

# U.S. Customs and Border Protection



## GENERAL NOTICE

### 19 CFR PART 177

#### **REVOCACTION OF A RULING LETTER AND REVOCACTION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN NETWORK DEVICES KNOWN AS RANGE EXTENDERS**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of certain network devices known as range extenders.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of certain network devices known as range extenders under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Tom P. Beris, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of certain network devices known as range extenders. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N300883, dated October 16, 2018, CBP classified network devices referred to as range extenders in heading 8517, HTSUS, specifically in subheading 8517.62.0020, HTSUSA (Annotated), which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus." CBP has reviewed N300883 and has determined the ruling letter to be in error. It is now CBP's position that range extenders are properly classified, in heading 8517, HTSUS, specifically in subheading 8517.62.0090, HTSUSA, which

provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N300883 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H306942, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H306942

December 4, 2020

CLA-2 OT:RR:CTF:EMAIN H306942 TPB

CATEGORY: Classification

TARIFF NO.: 8517.62.0090

CARL W. MERTZ

TP-LINK USA CORP

145 SOUTH STATE COLLEGE BLVD., SUITE 400

BREA, CA 92821

RE: Revocation of New York (NY) ruling letter N300883; Classification of network devices; re-classification of range extenders

DEAR MR. MERTZ:

In your letter dated October 1, 2018, you requested a ruling on the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain network devices from China. The items concerned are referred to as Wi-Fi extenders (Models: RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE).

In NY N300883, dated October 16, 2018, U.S. Customs and Border Protection (CBP) classified the range extenders in subheading 8517.62.0020, HTSUSA, which provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus.”

We have now determined that the network devices subject to N300883 are classifiable in subheading 8517.62.0090, HTSUSA, by application of GRIs 1 and 6. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020. No comments were received in response to that notice. For the reasons set forth below, we hereby revoke NY N300883.

**FACTS:**

As described in the original ruling request, the items concerned are as Wi-Fi extenders (model #'s RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, and 300 Mbps Wi-Fi Range Extender TL-WA850RE). The Wi-Fi extenders are plug-in devices that wirelessly connect to a customer's router or access point (AP) and expand the coverage area. These devices are either single band or dual band and operate on the 2.4GHz or 5GHz wireless spectrum. Devices may have Ethernet ports rated at fast or gigabit speeds for wired expansion.

Devices that connect to the wireless network through them communicate with the router or AP and access the internet or internal network resources that would otherwise be unreachable from their locations. Range extenders do not assign IP addresses nor create routing tables. Likewise, they do not have the physical incoming and outgoing communications ports and links of a network switch and so cannot set up a transmission path through them. The Wi-Fi extenders wirelessly transmit requests to and from the router based on instructions provided in the message address.

**ISSUE:**

Whether the network devices at issue should be classified as switching and routing apparatus under the HTSUS.

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The subheadings under consideration are:

8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:  Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):
8517.62.00	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus...
8517.62.0020	Switching and routing apparatus
8517.62.0090	Other

As indicated by you in a supplemental submission, range extenders are network expansion devices that wirelessly link to a main router or wireless AP for the sole purpose of extending the range of the router or AP’s existing network to client devices that would otherwise be outside the wireless transmission range of the router or AP.

To be classified as switching or routing apparatus, the devices must perform switching or routing themselves and not merely rely on an external switching or routing device. A routing device performs the traffic directing function. It is used to forward IP packets in a wide area network (WAN) to a destined client in a local area network (LAN) based on reading the network address information in the data packet, which determines the destination. Then using information in its routing table, or routing policy, it actively directs the packet to the next network on its journey. A routing table file is stored in random access memory (RAM) that contains network information.

A network switch is a multiple-Ethernet-port device that physically connects individual network devices in a computer network, so they can communicate with one another. It is the key component in a business network, connecting multiple network devices such as: PCs, printers, servers and peripherals, and it associates each device’s address with one of the physical ports on the switch.

Unlike a router or a switch, Wi-Fi range extenders have no intelligence and make no decisions as to where the data goes next. They do not contain a

software or firmware routing table and cannot read the network address information in the data packet to determine the specific destination of the data packet.

Based on the supplemental information provided and the notion that the range extenders do not act as a switch or a router within the realm of networking terminology, CBP is now of the view that these devices are properly classified under subheading 8517.62.0090, HTSUS, which provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.” The general rate of duty will be Free.

**HOLDING:**

For the reasons set forth above, the Wi-Fi Extenders (Models RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE) are classified in subheading 8517.62.0090, HTSUS, which provides for “Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.” The column one, general rate of duty is free.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY N300883, dated October 16, 2018, is hereby REVOKED.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

*Sincerely,*


GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND MODIFICATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF POLYMER PRODUCTS,  
A312A-9010-W AND A312A-NP-W**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed modification of one ruling letter and modification of treatment relating to the tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before January 15, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Sarita Singh, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0119.

## **SUPPLEMENTARY INFORMATION:**

### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N278871, dated September 29, 2016 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N278871, CBP classified Polymer Products, A312A-9010-W and A312A-NP-W in heading 3903, HTSUS, specifically in subheading 3903.30.00, HTSUS, which provides for “Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene (‘ABS’) copolymers.” CBP has reviewed NY N278871 and has determined the ruling letters to be in error. It is now CBP’s position that Polymer Products, A312A-9010-W and A312A-NP-W are properly classified, in heading 3903, HTSUS, specifically in subheading 3903.90.50, HTSUS, which provides for “Polymers of styrene, in primary forms: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N278871 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H287193, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.



Dated: November 19, 2020

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments

HQ H287193  
 CLA-2 OT:RR:CTF:TCM H287193 SMS  
 CATEGORY: Classification  
 TARIFF NO: 3903.30.0000; 3903.90.5000

RACHEL LEE, ATTORNEY IN FACT  
 FNS CUSTOMS BROKER, INC.  
 1545 FRANCISCO ST  
 TORRANCE, CA, 90501

RE: Modification of NY N278871; Classification of: Various Polymer Products

DEAR Ms. LEE:

This is in response to your request sent on behalf of your client LG Chem America, Inc. (“LGCAI”) on May 31, 2017, in reference to New York Ruling Letter (“NY”) N278871, dated September 29, 2016, regarding the classification, under the Harmonized Tariff Schedule of the United States (“HTSUS”), of eleven polymer products.

In NY N278871, U.S. Customs and Border Protection (“CBP”) classified eleven products. CBP classified nine products, A121H-NP-G, A220-8C657-W, A220-NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, A121-NP-K, A312A-9010-W, and A312A-NP-W, in subheading 3903.30.00, HTSUS, which provides for: “Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene (‘ABS’) copolymers.” The general rate of duty is 6.5% *ad valorem*. CBP classified the remaining two products, A401-9001F-K and A401-NP-W, in subheading 3903.90.50, HTSUS, which provides for: “Polymers of styrene, in primary forms: Other: Other.” The general rate of duty is also 6.5% *ad valorem*. You requested a modification to the finding in the first nine products in favor of subheading 3903.90.50, HTSUS. We have reviewed NY N278871 and find it to be in error with respect to only two of those products, namely A312A-9010-W and A312A-NP-W.

**FACTS:**

NY N278871 describes the instant merchandise as follows:

A121H-NP-G; A220-8C657-W; A220-NP-W; A650-8F075-K; A610A-NP-K; A121R-92885-L; A121-NP-K; A312A-9010-W; and A312A-NP-W are described as molding resins consisting of acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003-56-9 that will be imported in pellet form for use in the manufacture of plastic products. A312A-9010-W and A312A-NP-W will also contain flame-retardant additives.

....

A401-9001F-K and A401-NP-W are described as molding resins each consisting of a copolymer blend of methylstyrene-acrylonitrile-styrene copolymer CAS-9010-96-2 and acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003-56-9 that will be imported in pellet form for use in the manufacture of plastic products.

NY N278871 (Sept 29, 2016).

The percentage totals for the monomer composition reported in the Material Safety Data Sheets (“MSDS”), for each product is captured as follows:

	Final Product Monomer Content Total %		
	% acrylonitrile	% butadiene	% styrene
A121H-NP-G	21.2	14.3	66.1
A312A-9010-W	14.5	5.7	48.9
A312A-NP-W	14.5	5.7	48.9
A220-8C657-W	25.6	10.9	60.2
A220-NP-W	25.9	11.1	60.7
A650-8F075-K	23.5	16.7	58.3
A610A-NP-K	22.6	26.3	57.2
A121R-92885-L	24.3	18.0	56.0
A121-NP-K	22.4	19.0	57.9

You note that one of the starting materials in producing the ABS copolymer at issue is Styrene Acrylonitrile (SAN).

**ISSUE:**

Whether A121H-NP-G, A312A-9010-W, A312A-NP-W, A220-8C657-W, A220-NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K are classified as copolymers under 3903.30.00, HTSUS, or as copolymer blends of heading 3903.90.50, HTSUS.

**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the Harmonized Tariff Schedule of the United States. Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs, 2 through 6, may then be applied in order.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. When interpreting and implementing the HTSUS, the ENs may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS.

The following HTSUS provisions are relevant to the classification of these products:

- 3903: Polymers of styrene, in primary forms:
- 3903.30.00 Acrylonitrile-butadiene-styrene (ABS) copolymers
- \* \* \* \* \*
- 3903.90 Other
- 3903.90.50 Other

Chapter 39, Note 4, states, in pertinent part, the following:

The expression “copolymers” covers all polymers in which no single monomer contributes 95 percent or more by weight to the total polymer content.

For the purposes of this chapter, except where the context otherwise requires, copolymers (including co-polycondensates, co-polyaddition products, block copolymers and graft copolymers) and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit. For the purposes of this note, constituent comonomer units of polymers falling in the same heading shall be taken together.

Subheading Note 1 to Chapter 39 further provides, in pertinent part:

1. Within any one heading of this chapter, polymers (including copolymers) are to be classified according to the following provisions:

(a) Where there is a subheading named “Other” in the same series:

- (1) The designation in a subheading of a polymer by the prefix “poly” (for example, polyethylene and polyamide-6, 6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95 percent or more by weight of the total polymer content.
- (2) The copolymers named in subheadings 3901.30, 3901.40, 3903.20, 3903.30 and 3904.30 are to be classified in those subheadings, provided that the comonomer units of the named copolymers contribute 95 percent or more by weight of the total polymer content. . . .
- (3) Chemically modified polymers are to be classified in the subheading named “Other”, provided that the chemically modified polymers are not more specifically covered by another subheading.
- (4) Polymers not meeting (1), (2), or (3), above, are to be classified in the subheading, among the remaining subheadings in the series, covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series of subheadings under consideration are to be compared.

...

Polymer blends are to be classified in the same subheading as polymers of the same monomer units in the same proportions.

The General EN to Chapter 39 further states, in pertinent part:

### **Polymers**

Polymers consist of molecules which are characterised by the repetition of one or more types of monomer units.

