the goods in issue.

91. Finally, turning to the third requirement for classification in heading No. 84.79, the Tribunal is satisfied that ROV systems are not more specifically described elsewhere in Chapter 84. The explanatory notes to heading No. 84.79 provide the following:

This heading is **restricted to** machinery having individual functions, which:

- (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.
- and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.
- and (c) Cannot be classified in any other particular heading of this Chapter since:
  - (i) No other heading covers it by reference to its method of functioning, description or type.
  - and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.
  - or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).

...

92. ROV systems are not included elsewhere either by reference to their method of functioning, description, type or use. Indeed, neither of the parties suggested otherwise.

93. Accordingly, for the reasons outlined above, and by application of Rule 1 of the *General Rules*, the Tribunal finds that the goods in issue are properly classified in heading No. 84.79.

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81. The CBSA determined that the principal function of the goods in issue is to work on structures under the sea, and Oceaneering agreed with this aspect.

94. The parties agreed that the present dispute revolved around the classification of the goods in issue at the heading level and did not submit extensive arguments regarding classification at the subheading and tariff item levels.<sup>82</sup> As argued by Oceaneering, given that the goods in issue are not described in any more specific subheadings and tariff items, the Tribunal finds that the goods in issue are properly classified under tariff item No. 8479.89.90 in accordance with Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*.

95. Given this conclusion, it is not necessary to consider Oceaneering's alternative argument that the goods in issue may be classified in tariff item No. 8525.80.00.

## DECISION

96. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 8479.89.90.

97. The appeal is therefore allowed.

Jason W. Downey  
\_\_\_\_\_  
Jason W. Downey  
Presiding Member

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82. *Transcript of Public Hearing*, 31 October 2013, at 151, 173.