Polymers may be formed by reaction between several molecules of the same or of different chemical constitution. The process by which polymers are formed is termed polymerisation.

The relative amounts of monomer units in a polymer need not be in the same order as that represented by its abbreviation (e.g., acrylonitrile-butadiene-styrene (ABS) copolymer containing styrene as the predominant monomer unit). Polymer abbreviations should therefore be used only as a guide. Classification, in all cases, should be by application of the relevant Chapter Note and Subheading Note and on the basis of the relative composition of the monomer units in a polymer (see Note 4 and Subheading Note 1 to this Chapter).

The ENs further provide guidance of the Subheading Notes to Chapter 39: Subparagraph (a) (2) of Subheading Note 1 deals with the classification of the products of subheadings 3901.30, 3901.40, 3903.20, 3903.30 and 3904.30.

Copolymers classified in these four subheadings must have 95 % or more by weight of the constituent monomer units of the polymers named in the subheading

Thus, for example, a copolymer consisting of 61 % vinyl chloride, 35 % vinyl acetate and 4 % maleic anhydride monomer units (being a polymer of heading 39.04) should be classified as a vinyl chloride-vinyl acetate copolymer of subheading 3904.30 because vinyl chloride and vinyl acetate monomer units taken together contribute 96 % of the total polymer content.

On the other hand, a copolymer consisting of 60 % styrene, 30 % acrylonitrile and 10 % vinyl toluene monomer units (being a polymer of heading 39.03) should be classified in subheading 3903.90 (named "Other") and not in subheading 3903.20 because the styrene and acrylonitrile monomer units taken together contribute only 90 % of the total polymer content.

Based on Chapter 39 Note 4, "[t]he expression 'copolymers' covers all polymers in which no single monomer contributes 95 percent or more by weight to the total polymer content . . . and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit." Accordingly, there is no dispute that all nine products consist of ABS and are properly classified under heading 3903, which provides for "Polymers of Styrene", because styrene is the comonomer unit which predominates by weight over the other two comonomer units. See Chapter 39, note 4.

As to the proper subheading for the above nine listed products, Subheading Note 1(a)(2) to Chapter 39 and the corresponding subheading Explanatory Note require that the constituent monomer units of the polymers named in the subheading contribute 95 percent or more by weight of the total polymer content. The percent by weight of each acrylonitrile, butadiene and styrene monomer for the nine products at issue are as follows:

	Final Product Monomer Content Total %			Total %
	% acrylonitrile	% butadiene	% styrene	
A121H-NP-G	21.2	14.3	66.1	<b>101.6<sup>1</sup></b>
A312A-9010-W	14.5	5.7	48.9	<b>69.1</b>
A312A-NP-W	14.5	5.7	48.9	<b>69.1</b>
A220-8C657-W	25.6	10.9	60.2	<b>96.7</b>
A220-NP-W	25.9	11.1	60.7	<b>97.7</b>
A650-8F075-K	23.5	16.7	58.3	<b>98.5</b>
A610A-NP-K	22.6	26.3	57.2	<b>106.1<sup>2</sup></b>
A121R-92885-L	24.3	18.0	56.0	<b>98.3</b>
A121-NP-K	22.4	19.0	57.9	<b>99.3</b>

As such, the above listed products containing a total of 95 percent or more of the monomers, acrylonitrile, butadiene, and styrene, A121H-NP-G, A220-8C657-W, A220-NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, are properly classified in subheading 3903.30.00, HTSUS, as Acrylonitrile-butadiene-styrene (ABS) copolymers. As neither of the remaining two products, A312A-9010-W and A312A-NP-W, contain 95 percent or more of the monomers acrylonitrile, butadiene, and styrene, they are properly classified in subheading 3903.90.50, HTSUS, which provides for: "Polymers of styrene, other than ABS. We note that certain products falling within these provisions may be eligible for preferential treatment under the United States-Korea Free Trade Agreement.

LGCAI contends that these products should be classified in accordance with Chapter 39 Subheading Note 1(a)(4), instead of 1(a)(2), because "[i]n the blending process there is no polymerization process in which the intermolecular chemical reaction . . . occurs and only a simple mixing process occurs." *i.e.*, that no bonding has occurred and thus should not count towards the total composition amount. However, the fact that the ABS and SAN polymers are physically blended and not themselves bonded into a single polymer does not in any way preclude classification in subheading 3903.30.00. Subheading Note 1 to Chapter 39 specifically notes that "Polymer blends are to be classified in the same subheading as polymers of the same monomer units in the same proportions". The same subheading note, as stated above, requires that copolymers named in subheading 3903.30 are to be classified therein, "provided that the comonomer units of the named copolymers contribute 95 percent or more by weight of the total polymer content." As the ABS copolymer contributes 95 percent or more by weight of the total polymer content of products A121H-NP-G, A220-8C657-W, A220-NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, these are correctly classified in subheading 3903.30.00, HTSUS, whereas the correct classification of products A312A-9010-W and A312A-NP-W is subheading 3903.90 because the ABS constitutes less than 95 percent of the total polymer content.

#### **HOLDING:**

By application of GRIs 1 and 6, the classification of A121H-NP-G, A220-8C657-W, A220-NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, is in heading 3903, HTSUS, specifically, 3903.30.0000,

<sup>1</sup> Figures provided by the importer.

<sup>2</sup> Figures provided by the importer.

HTSUSA (Annotated), which provides for “Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene (‘ABS’) copolymers.”

By application of GRIs 1 and 6, the classification of A312A-9010-W and A312A-NP-W is in heading 3903, HTSUS, specifically, 3903.90.5000, HTSUSA, which provides for: “Polymers of styrene, in primary forms: Other: Other.” The general rate of duty for both subheadings will be 6.5% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at *www.usitc.gov*.

**EFFECT ON OTHER RULINGS:**

This ruling modifies NY N278871, dated September 29, 2016, with respect to the classification of A312A-9010-W and A312A-NP-W.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

CC: NIS Christina Allen, April Cutuli

N278871

September 29, 2016

CLA-2-39:OT:RR:NC:N2:421

CATEGORY: Classification

TARIFF NO.: 3903.30.0000; 3903.90.5000

ELLEN KIM  
LG CHEM AMERICA INC.  
3475 PIEDMONT ROAD NE, SUITE 1200  
ATLANTA, GEORGIA 30305

RE: The tariff classification of nine copolymers of acrylonitrile-butadiene-styrene (ABS) CAS-9003-56-9 and two copolymer blends of ABS CAS-9003-56-9 and methylstyrene-acrylonitrile-styrene CAS-9010-96-2 from Korea

DEAR Ms. KIM:

In your letter dated August 24, 2016 you requested a tariff classification ruling.

A121H-NP-G; A220-8C657-W; A220-NP-W; A650-8F075-K; A610A-NP-K; A121R-92885-L; A121-NP-K; A312A-9010-W; and A312A-NP-W are described as molding resins consisting of acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003-56-9 that will be imported in pellet form for use in the manufacture of plastic products. A312A-9010-W and A312A-NP-W will also contain flame-retardant additives.

The applicable subheading for A121H-NP-G; A220-8C657-W; A220-NP-W; A650-8F075-K; A610A-NP-K; A121R-92885-L; A121-NP-K; A312A-9010-W; and A312A-NP-W copolymers consisting of acrylonitrile-butadiene-styrene (ABS) with or without additives and in powder form will be 3903.30.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for: Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene (ABS) copolymers. The general rate of duty will be 6.5% ad valorem.

A401-9001F-K and A401-NP-W are described as molding resins each consisting of a copolymer blend of methylstyrene-acrylonitrile-styrene copolymer CAS-9010-96-2 and acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003-56-9 that will be imported in pellet form for use in the manufacture of plastic products.

The applicable subheading for A401-9001F-K and A401-NP-W copolymer blends consisting of methylstyrene-acrylonitrile-styrene copolymer and acrylonitrile-butadiene-styrene (ABS) copolymer in pellet form will be 3903.90.5000, HTSUS, which provides for: Polymers of styrene, in primary forms: Other: Other. The general rate of duty will be 6.5% ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <https://hts.usitc.gov/current>.

Your products may be subject to the requirements of the Toxic Substances Control Act (TSCA), which are administered by the U. S. Environmental Protection Agency at 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460. Information on the TSCA can be obtained by calling the TSCA Assistance Line at (202) 554-1404 or by e-mail to: [tsca-hotline@epa.gov](mailto:tsca-hotline@epa.gov).

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is



imported. If you have any questions regarding the ruling, contact National Import Specialist April Cutuli at [april.a.cutuli@cbp.dhs.gov](mailto:april.a.cutuli@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*



**MODIFICATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
ELIGIBILITY OF CERTAIN INSTANT CHAI TEAS FOR  
PREFERENTIAL TREATMENT UNDER NAFTA**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of modification of one ruling letter and revocation of treatment relating to the eligibility of certain instant chai teas for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”).

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (“CBP”) is modifying one ruling letter concerning the eligibility of certain instant chai teas for preferential tariff treatment under NAFTA. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020 of Customs Bulletin publication. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Elif Eroglu, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0277.

**SUPPLEMENTARY INFORMATION:**

**Background**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020 of Customs Bulletin publication, proposing to modify one ruling letter concerning the eligibility of certain instant chai teas for preferential tariff treatment under NAFTA. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N306886, dated November 18, 2019, CBP determined that the instant chai teas classified under subheadings 2101.20.54, 2101.20.58, or 2101.20.90, HTSUS, were not eligible for preferential treatment under NAFTA and that the country of origin of the instant chai teas was either the United States or Kenya for marking purposes. CBP has reviewed NY N306886, and has determined this ruling letter to be partially in error. CBP disagrees with NY N306886 that the Chai Moments Matcha Latte is classified under subheading 2101.20.54, HTSUS, which is not a NAFTA eligible provision for goods of Mexico. It is now CBP's position that the Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, is eligible for preferential tariff treatment under NAFTA, and its country of origin is Mexico for purposes of the marking requirements. Further, the country of origin of the remaining four instant chai teas, Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala is Kenya for marking purposes.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying NY N306886 and revoking or modify any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H312440, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachment

Q H312440

OT:RR:CTF:VS H312440 EE

CATEGORY: Classification

MR. HAROLD C. AVERILL  
 PARKER & COMPANY  
 P.O. BOX 271  
 4694 JAIME ZAPATA AVE.  
 BROWNSVILLE, TX 78522

RE: Modification of NY N306886; Preferential Tariff Treatment under  
 NAFTA; Instant Chai Teas

DEAR MR. AVERILL:

This letter is to inform you of the reconsideration of New York Ruling Letter (“NY”) N306886 which was issued to you by U.S. Customs and Border Protection (“CBP”) on November 18, 2019. NY N306886 concerns the tariff classification of certain instant chai teas and their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”). We have reviewed NY N306886 and determined that it is partially incorrect with respect to the eligibility of the instant chai teas for preferential tariff treatment under NAFTA. For the reasons set forth below, we are modifying that ruling letter.

**FACTS:**

The subject merchandise is described as instant chai teas under the brand name “Tea India.” There are four varieties of sweetened teas and one unsweetened tea under the product name “Chai Moments.”

Chai Moments Ginger Chai sweetened tea contains 55 to 60 percent cane sugar, 12 to 14 percent whole milk powder, 11 to 13 percent skim milk powder, 6 to 7 percent black tea extract, 4 to 5 percent chicory root inulin, 1 to 2 percent ginger flavor, and 1 to 2 percent ginger spice powder. The cane sugar, whole milk powder, skim milk powder, and ginger flavor are products of the United States. The total dry weight of sugar is said to be 59.86 percent. The non-originating ingredients of the Chai Moments Ginger Chai are as follows:

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Ginger Spice Powder	China, India or Nigeria	2106.90.09
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00
Ginger Flavor	United States	2106.90.09

Chai Moments Matcha Latte sweetened tea contains 55 to 60 percent cane sugar, 17 to 19 percent non-dairy creamer, 10 to 12 percent malted milk powder, 4 to 6 percent matcha green tea, 4 to 6 percent skim milk powder, 3 to 5 percent whole milk powder, 1 to 2 percent green tea matcha flavor, and less than 1 percent of pectin and tara gum. The cane sugar, non-dairy creamer, malted milk powder, skim milk powder, whole milk powder, and

green tea matcha flavor are products of the United States. The total dry weight of sugar is said to be 55.25 percent. The non-originating ingredients of the Chai Moments Matcha Latte are as follows:

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Matcha Green Tea	Japan	0902.10.10
Pectin	Mexico, China or Spain	1302.20.00
Tara Gum	Peru	1302.20.00
Cane Sugar	United States	1701.99.50
Non Dairy Creamer	United States	2106.90.09
Malted Milk Powder	United States	2106.90.09
Skim Milk Powder	United States	0402.10.00
Whole Milk Powder	United States	0402.10.00
Green Tea Matcha Flavor	United States	2106.90.09

Chai Moments Plain Chai sweetened tea contains 55 to 60 percent cane sugar, 14 to 16 percent whole milk powder, 11 to 13 percent skim milk powder, 6 to 8 percent black tea extract, and 9 to 11 percent chicory root inulin. The cane sugar, whole milk powder, and skim milk powder are products of the United States. The total dry weight of sugar is said to be 56.39 percent. The non-originating ingredients of the Chai Moments Plain Chai are as follows:

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00

Chai Moments Ginger Turmeric sweetened tea contains 55 to 65 percent cane sugar, 12 to 14 percent whole milk powder, 11 to 13 percent skim milk powder, 5 to 6 percent black tea extract, 5 to 6 percent chicory root inulin, 1 to 2 percent ginger flavor, less than 1 percent of ginger spice powder, turmeric spice powder, cinnamon spice powder, and pepper spice powder. The cane sugar, whole milk powder, skim milk powder, and ginger flavor are products of the United States. The total dry weight of sugar is said to be 59.45 percent. The non-originating ingredients of the Chai Moments Ginger Turmeric are as follows:

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Ginger Spice Powder	China, India or Nigeria	2106.90.09
Turmeric Spice Powder	India	2106.90.09
Cinnamon Spice Powder	Vietnam	2106.90.09

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Pepper Spice Powder	India, Indonesia, Malaysia or Vietnam	2106.90.09
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00
Ginger Flavor	United States	2106.90.09

Chai Moments Unsweetened Masala tea contains 45 to 50 percent whole milk powder, 35 to 40 percent chicory root inulin, 8 to 10 percent black tea extract, 1 to 2 percent cinnamon spice powder, and less than 1 percent of clove spice powder, ginger spice powder, cardamom spice powder, and pepper spice powder. The whole milk powder is a product of the United States. The non-originating ingredients of the Chai Moments Unsweetened Masala are as follows:

<b>Ingredient</b>	<b>Origin</b>	<b>HTSUS Classification</b>
Chicory Root Inulin	Belgium	1108.20.00
Black Tea Extract	Kenya	2101.20.20
Cinnamon Spice Powder	Vietnam	2106.90.09
Clove Spice Powder	Brazil, Comoros, Indonesia, Madagascar, Vietnam or Zanzibar	2106.90.09
Ginger Spice Powder	China, India or Nigeria	2106.90.09
Cardamom Spice Powder	Guatemala, Honduras or India	2106.90.09
Pepper Spice Powder	India, Indonesia, Malaysia or Vietnam	2106.90.09
Whole Milk Powder	United States	0402.10.00

All ingredients will be shipped to Mexico where they will be manufactured into instant chai tea products. They are then packaged into individual units (sticks) varying from 12.5g to 25g. These individual packages are then packaged in boxes of either 10 or 20 units each. Both are then bulk packed in master cartons of 6 each. The boxes that have 10 sticks each will be put up for retail sale. The boxes with 20 sticks will be sold as individual single serve per stick. The product is steeped in a cup of hot water to make a beverage.

In NY N306886, CBP determined the Chai Moments Ginger Chai, Chai Moments Matcha Latte, Chai Moments Plain Chai, and Chai Moments Ginger Turmeric were classified under subheading 2101.20.54, Harmonized Tariff Schedule of the United States (“HTSUS”), or 2101.20.58, HTSUS, if the quantitative limits of Additional U.S. Note 8 to Chapter 17 have been reached. The Chai Moments Unsweetened Masala was classified under subheading, 2101.20.90, HTSUS. Additionally, CBP determined none of the five instant chai teas qualified for preferential tariff treatment under NAFTA because the non-originating materials used in the production of the instant chai teas did not undergo the change in tariff classification required by General Note 12(t)/21.2, HTSUS. CBP also determined that the country of origin of the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai

Moments Ginger Turmeric and Chai Moments Unsweetened Masala for marking purposes was the United States and that the country of origin of the Chai Moments Matcha Latte for marking purposes was Kenya.

**ISSUE:**

Whether the instant chai teas classified under subheadings 2101.20.54, 2101.20.58, and 2101.20.90, HTSUS, imported into the United States from Mexico are eligible for preferential tariff treatment under the NAFTA.

What is the country of origin of the instant chai teas for purposes of country of origin marking?

**LAW AND ANALYSIS:**

General Note (“GN”) 12, HTSUS, incorporates Article 401 of the NAFTA into the HTSUS. GN 12(a)(ii), HTSUS, provides that goods are eligible for the NAFTA rate of duty if they originate in the territory of a NAFTA party and qualify to be marked as goods of Mexico. GN 12(b), HTSUS, sets forth the various methods for determining whether a good originates in the territory of a NAFTA party. Specifically, these provisions provide, in relevant part, as follows:

(a) Goods originating in the territory of a party to the North American Free Trade Agreement (NAFTA) are subject to duty as provided herein. For the purposes of this note—

\*            \*            \*            \*

(i) Goods that originate in the territory of a NAFTA party under the terms of subdivision (b) of this note and that qualify to be marked as goods of Mexico under the terms of the marking rules set forth in regulations issued by the Secretary of the Treasury (without regard to whether the goods are marked), and goods enumerated in subdivision (u) of this note, when such goods are imported into the customs territory of the United States and are entered under a subheading for which a rate of duty appears in the “Special” subcolumn followed by the symbol “MX” in parentheses, are eligible for such duty rate, in accordance with section 201 of the North American Free Trade Agreement Implementation Act.

(b) For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “goods originating in the territory of a NAFTA party” only if—

(i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or

(iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Since the instant chai teas contain non-originating materials, they are not considered goods wholly obtained or produced entirely in a NAFTA party under GN 12(b)(i). We must next determine whether the instant chai sticks qualify under GN 12(b)(ii).

There is no dispute that the instant chai teas are classified in heading 2101, HTSUS. The applicable rule is in GN 12(t)/21.2, HTSUS, which provides: “[a] change to heading 2101 from any other chapter.” All of the instant chai teas with the exception of the Chai Moments Matcha Latte contain ingredients classified in Chapter 21. Therefore, we agree with NY N306886 that the four teas, Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala, do not meet the tariff shift rule since they contain ingredients classified in Chapter 21. As such, they do not qualify as NAFTA originating goods.

However, the Chai Moments Matcha Latte contains only three ingredients which are non-originating: matcha green tea from Japan classified under subheading 0902.10.10, HTSUS; pectin from China or Spain, classified under subheading 1302.20.00, HTSUS; and tara gum from Peru, classified under subheading 1302.20.00, HTSUS. Since all three non-originating ingredients are classified in a chapter other than chapter 21, the tariff shift rule is met. Accordingly, we disagree with NY N306886 that the Chai Moments Matcha Latte does not qualify as a NAFTA originating good.

We must next determine whether the Chai Moments Matcha Latte qualifies to be marked as a good of Mexico. *See* GN 12(a)(ii), HTSUS (NAFTA-originating goods must also qualify to be marked as products of Mexico under the NAFTA Marking Rules to be eligible for preferential treatment).

In this regard, 19 C.F.R. § 134.1(j) provides that “[t]he ‘NAFTA Marking Rules’ are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country.” 19 C.F.R. § 134.1(j) defines a “good of a NAFTA country” as “an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.”

19 C.F.R. § 102.11 sets forth the required hierarchy for determining whether a good is a good of a NAFTA country for marking purposes. 19 C.F.R. § 102.11(a) provides that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
  - (2) The good is produced exclusively from domestic materials;
- or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Because the Chai Moments Matcha Latte is produced in Mexico from non-originating materials, it is neither wholly obtained or produced (19 C.F.R. § 102.11(a)(1)), nor produced exclusively from domestic materials (19 C.F.R. § 102.11(a)(2)). Accordingly, 19 C.F.R. § 102.11(a)(3) is the applicable rule that must next be applied to determine the origin of the Chai Moments Matcha Latte for marking purposes. “Foreign material” is defined in 19 C.F.R. § 102.1(e) as “a material whose country of origin as determined under



these rules is not the same country as the country in which the good is produced.” In order to determine whether Mexico is the country of origin, we must look at those ingredients whose country of origin is other than Mexico. Pursuant to 19 C.F.R. § 102.20(d), the applicable tariff shift rule for the Chai Moments Matcha Latte is “[a] change to heading 2101 from any other heading.” Since the matcha green tea from Japan, the pectin from China or Spain, the tara gum from Peru, the cane sugar, non-dairy creamer, malted milk powder, skim milk powder, whole milk powder, and green tea matcha flavor from the United States are classified in a heading other than heading 2101, the tariff shift rule is met. As such, we find that the Chai Moments Matcha Latte qualifies to be marked as a good of Mexico under the NAFTA Marking Rules.

We note that subheading 2101.20.54, HTSUS, is not a NAFTA eligible provision for goods of Mexico. Examining the special column for subheading 2101.20.54, HTSUS, the article may only be duty-free under NAFTA if it qualifies to be marked as a good of Canada, as the special column only has an indicator for “CA” and not for “MX.” Indeed, additional U.S. note 8 to chapter 17 referenced in subheading 2101.20.54, HTSUS, indicates that “articles the product of Mexico shall not be permitted or included under this quantitative limitation and no such articles shall be classifiable therein.” Accordingly, we disagree with NY N306886 that the Chai Moments Matcha Latte is classified under subheading 2101.20.54, HTSUS, which is not a NAFTA eligible provision for goods of Mexico. Rather, we find that the Chai Moments Matcha Latte is classified under subheading 2101.20.58, HTSUS, and qualifies as a NAFTA originating good.

Regarding making a NAFTA claim for the Chai Moments Matcha Latte, if an importer fails to make a claim for NAFTA at the time of entry, the NAFTA claim may be made by filing a request under 19 U.S.C. § 1520(d). Specifically, that provision states in pertinent part that:

Notwithstanding the fact that a valid protest was not filed, the Customs Service may . . . reliquidate an entry to refund any excess duties (including any merchandise processing fees) paid on a good qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act [19 USCS § 3332], . . . for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—

- (1) a written declaration that the good qualified under the applicable rules at the time of importation;
- (2) copies of all applicable certificates or certifications of origin; and
- (3) such other documentation and information relating to the importation of the goods as the Customs Service may require.

Although the remaining four teas do not qualify for NAFTA preference, the NAFTA Marking Rules will still apply for purposes of this marking decision modification. As the black tea extract from Kenya in the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala is classified under heading 2101, HTSUS, the tariff shift rule is not satisfied for these four instant chai teas. Because 19 C.F.R. § 102.11(a)(1)-(3) is not determinative of origin, the analysis continues to 19 C.F.R. § 102.11(b) which provides in pertinent part:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

- (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good, or...

When determining the essential character of a good under 19 C.F.R. § 102.11, 19 C.F.R. § 102.18(b) provides that only domestic and foreign materials that are classified in a tariff provision from which a change is not allowed shall be taken into consideration. Therefore, only the black tea extract from Kenya may be considered for purposes of determining the essential character of the instant chai teas. Accordingly, we disagree with N306886 and find that the country of origin of the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala teas is Kenya for country of origin marking purposes.

**HOLDING:**

The Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, is eligible for preferential tariff treatment under NAFTA. The country of origin of the Chai Moments Matcha Latte is Mexico for purposes of the marking requirements. The Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, classified under subheading 2101.20.58, HTSUS, and Chai Moments Unsweetened Masala teas, classified under subheading 2101.20.90, HTSUS, are not eligible for preferential tariff treatment under NAFTA, and their country of origin is Kenya for marking purposes.

**EFFECT ON OTHER RULINGS:**

To the extent that a post-importation 19 U.S.C. 1520(d) will be made, HQ N306886, dated November 18, 2019, is hereby MODIFIED with respect to the eligibility of Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, for preferential tariff treatment under NAFTA and the country of origin of all five instant chai teas for marking purposes.

*Sincerely,*

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

## 19 CFR PART 177

### REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN FOOTWEAR

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of certain footwear.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of certain footwear under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of certain footwear. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N298995, dated August 2, 2018, CBP classified certain footwear in heading 6404, HTSUS, specifically in subheading 6404.11.90, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair." CBP has reviewed NY N298995 and has determined the ruling letter to be in error. It is now CBP's position that the footwear at issue is properly classified in heading 6404, HTSUS, specifically in subheading 6404.19.90, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Other: Valued over \$12/pair."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N298995 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H301907, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

*For*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H301907

November 25, 2020

OT:RR:CTF:FTM H301907 TSM

CATEGORY: Classification

TARIFF NO.: 6404.19.90

Ms. PRISCILLA DOBBS

CONVERSE INC.

160 N. WASHINGTON STREET

BOSTON, MA 02114

RE: Revocation of NY N298995; Tariff classification of certain women's footwear

DEAR Ms. DOBBS:

This is in reference to New York Ruling Letter ("NY") N298995, issued to Converse, Inc. on August 2, 2018. In NY N298995, U.S. Customs and Border Protection ("CBP") classified certain Converse footwear, identified as style G30947-CTA39W-19S01, under subheading 6404.11.90, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair." We have reviewed NY N298995 and found it to be incorrect. For the reasons set forth below, we are revoking NY N298995.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 54, No. 40, on October 14, 2020, proposing to revoke NY N298995, and revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

**FACTS:**

In NY N298995, style G30947-CTA39W-19S01 was described as follows:

Style ID: G30947-CTA39W-19S01 Converse All Star Sasha is a woman's, closed toe/closed-heel, above-the-ankle sneaker. The shoe has nine eyelets on each side of the tongue facilitating a lace closure. The external surface area of the upper is predominantly cotton canvas textile. ... [The shoe also] has a rubber/plastics foxing band, a cushioned midsole, [and] a general athletic appearance, including a toe cap. The flexible rubber or plastics outer sole provides adequate traction. You've provided an F.O.B. value over \$12 per pair.

In a letter dated, November 9, 2018, filed on behalf of Converse, Inc., you requested reconsideration of NY N298995, arguing that the footwear style G30947-CTA39W-19S01 should be classified under subheading 6404.19.90, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Valued over \$12/pair."

**ISSUE:**

What is the tariff classification of the footwear style at issue?

**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provision of law for all purposes. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the proper classification of merchandise. It is CBP’s practice to follow, whenever possible the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

- 6404 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
  - Footwear with outer soles of rubber or plastics:
    - 6404.11 Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like:
      - Other:
        - 6404.11.90 Valued over \$12/pair
          - \* \* \*
    - 6404.19 Other:
      - Other:
        - 6404.19.90 Valued over \$12/pair
          - \* \* \*

Additional U.S. Note 2 to Chapter 64 provides as follows:

For the purposes of this chapter, the term “tennis shoes, basketball shoes, gym shoes, training shoes and the like” covers athletic footwear other than sports footwear (as defined in subheading note 1 above), whether or not principally used for such athletic games or purposes.<sup>1</sup>

\* \* \*

“Footwear Definitions” T.D. 93–88, dated October 25, 1993, provides in relevant part:

“Athletic” footwear (sports footwear included in this context) includes:

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<sup>1</sup> Subheading Note 1 to Chapter 64 provides as follows:  
 For the purposes of subheadings 6402.12, 6402.19, 6403.12, 6403.19 and 6404.11, the expression “sports footwear” applies only to:  
 (a) Footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, sprigs, cleats, stops, clips, bars or the like;  
 (b) Skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes.

1. Shoes usable only in the serious pursuit of a particular sport, which have or have provision for attachment of spikes, cleats, clips or the like.
2. Ski, wrestling & boxing boots; cycling shoes; and skating boots w/o skates attached.
3. Tennis shoes, basketball shoes, gym shoes (sneakers), training shoes (joggers) and the like whether or not principally used for such games or purposes.

It does not include:

1. Shoes that resemble sport shoes but clearly could not be used at all in that sporting activity. Examples include sneakers with a sequined or extensively embroidered uppers.
2. A “slip-on”, except gymnastic slippers.
3. Skate boots with ice or roller skates attached.

In NY N298995, footwear style G30947-CTA39W-19S01 was classified under subheading 6404.11.90, HTSUS, because CBP concluded that it had most of the characteristics of athletic footwear, such as a rubber/plastics foxing band, a cushioned midsole, a flexible rubber or plastics outer sole that provides adequate traction, as well as a general athletic appearance. Upon additional review, we find that to be incorrect, as CBP did not consider a certain feature that is not indicative of athletic footwear. Although the footwear style at issue has a general athletic appearance and most of the other construction features identifiable with athletic footwear, referenced above, further review shows that due to a certain design feature, this footwear is not properly classified as athletic. Specifically, footwear style G30947-CTA39W-19S01 has a pointed toe, which could make running long distances uncomfortable. Accordingly, we find that footwear style G30947-CTA39W-19S01 is not athletic footwear of subheading 6404.11, HTSUS. *See* NY N299439, dated August 23, 2018 (classifying footwear with a pointed toe under subheading 6404.19, HTSUS, as footwear other than athletic, because the pointed toe could make running long distances uncomfortable).

In accordance with the foregoing, we find that footwear style G30947-CTA39W-19S01 is classified under heading 6404, HTSUS, and specifically under subheading 6404.19.90, HTSUS.

#### **HOLDING:**

By application of GRI 1, we find that footwear style G30947-CTA39W-19S01, at issue in NY N298995, is classified under heading 6404, HTSUS, and specifically under subheading 6404.19.90, HTSUS, which provides for “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Other: Valued over \$12/pair.” The 2020 column one, general rate of duty is 9% *ad valorem*.

#### **EFFECT ON OTHER RULINGS:**

NY N298995, dated August 2, 2018, is REVOKED in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.



*Sincerely,*  
*For*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*



**PROPOSED REVOCATION OF TWO RULING LETTERS,  
MODIFICATION OF THREE RULING LETTERS, AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF AUTOMOBILE ORGANIZERS**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of two ruling letters, modification of three ruling letters, and proposed revocation of treatment relating to the tariff classification of automobile organizers.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke two ruling letters and modify three ruling letters concerning tariff classification of automobile organizers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before January 15, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: [1625Comments@cbp.dhs.gov](mailto:1625Comments@cbp.dhs.gov). All comments should reference the title of the proposed notice at issue and the Customs Bulletin volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke two ruling letters and modify three ruling letters pertaining to the tariff classification of automobile organizers. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") M80150, dated February 24, 2006 (Attachment A), NY L81614, dated January 4, 2005 (Attachment B), NY C89303, dated June 25, 1998 (Attachment C), NY A87718, dated October 15, 1996 (Attachment D), and Headquarters Ruling Letter ("HQ") 950525, dated February 7, 1992 (Attachment E), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY M80150, NY A87718, and NY L81614 CBP classified automobile organizers in subheading 8708.29.80, HTSUS.<sup>1</sup> In HQ 950525 CBP classified the automobile organizer in subheading 8708.99.50, HTSUS.<sup>2</sup> Subheading 8708.99.81, HTSUS provides for “Parts and accessories of the motor vehicles of Headings 8701 to 8705: Other: Other: Other.” In NY C89303 CBP classified the automobile organizer in subheading 8708.29.50, HTSUS, which provides for “Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories of bodies (including cabs): Other: Other.”

CBP has reviewed NY M80150, NY C89303, NY A87718, and HQ 950525 and has determined the ruling letters to be in error. It is now CBP’s position that automobile organizers are properly classified, in heading 4202, HTSUS, specifically in subheading 4202.92.91, HTSUS, which provides for “Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; ... of textile materials: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: With outer surface of textile materials: Other: Of man-made fibers.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY L81614 and HQ 950525 and modify NY M80150, NY C89303, and NY A87718 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H287875, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

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<sup>1</sup> Subheading 8708.99.81 in 2020 HTSUS.

<sup>2</sup> Subheading 8708.99.81 in 2020 HTSUS.

NY M80150

February 24, 2006

CLA-2-87:RR:NC:N1:101 M80150

CATEGORY: Classification

TARIFF NO.: 8708.99.8080, 4202.92.9026

MR. WILLIAM A. HELMS

VICE PRESIDENT SCHMIDT, PRITCHARD &amp; Co. CUSTOMHOUSE BROKERS

9801 WEST LAWRENCE AVENUE

SCHILLER PARK, IL 60176

RE: The tariff classification of automobile accessories and a zippered organizer from China.

DEAR MR. HELMS:

In your letter dated January 24, 2006 you requested a tariff classification ruling.

The first item (your stock number sku #25080) is multi pocketed item which hangs over an automobile seat and is designed to hold assorted electronics and media.

The second item (your stock number sku # 25100) is a portable SUV/MINI VAN Organizer. It is Heavy-duty with convenient handles and features a zippered closure.

The third item (your stock number sku # 25110) is a container that fits in a trunk and has convenient handles. It has no zippered closure and no cover.

All three items are made of polypropylene.

The applicable subheading for the item numbers sku # 25080 and sku # 25110 will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other. The rate of duty will be 2.5 percent.

The applicable subheading for the item number sku # 25100 will be 4202.92.9026, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in part, for other containers and cases, with outer surface of textile materials or sheeting of plastic, other. The rate of duty will be 17.6 percent.

Tariff number 4202.92.9026 falls within textile category designation 670. Quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information as to whether quota and visa requirements apply to this merchandise, we suggest that you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" available at our web site at [www.cbp.gov](http://www.cbp.gov). In addition, you will find current information on textile import quotas, textile safeguard actions and related issues at the web site of the Office of Textiles and Apparel, at [otexa.ita.doc.gov](http://otexa.ita.doc.gov).

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 646-733-3008.

*Sincerely,*  
ROBERT B. SWIERUPSKI  
*Director,*  
*National Commodity Specialist Division*

NY L81614

January 4, 2005

CLA-2-87:RR:NC:MM:101 L81614

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

MS. JANE JEWETT  
TALUS CORP.  
470 RIVERSIDE STREET  
PORTLAND, MAINE 04103

RE: The tariff classification of a “Car Cooler” from China

DEAR MS. JEWETT:

In your letter dated December 16, 2004 you requested a tariff classification ruling.

You submitted a sample (that we are returning to you) and photographs of a “Car Cooler”. This item is made from 600-denier polyester with a PVC sheet laminated. It is a cooler-type bag *without carry handles* designed for use in automobiles. It hangs from the headrest either in the front or backseat area. Its purpose is to hold cold drinks and food.

The applicable subheading for the “Car Cooler” will be **8708.99.8080**, Harmonized Tariff Schedule of the United States (HTS), which provides for *Parts and accessories for the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other*. The rate of duty will be 2.5% *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 646-733-3008.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY C89303

June 25, 1998

CLA-2-87:RR:NC:MM:101 C89303

CATEGORY: Classification

TARIFF NO.: 8708.29.5060

MS. SALLY STROM  
CASE LOGIC, INC.  
6303 DRY CREEK PARKWAY  
LONGMONT, CO 80503

RE: The tariff classification of automotive body accessories from the Philippines, China, and Indonesia.

DEAR MS. STROM:

In your letter dated May 20, 1998, you requested a tariff classification ruling.

You have listed four different items which will be principally used in the passenger compartment of a motor vehicle. You state that any one of the five items may be imported from the Philippines, China, or Indonesia.

The first item is a back seat organizer. This item is designed to hang on the back of an automobile seat and offers several types of pockets for organizing maps, a tissue box, sunglasses, magazines, toys, etc. It is attached to the seat with a webbing strap and bayonet clip hardware. It can be secured at the bottom with a cord strung through rivets.

The applicable subheading for the backseat organizer will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The second item is a deluxe back seat organizer with flip-down tray. This item is designed to hang on the back of an automobile seat and offers several types of pockets for organizing maps, a tissue box, toys, magazines, etc.. It also includes a "flip-down tray" feature, and a removable mesh pocket. It is attached to the seat with webbing straps and bayonet clip hardware, both at the top and bottom.

The applicable subheading for the deluxe back seat organizer with flip down tray will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The third item is a back seat pocket. This item attaches to the back of an automobile seat with an adjustable webbing strap. It has pleated pockets made of clear PVC and fabric flaps secured with hook and loop. The clear PVC allows the user to view the contents of the pocket, and is also ideal for storing items such as sunscreen or lotion.

The applicable subheading for the back seat pocket will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The fourth item is a center seat organizer. This item can be attached to the side of an automobile seat, in-between the driver and passenger seats. The top elastic strap attaches to the headrest, and the lower strap stretches around the upper portion of the seat. There are two pockets, one open at the top and one zippered. There is a mesh pocket on the back to hold maps, tickets, etc.

The applicable subheading for the center seat organizer will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-466-5667.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director*

*National Commodity Specialist Division*



NY A87718

October 15, 1996

CLA-2-87:RR:NC:1:101 A87718

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

Ms. SANDRA L. HAUPT  
TOWER GROUP INTERNATIONAL, INC.  
128 DEARBORN STREET  
BUFFALO, NY 14207-3198

RE: The tariff classification of automotive accessories from China

DEAR Ms. HAUPT:

In your letter dated September 5, 1996 you requested a tariff classification ruling on behalf of Autoshade L.L.C. of Moorpark, California.

The first item concerned (pictured below) is the Trunk Lid Organizer (Item #141306); it is a rectangular textile article of black nylon with PVC backing. Six cords, one attached to each corner and one each to the top-center and bottom-center, with hooks on the unattached ends, are used to attach the Organizer to the inside lid of a vehicle trunk. The Organizer, itself, measures 25" in length and 10" in height. There are two zippered pockets sewn to the outside of the Organizer: one measuring 13" L X 9" H and the other measuring 8" L X 9" H.

You state that the function of the Trunk Lid Organizer is to expand the storage space of a vehicle trunk; in particular, for highway emergency articles.

The second item (pictured below) is the Backseat Travel Tray (Item #142402). It is a rectangular, briefcase-sized, folding article composed of two sewn-in cardboard squares covered with black nylon. There is one, 9" H X 12" L, mesh pocket sewn onto the bottom outside of the "tray" portion of the article and four nylon strips with sewn-in Velcro closures sewn onto the top outside portion which are used to "belt" the Travel Tray to the back of a vehicle seat. A cord passes through two holes in both the "tray" and top portions of the article and passes through a hard, plastic cordlock which provides adjustable tension to allow the "tray" to remain stable at a desirable angle. There are four pockets sewn into the inside of the top portion of the article; three with Velcro closures and one intended as a cup holder. Sewn into the outside of the upper inner pocket is an open-ended rectangular piece of nylon which is intended as a sunglasses' holder. There is a zipper sewn around the outside edge of the items center, when folded; a nylon, strip handle sewn into the center of the exterior flap of the items top portion and, alongside, a nylon strip which can attach to a sewn-on Velcro square at the top of the outside of the "tray" portion of the item thereby keeping the item "closed". The item measures 11" H X 15" W X 3" Depth.

[Closed]

[Open]

You state that the purpose of this item is to allow passengers in the rear seats of vehicles to store things and have a surface to eat, write or play games on, etc.

The third item (shown below) is the Backpack Backseat Organizer (Item #14510). It is an oblong-shaped article of black nylon with an open-topped pocket and a mesh pocket sewn onto the front outside surface along with a length zipper around the top portion; on the top of the back outside surface

is a sewn-in belt with a hard plastic buckle and clasp and on the bottom of the back outside surface are two sewn-in nylon loops and two short pieces of belt webbing with hard plastic D-rings attached. On the front inside of the item is a sewn-in, multi-looped piece of elastic. On the back inside, are two Velcro-closed pockets. A loose piece of nylon drawcord is included to fit through either the loops or D-rings on the bottom of the back outside surface of the item to tie it down to various lengths of vehicle seats. The item measures 3”L X 11”W X 17”H.

[Closed]

[Open]

You state that the function of this item is to hold or store items in an organized fashion within an automobile.

The last item (shown below) is the Glove Box Litter Bag (Item #14521). It is a 11”H X 8”W X 3”Depth, rectangular, black nylon bag with PVC backing. There is a top flap which has a sewn-on Velcro closure on the front. On the back are two webbed loops. Included are two, soft metal, bendable hooks covered with black rubber material; they “hook” through the webbed loops on the back of the Bag and the other end of the hooks are “hooked” to the Glove Compartment or Glove Box of a vehicle.

You state that the purpose of this item is to hold litter.

All of the items listed above are supplied by A.S. Sheng Chan International and will be imported into the U.S. through the Ports of Los Angeles and Long Beach, California.

The applicable subheading for the Trunk Lid Organizer, Backseat Travel Tray, Backpack Backseat Organizer and Glove Box Litter Bag will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories for . . . motor vehicles . . . : Other parts and accessories: Other: Other: Other: Other: Other. The rate of duty will be 2.9% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-466-5667.

*Sincerely,*

ROGER J. SILVESTRI

*Director*

*National Commodity Specialist Division*

HQ 950525

February 7, 1992

CLA-2 CO:R:C:M 950525 NLP

CATEGORY: Classification

TARIFF NO.: 8708.99.50

MR. BRIAN ELLSWORTH  
E & J TRADING CO.  
1415 1/2 WEST FORT STREET  
BOISE, IDAHO 83702 USA

RE: automobile trash containers; automobile accessories; General  
Explanatory Notes to Section XVII; Explanatory Note 87.08

DEAR MR. ELLSWORTH:

This is in response to your letter dated October 7, 1991, in which you requested a tariff classification of an automobile trash container under the Harmonized Tariff Schedule of the United States (HTSUS). Descriptive literature and samples of the materials that comprise the container were enclosed with your letter.

**FACTS:**

The imported product is an automobile trash container that comes in two sizes. The trash container is constructed of 220D and 420D nylon fabric and 1/4 inch Artilon foam. The foam is sandwiched between two layers of fabric and laminated to one layer of fabric. Your letter states that the foam and fabric will most likely be products of Korea or Taiwan. Your letter also states that the trash container will be imported from Taiwan, Thailand, China, Mexico, Korea, or the Philippines.

The trash container is attached to the back of the passenger side car seat and is used to hold trash in the automobile. The bag is secured by buckling the strap around the seat headrest and by attaching the two bottom cords to the undercarriage of the seat. It is designed to use a grocery style plastic bag as a liner. The liner is clipped into the exterior pack cloth bag at each corner. The liners are then disposed of as they become full. The pocket on the outside of the bag provides a place to store additional liners. The bag is available in a variety of colors.

The automobile trash container may be used in motorboats, sailboats, river rafts, but it is primarily used in motor vehicles.

**ISSUE:**

Whether the automobile trash container is classified as other motor vehicle accessories in heading 8708, HTSUS.

**LAW AND ANALYSIS:**

The General Rules of Interpretation (GRI's) set forth the manner in which merchandise is to be classified under the HTSUS. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's, taken in order.

Heading 8708, HTSUS, provides for parts and accessories of the motor vehicles of headings 8701 to 8705. To qualify for classification within this heading, an article must meet certain criteria set forth in the Harmonized

Commodity Description and Coding System (HCDCS) General Explanatory Notes to Section XVII and the HCDCS Explanatory Notes to Heading 8708, HTSUS. The criteria set forth in the General Explanatory Notes to Section XVII, page 1410, regarding parts and accessories provide the following:

- (a) They must not be excluded by the terms of Note 2 to this Section; and
- (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88; and
- (c) They must not be more specifically included elsewhere in the Nomenclature.

Furthermore, the Explanatory Notes to heading 8708, HTSUS, page 1432, state this heading covers parts and accessories of the motor vehicles of headings 8701 to 8705 provided the parts and accessories fulfill both the following conditions:

- (i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles; and
- (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

The term “accessory” is not defined in either the tariff schedule or the Explanatory Notes to the Harmonized Commodity Description and Coding System. A part is generally an article which is an integral, constituent or component part, without which the article to which it is joined could not function. An accessory is generally a nonessential but useful item that has a supplementary function to that of the larger article to which the accessory is attached. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. In addition, they generally contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation.) See, Headquarters Ruling Letter (HRL) 088579, dated May 23, 1991 and HRL 087704, dated September 27, 1990. The automobiles to which the trash containers will be attached are able to function without the trash containers. The trash containers merely supplement the automobiles to which they are attached. Thus, they are not parts but may be accessories.

Note 2 to Section XVII, HTSUS, sets forth a list of articles which are precluded from classification as accessories for the purposes of that Section. None of the enumerated articles in Note 2 are similar in any way to the instant merchandise. Therefore, the automobile trash container is not specifically excluded by the provisions of the Notes to Section XVII, HTSUS.

Furthermore, the automobile trash container is principally designed to be used with those vehicles enumerated in headings 8701 to 8705. The trash container is specially designed to be affixed onto the back of the passenger car seat headrest by a strap and by attaching the two bottom cords to the undercarriage of the seat. Moreover, this type of container is not more specifically provided for elsewhere in the tariff schedule.

In addition, past rulings support the position that the subject product is classified as an automobile accessory in heading 8708, HTSUS. New York Ruling Letter (NYRL) 847585, dated December 5, 1989, held that a motor vehicle saddle bag that was solely or principally used with an automobile and that was specially designed to be installed over the back of the front seat was classified as a motor vehicle accessory in subheading 8708.99.50, HTSUS.

NYRL 830760, dated July 21, 1988, held that a motor vehicle litter bag, which was described and marketed for use in a car and that had a slot in its rear portion for hanging in a car, was classified as a motor vehicle accessory in subheading 8708.99.50, HTSUS.

The subject merchandise satisfies all of the above criteria. It meets the three requirements for being considered an accessory set out in the General Explanatory Notes to Section XVII and the Explanatory Notes to heading 8708, HTSUS. It also meets the criteria for being considered an accessory of a motor vehicle. Accordingly, the automobile trash container is properly classifiable in subheading 8708.99.50, HTSUS.

**HOLDING:**

The automobile trash container is classifiable in subheading 8708.99.50, HTSUS, which provides for other parts and accessories of the motor vehicles of headings 8701 to 8705, other, other. The rate of duty is 3.1 percent ad valorem for articles classified under this subheading.

Pursuant to Section 502(a)(3) of the Trade Act of 1975 (19 U.S.C. Section 2652(a)(3)) and General Note 3(c)(ii)(A), HTSUS, Mexico, Thailand and the Philippines have been designated beneficiary developing countries for the purposes of the Generalized System of Preferences (GSP), provided for in Title V of the Trade Act of 1974, as amended (19 U.S.C. Section 2461, et seq.). Articles classifiable under subheading 8708.99.50, HTSUS, which are products of Mexico, Thailand and the Philippines are entitled to duty-free treatment under the GSP upon compliance with all applicable regulations.

*Sincerely,*

JOHN DURANT,

*Director*

*Commercial Rulings Division*

HQ H287875

October 7, 2020

OT:RR:CTF:CPMM H287875 MMM

CATEGORY: Classification

TARIFF NO.: 4202.92.91, 4202.92.08

MR. WILLIAM A. HELMS

VICE PRESIDENT SCHMIDT, PRITCHARD & Co. CUSTOMHOUSE BROKERS

9801 WEST LAWRENCE AVENUE

SCHILLER PARK, IL 60176

RE: Revocation of NY L81614 and HQ 950525 and Modification of NY M80150, NY C89303 and NY A87718; classification of automobile organizers

DEAR MR. HELMS:

This is in regard to New York Ruling Letter (NY) M80150, dated February 24, 2006, regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of the automobile organizer. In NY M80150, CBP classified the automobile organizer in heading 8708, HTSUS, as a motor vehicle accessory. We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY L81614, dated January 4, 2005, NY C89303, dated June 25, 1998, NY A87718, dated October 15, 1996, and HQ 950525, dated February 7, 1992, and determined they are also incorrect, and for the reasons set forth below, we are revoking NY L81614, and HQ 950525 and modifying NY C89303 and NY A87718.

**FACTS:**

In your ruling NY M80150, CBP stated as follows in reference to the subject merchandise:

The third item (your stock number sku # 25110) is a container that fits in a trunk and has convenient handles. It has no zippered closure and no cover.

CBP classified the merchandise in heading 8708, HTSUS, as an accessory of a motor vehicle.

The subject merchandise in NY L81614 (automobile cooler), NY C89303 (backseat pocket and center seat organizer), NY A87718 (backpack backseat organizer (Item #14510) and glove box litter bag (Item #14521)), and HQ 950525<sup>1</sup> (automobile trash container) are similar to the merchandise in NY M80150 and were all classified in heading 8708, HTSUS.

**ISSUE:**

Are the automobile organizers solely or principally suitable for use in a motor vehicle and thus classifiable as an accessory of heading 8708, HTSUS, or as a travel bag of heading 4202, HTSUS?

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<sup>1</sup> New York Ruling Letter 830760 is mentioned in HQ 950525, however, is unavailable on CROSS.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2020 HTSUS provisions under consideration are as follows:

- 4202**            **Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:**
- 8708**            Parts and accessories of the motor vehicles of headings 8701 to 8705

\*   \*   \*   \*   \*   \*   \*

Note 3 to Section XVII states as follows:

References in chapters 86 to 88 to “parts” or “accessories” do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters. A part or accessory which answers to a description in two or more of the headings of those chapters is to be classified under that heading which corresponds to the principal use of that part or accessory.”

The General EN to Section XVII, states, in pertinent part:

It should, however, be noted that these headings apply **only** to those parts or accessories which comply with **all three** of the following conditions :

- (a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).
- and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).
- and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

\*   \*   \*

**(C) Parts and accessories covered more specifically elsewhere in the Nomenclature.**

Parts and accessories, even if identifiable as for the articles of this Section, are **excluded** if they are covered more specifically by another heading elsewhere in the Nomenclature, e.g.:

....

(12) Vehicle seats of **heading 94.01**.

The EN to 8708 states, in pertinent part:

This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfill **both** the following conditions:

- (i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;
- and (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

\* \* \* \* \*

In *Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), the court identified two distinct lines of cases defining the word “part.” Consistent with *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (citations omitted), one line of cases holds that a part of an article “is something necessary to the completion of that article. . . . [W]ithout which the article to which it is to be joined, could not function as such article.” The other line of cases evolved from *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. The definition of “parts” was also discussed in *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002), wherein the United States Court of Appeals for the Federal Circuit (“CAFC”) defined parts as “an essential element or constituent; integral portion which can be separated, replaced, etc.”<sup>2</sup> This line of reasoning has been applied in previous CBP rulings.<sup>3</sup>

Insofar as the term “accessory” is concerned, the Court of International Trade (“CIT”) has previously referred to the common meaning of the term because the term is not defined by the HTSUS or its legislative history.<sup>4</sup> We also employ the common and commercial meanings of the term “accessory”, as the CIT did in *Rollerblade, Inc.*, wherein the court derived from various dictionaries “that an accessory must relate directly to the thing accessorized.”<sup>5</sup> In *Rollerblade, Inc.*, the CAFC noted that “an ‘accessory’ must bear a direct relationship to the primary article that it accessorizes.”<sup>6</sup>

The subject merchandise in this case is not a “part” under any of the tests provided in the judicial decisions described above. It is not a “part” under the

<sup>2</sup> *Id.* at 1353 (citing Webster’s New World Dictionary 984 (3d College Ed. 1988)).

<sup>3</sup> See e.g., HQ H255093, dated January 14, 2015; HQ H238494, dated June 26, 2014; and HQ H027028, dated August 19, 2008

<sup>4</sup> See *Rollerblade, Inc. v. United States*, 24 Ct. Int’l Trade 812, 815–819 (2000), aff’d, 282 F.3d 1349 (Fed. Cir. 2002)).

<sup>5</sup> See *Rollerblade, Inc.*, 24 Ct. Int’l Trade at 817.

<sup>6</sup> 282 F.3d at 1352 (holding that inline roller skating protective gear is not an accessory because it “does not directly act on” or “contact” the roller skates).



*Willoughby* test because a car can function without a automobile organizer, litter bag, cooler, etc. It is also not a “part” under the Pompeo test because the subject merchandise is not “installed,” and the car can still operate without the subject merchandise once stored in the car.<sup>7</sup> Lastly the subject merchandise is not a “part” because it is not an essential, constituent, or integral part to the vehicle.<sup>8</sup>

The subject merchandise is also not an “accessory” of motor vehicles. Like the protective gear in *Rollerblade, Inc.* and the truck tents classified in HQ H242603, dated April 3, 2015, the subject merchandise at issue does not directly affect the car’s operation nor does it contribute to the car’s effectiveness.<sup>9</sup> Instead, the subject merchandise merely allows the driver and its passengers to store items needed for their enjoyment or convenience,<sup>10</sup> or dispose of items while driving. The subject merchandise is not classified in heading 8708, HTSUS.

Heading 4202, HTSUS, provides for, among other items, spectacle cases, camera cases, holsters, traveling bags and similar containers of textile materials such as the subject article. In classifying goods under the residual provision of “similar containers” of heading 4202, HTSUS, the Court of International Trade has stated as follows: “As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.”<sup>11</sup> The court found that the rule of *ejusdem generis* requires only that the imported merchandise share the essential character or purpose running through all the containers listed *eo nomine* in heading 4202, HTSUSA., i.e., “...to organize, store, protect and carry various items.”<sup>12</sup>

In *Totes*, the CIT held that a trunk organizer, used to store automotive tools and supplies, was correctly classified in heading 4202. The trunk organizer in *Totes* had handles for carrying and Velcro strips that gripped carpeted surfaces and held it in place inside a trunk. The trunk organizer was comprised of a storage section which could be divided into three storage areas using dividers. The subject merchandise is similar to the merchandise in *Totes*, and is designed to organize, store, protect, and carry personal items. The varying merchandise are all comprised of a single storage section. The subject merchandise in M80150 and L81614 include handles for carrying and the subject merchandise in A87718 includes a closure to the main storage section in order

<sup>7</sup> See also *Rollerblade, Inc.*, 282 F.3d at 1353 (the CAFC found that the protective gear was not a part to the roller skates because they did not “attach to or contact” the roller skates, they were “not necessary to make the skates ... work”, nor were “they necessary to make the skates ... work efficiently or safely.”)

<sup>8</sup> See *Id.*

<sup>9</sup> See *Rollerblade, Inc.*, 282 F.3d at 1353; HQ 960950 (Jan. 16, 1998) (stating that “[a]ccessories are of secondary importance,” but must “somehow contribute to the effectiveness of the principal article”).

<sup>10</sup> To the extent some of these articles accessorize a vehicle’s seat, they are excluded from classification here under the General EN to the Section, C(12). Heading 9401 for seats does not include a provision for accessories.

<sup>11</sup> *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867, 871 (1994), *aff’d*. 69 F. 3d 495 (Fed. Cir. 1995).

<sup>12</sup> *Totes*, 865 F. Supp. at 872.

to protect and store. The subject merchandise thus shares the essential character and purpose of the containers of heading 4202, HTSUS, and is therefore *ejusdem generis* with those articles. Past rulings have also classified similar articles in Heading 4202, despite their claimed use as motor vehicle accessories.<sup>13</sup>

Lastly, according to Note 3 to Section XVII and the ENs to Section XVII, parts and accessories that are more specifically described outside of HTSUS Section XVII should be classified under the other, more specific provision.<sup>14</sup> If the subject merchandise is also *prima facie* classifiable in 8708, HTSUS, it is still correctly classified in heading 4202, HTSUS, because the merchandise is more specifically described by heading 4202, HTSUS.<sup>15</sup>

### **HOLDING:**

By application of GRI 1, the automobile organizers found in NY M80150, NY C89303, NY A87718, and HQ 950525 are classified in heading 4202, HTSUS, specifically 4202.92.91, HTSUS, which provides for: “Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; ... of textile materials: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: With outer surface of textile materials: Other: Of man-made fibers.” The automobile cooler in NY L81614 is specifically classified in subheading 4202.92.08, HTSUS, which provides for: “Insulated food and beverage bags...with outer surface of textile materials: Other: of man-made fibers.” The rate of duty for 4202.92.91 is 17.6% *ad valorem*. The rate of duty for 4202.92.08 is 7% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

### **EFFECT ON OTHER RULINGS:**

NY M80150, dated February 24, 2006, NY C89303, dated June 25, 1998, and NY A87718, dated October 15, 1996 are hereby MODIFIED in accordance with the above analysis.

NY L81614, dated June 1, 2005 and HQ 950525, dated February 7, 1992 are hereby REVOKED in accordance with the above analysis.

*Sincerely,*

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

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<sup>13</sup> See *e.g.*, Headquarters Ruling Letter (HQ) 084931, dated August 14, 1989; HQ 087795, dated August 30, 1990; NY G87545, dated February 26, 2001; NY G88609, dated April 3, 2001; NY M80989, dated March 16, 2006; and NY N032058, dated July 29, 2008.

<sup>14</sup> *Totes*, 69 F.3d at 499.

<sup>15</sup> *Totes*, 69 F.3d at 499 (*citing United States v. Electrolux Corp.*, 46 C.C.P.A. 143, 147 (1959) (principal that use provisions generally govern over *eo nomine* provisions is not a strict rule, but a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance”).

## 19 CFR PART 177

### REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FRAMED MIRROR

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a framed mirror.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a framed mirror under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 28, on July 22, 2020. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0041.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 28, on July 22, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of a framed mirror. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N304224, the framed mirror was classified in subheading 9403.50.90, HTSUS. CBP has reviewed NY N304224 and has determined the ruling letter to be in error. It is now CBP's position that the framed mirror is properly classified in subheading 9403.89.60, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N304224 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H305460, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: November 27, 2020

*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H305460

November 27, 2020

OT:RR:CTF:CPMM H305460 KSG

CATEGORY: Classification

TARIFF NO.: 9403.89.60

DEBBIE TAYLOR  
THE CONTAINER STORE  
500 FREEPORT PARKWAY  
COPPELL TX 75019

RE: Revocation of NY N304224; tariff classification of framed mirror;  
component of a closet system

DEAR MS. TAYLOR:

This letter is in reference to New York Ruling Letter (NY) N304224, dated May 29, 2019, regarding the classification of a framed mirror in the Harmonized Tariff Schedule of the United States (HTSUS).

In NY N304224, U.S. Customs & Border Protection (CBP) classified a framed mirror that is a component of a closet system in subheading 9403.50.90, HTSUS, which provides for Other furniture and parts thereof: Wooden furniture of a kind used in the bedroom: Other.”

We have reviewed NY N304224 and determined that the ruling is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N304224.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N304224 was published on July 22, 2020, in Volume 54, Number 28 of the Customs Bulletin. One comment was received in response to this notice, which is addressed below.

**FACTS:**

The Container Store sells mirrors as part of the Elfa closet system. The Elfa System is a modular storage and organization system. The system involves uniform “top tracks” and “hanging standards” that allow consumers to assemble different components of the system in a variety of configurations to create a customized closet, shelving or storage unit. The steel top tracks and hanging standards act as the core structure of the Elfa System; the wood framed mirror contains four metal brackets screwed to the back of the wooden frame that hook into the steel track of the closet system.

The framed mirror is 24 inches by 25 inches with a two inch birch wood frame. The mirror sits inside a groove in the frame and appears to be secured with adhesives or caulk. There is no backing to the frame to secure the mirror.

**ISSUE:**

Whether the framed mirror that is a component in a closet system is properly classified in subheading 9403.50 as wooden furniture of a kind used in the bedroom or in subheading 9403.89 as other furniture.

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

When goods are composite good classifiable in two or more headings, they are classified pursuant to GRI 3(b) by the material or component which gives them their essential character.

GRI 6 provides that for legal purposes, 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, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The HTSUS subheadings under consideration are the following:

9403	Other furniture and parts thereof:
9403.50	Wooden furniture of a kind used in the bedroom:
9403.50.90	Other
9403.89	Other:
9403.89.60	Other

Chapter Note 2 for heading 9403 provides, in pertinent part:

2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other:

(a) Cupboards, bookcases, other shelved furniture (including single shelves presented with supports for fixing them to the wall) and **unit furniture**;

(b) Seats and beds.

In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System, constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The EN for GRI 3(b) describes essential character as the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods

The EN for heading 9403 provides, in pertinent part:

This heading covers furniture and parts thereof, **not covered** by the previous headings. It includes furniture for general use (e.g., cupboards, show-cases, tables, telephone stands, writing-desks, escritoirs, book-cases, and other shelved furniture (including single shelves presented with supports for fixing them to the wall), etc.), and also furniture for special uses.

The heading includes furniture for:

- (1) **Private dwellings, hotels, etc.**, such as: cabinets, linen chests, bread chests, log chests; chests of drawers, tallboys; pedestals, plant stands; dressing-tables; pedestal tables; wardrobes, linen presses; hall stands, umbrella stands; side-boards, dressers, cupboards; food-safes; bedside tables; beds (including wardrobe beds, camp-beds, folding beds, cots, etc.); needlework tables; stools and foot-stools (whether or not rocking) designed to rest the feet, fire screens; draught-screens; pedestal ashtrays; music cabinets, music stands or desks; play-pens; serving trolleys (whether or not fitted with a hot plate).
- (2) **Offices**, such as: clothes lockers, filing cabinets, filing trolleys, card index files, etc.
- (3) **Schools**, such as: school-desks, lecturers' desks, easels (for blackboards, etc.).
- (4) **Churches**, such as: altars, confessional boxes, pulpits, communion benches, lecterns, etc.
- (5) **Shops, stores, workshops, etc.**, such as: counters; dress racks; shelving units; compartment or drawer cupboards; cupboards for tools, etc.; special furniture (with cases or drawers) for printing-works.
- (6) **Laboratories or technical offices**, such as : microscope tables; laboratory benches (whether or not with glass cases, gas nozzles and tap fittings, etc.); fume-cupboards; unequipped drawing tables.

In *Storewall, LLC v. United States*, 675 F. Supp. 2d 1200 (Ct. Int'l Trade 2009), the Court of International Trade (CIT), defined unit furniture as: an item (a) fitted with other pieces to form a larger system or which is itself composed of smaller complementary items, (b) designed to be hung, or fixed to the wall, or stand one on the other or side by side, (c) assembled together in various ways to suit the consumer's individual needs to hold various objects or articles, and (d) excludes other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks. The Court of Appeals for the Federal Circuit (CAFC), in *Storewall, LLC v. United States*, 644 F.3d 1358 (Fed. Cir. 2011), upheld the CIT definition of unit furniture and added that unit furniture may be assembled together in various ways to suit the consumer's individual needs to hold various objects and articles, and it was this versatility and adaptability that is the essence of unit furniture.

In *The Container Store v. United States*, 864 F.3d 1326 (Fed. Cir. 2017), the CAFC addressed the classification of other parts of the Elfa System, namely, the top tracks and hanging standards. The Federal Circuit held that the Elfa system constitutes "unit furniture" because it is designed to be hung on a wall, is "fitted with other pieces to form a larger system," and can be "assembled together in various ways to suit the consumer's individual needs to

hold various objects or articles.” In that case, the tracks and hanging standards were classified in subheading 9403.90.80, HTSUS, as parts of furniture.

In New York Ruling Letter (NY) N255614, dated August 22, 2014, CBP ruled that a sliding mirror in a closet system combined with mountings and fittings falls within heading 9403, HTSUS. CBP stated that the sliding closet mirror was “only one unit element of a closet organizer system, which normally can include shelves, baskets, drawers, racks and other unit elements.” The sliding mirror was classified in subheading 9403.89.60, HTSUS, as other furniture. Also see NY N299949, dated August 23, 2018, in which shelves and storage organizers for a closet system were classified in subheading 9403.89.60, HTSUS.

As stated above, Chapter Note 2(a) of heading 9403 states that the chapter includes unit furniture. The Elfa mirror with four brackets is a unit element of a closet organizer system and would be classified in heading 9403, HTSUS, consistent with the definition of unit furniture in *Storewall*, *The Container Store*, NY N255614 and NY N299949. It is (a) fitted with other pieces to form a larger system (b) designed to be hung, or fixed to the wall (c) possible to assemble to the Elfa closet system in various ways to suit the consumer’s individual needs and does not fit within any of the rack exceptions.

Pursuant to GRI 6, we must next determine the proper subheading in heading 9403 in which to classify the Elfa mirror. The Elfa mirror is a composite good, made of both glass and wood, which can therefore be classified in two headings and therefore, is not classifiable under GRI 1. Pursuant to GRI 3(b), we must consider both the wood and glass to determine the essential character of the article. The reflective glass surface of the mirror is the material that is functional to the use of the good, is the major component of the article in size and would impart its essential character. Therefore, the mirror would not be classified in subheading 9403.50, HTSUS. The wood frame does not impart the essential character of the article so it would not be considered wooden furniture. Based on the above, pursuant to GRI 3(b), the mirror is classified in subheading 9403.89.60 as other furniture. That is consistent with NY N255614 involving a sliding mirror door that is a unit element of a closet organizer system.

One commenter stated *Storewall* and *The Container Store* do not apply to mirrors and that the framed mirror in this case should be classified in heading 7009, HTSUS. We find that while *Storewall* and *The Container Store* did not involve the classification of mirrors, the definition of unit furniture in those case is applicable. Since we found that the mirrors in this case are unit furniture, they are not properly classified in heading 7009, HTSUS.

#### **HOLDING:**

Pursuant to GRI’s 1, 3(b) and 6, the Elfa mirror is classified in subheading 9403.89.60, HTSUS. The column one, general rate of duty is Free.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided for at [www.usitc.gov](http://www.usitc.gov).

#### **EFFECT ON OTHER RULINGS:**

NY N304224 is revoked.



*Sincerely,*  
*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*



**PROPOSED REVOCATION OF NINE LETTERS,  
MODIFICATION OF FOUR LETTERS, AND REVOCATION  
OF TREATMENT RELATING TO THE TARIFF  
CLASSIFICATION OF TEXTILE BACKSEAT AUTOMOBILE  
ORGANIZERS**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254, and NY 869451 and modification of NY N087915, M801150, NY C89303, and NY A87718.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke ten ruling letters and modify three ruling letters concerning tariff classification of backseat automobile organizers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before January 15, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: [1625Comments@cbp.dhs.gov](mailto:1625Comments@cbp.dhs.gov). All comments should reference the title of the proposed notice at issue and the Customs Bulletin volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to

inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

**FOR FURTHER INFORMATION CONTACT:** Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

## **SUPPLEMENTARY INFORMATION:**

### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke nine ruling letters and modify four ruling letters pertaining to the tariff classification of backseat automobile organizers.

Although in this notice, CBP is specifically referring to New York Ruling Letters ("NY") N087915, dated January 13, 2010 (Attachment A), N018628, dated November 8, 2007 (Attachment B), M80150, dated February 24, 2006 (Attachment C), J83474, dated April 25, 2003 (Attachment D), H87607, dated February 8, 2002 (Attachment E), G86716, dated February 6, 2001 (Attachment F), H82730, dated June 26, 2001 (Attachment G), G88263, dated March 19, 2001 (Attachment H), G84567, dated December 5, 2000 (Attachment I), C89303, dated June 25, 1998 (Attachment J), A87718, dated October 15, 1996 (Attachment K), 886254, dated May 20, 1993 (Attachment L), and 869451, dated December 17, 1991 (Attachment M), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the thirteen identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling

letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N087915, CBP classified the backseat automobile organizer in subheading 8708.99.81, HTSUS. In NY N018628, NY M80150, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, and NY A87718, CBP classified the backseat automobile organizers in subheading 8708.99.80, HTSUS.<sup>1</sup> In NY 886254 and NY 869451, CBP classified the backseat automobile organizers in 8708.99.50, HTSUS.<sup>2</sup> Subheading 8708.99.81, HTSUS provides for "Parts and accessories of the motor vehicles of Headings 8701 to 8705: Other: Other: Other." In NY C89303, CBP classified the backseat automobile organizers in 8708.29.50, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories of bodies (including cabs): Other: Other."

CBP has reviewed NY N087915, NY N018628, NY M80150, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY C89303, NY A87718, NY 886254, and NY 869451 and has determined the ruling letters to be in error. It is now CBP's position that backseat automobile organizers are properly classified, in heading 6307, HTSUS, specifically in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254, and NY 869451, modify NY N087915, NY M801150, NY C89303, and NY A87718 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H312216, set forth as Attachment N to this notice. Additionally,

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<sup>1</sup> 8708.99.81 in 2020 HTSUS.

<sup>2</sup> 8708.99.81 in 2020 HTSUS.

pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

N087915

January 13, 2010

CLA-2-39:OT:RR:NC:N4:421

CATEGORY: Classification

TARIFF NO.: 3923.90.0080; 6307.90.9889;  
8504.40.9580; 8518.30.2000; 8536.69.4020;  
8544.42.2000; 8708.99.8180; 9506.39.0080

MR. JIM GHEDI  
GHEDI INTERNATIONAL, INC.  
8002 BURLESON ROAD  
AUSTIN, TX 78744

RE: The tariff classification of various articles from China

DEAR MR. GHEDI:

In your letter dated December 9, 2009, on behalf of Norwood Promotional Products LLC, you requested a tariff classification ruling.

Samples were provided with your letter. Item 20870 is a packaging sleeve designed to hold a single golf ball and several golf tees. The sleeve is made from plastic sheeting that has been scored, folded and heat sealed. There is a circular hole cut out on the front and back panels where the ball will protrude. Item 61101 is a packaging sleeve designed to hold a number of golf tees. The sleeve is made from plastic sheeting that has been scored, folded and heat sealed. The sleeves will be imported empty and the balls and tees will be packaged inside the sleeves after importation. The balls and tees will be printed with company names or logos and will be distributed as promotional products.

The applicable subheading for the plastic packaging sleeves, items 20870 and 61101, will be 3923.90.0080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for articles for the conveyance or packing of goods, of plastics, other, other. The rate of duty will be 3 percent ad valorem.

Item 61165 is a multi-function golf tool with an attached split ring. The tool is made primarily of metal. It incorporates two fold-out divot repair tools, a fold-out knife blade, a fold-out brush, a pull-out ballpoint pen and a removable magnetic ball marker. The essential character of the multi-function golf tool is imparted by the divot repair tools.

The applicable subheading for the golf tool, item 61165, will be 9506.39.0080, HTSUS, which provides for articles and equipment for general physical exercise, gymnastics, athletics, other sports...parts and accessories thereof: golf clubs and other golf equipment; parts and accessories thereof: other. The rate of duty will be 4.9 percent ad valorem.

Item 20446 is an over-the-seat car organizer made of nylon fabric with plastic pockets and mesh pockets. It is designed with a snap clip and drawstring that enable the organizer to be attached to the car seat.

The applicable subheading for the car organizer, item 20446, will be 8708.99.8180, HTSUS, which provides for parts and accessories of ... motor vehicles...: other...accessories...: other: other: other: other: other. The rate of duty will be 2.5% percent ad valorem.

Item 20601 is an iPod computer accessory kit. It consists of a car charger adapter, a dual earphone splitter, earphones and a USB cable. The car charger adapter device plugs into a car's cigarette lighter on one end and into an iPod on the other end to provide power to the iPod and to charge the battery within the iPod. The dual earphone splitter is an adaptor plug with

a single cylindrical multicontact plug connector on one end and two cylindrical multicontact socket connectors on the other, allowing the use of two sets of audio ear buds or headsets at the same time from the same iPod. The earphones feature a set of ear buds on one end and a metal connector on the other end, both connected at the center to a case with retractable cords. The USB cable has a USB connector on one end and an iPod dock connector on the other end. The accessories are packed inside a zippered nylon bi-fold cover. You indicate that the nylon cover may also be imported separately.

The Explanatory Notes to the Harmonized Tariff System provide guidance in the interpretation of the Harmonized Commodity Description and Coding System at the international level. Explanatory Note X to GRI 3(b) provides that the term “goods put up in sets for retail sale” means goods that: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. The assortment fulfills the requirements of (a) and (c) above but fails (b). The function of each component does not join that of the others in a way that meets a particular need or carries out a specific activity. The activities of the components are independent of each other. This is a collection of related items, but is not a set for tariff purposes. Therefore, each of the components within the iPod accessory kit will be classified separately under its respective heading.

The applicable subheading for the car charger adapter will be 8504.40.9580, HTSUS, which provides for electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof: static converters: other: other. The rate of duty will be 1.5 percent ad valorem.

The applicable subheading for the dual earphone splitter will be 8536.69.4020, HTSUS, which provides for electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1,000 V: lamp-holders, plugs and sockets: other: coaxial connectors; cylindrical multicontact connectors...: cylindrical multicontact connectors. The rate of duty will be free.

The applicable subheading for the earphone/headset will be 8518.30.2000, HTS, which provides for headphones and earphones, whether or not combined with a microphone...other. The rate of duty will be 4.9 percent ad valorem.

The applicable subheading for the USB cable will be 8544.42.2000, HTSUS, which provides for insulated wire, cable...: other electric conductors, for a voltage not exceeding 1,000V: fitted with connectors: other: of a kind used for telecommunications. The rate of duty will be free.

The applicable subheading for the nylon bi-fold cover, whether imported separately or as part of the kit, will be 6307.90.9889, HTSUS, which provides for other made up textile articles, other. The rate of duty will be 7 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at (646) 733-3023.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director*

*National Commodity Specialist Division*

N018628

November 8, 2007

CLA-2-87:OT:RR:NC:N1:101

CATEGORY: Classification

TARIFF NO.: 8708.99.8180

FRANCINE RAMSEY  
HAMPTON DIRECT, INC.  
P.O. Box 1199  
WILLISTON, VT 05495-1199

RE: The tariff classification of an organizer from China

DEAR Ms. RAMSEY,

In your letter dated October 15, 2007, you requested a tariff classification ruling.

The item concerned is the Backseat Organizer (Part # 62950). The Organizer is made of black polyester and PVC and contains eight, horizontal pockets running vertically along its length. It measures approximately 19 inches in length X 10 ¾ inches in width. The Organizer attaches to the back of a vehicle seat by looping a pair of adjustable straps - one between the headrest and the seat back and the other around the bottom of the seat back.



The applicable classification subheading for the Backseat Organizer (Part # 62950) will be 8708.99.8180, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "...accessories of ... motor vehicles ... : Other ... accessories: Other: Other: Other: Other: Other: Other". The rate of duty will be 2.5%.

Duty rates are provided for your convenience and are subject to change. The text of the most recent Harmonized Tariff Schedule of the United States and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Richard Laman at 646-733-3017.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*



NY M80150

February 24, 2006

CLA-2-87:RR:NC:N1:101 M80150

CATEGORY: Classification

TARIFF NO.: 8708.99.8080, 4202.92.9026

MR. WILLIAM A. HELMS

VICE PRESIDENT SCHMIDT, PRITCHARD & Co. CUSTOMHOUSE BROKERS

9801 WEST LAWRENCE AVENUE

SCHILLER PARK, IL 60176

RE: The tariff classification of automobile accessories and a zippered organizer from China.

DEAR MR. HELMS:

In your letter dated January 24, 2006 you requested a tariff classification ruling.

The first item (your stock number sku #25080) is multi pocketed item which hangs over an automobile seat and is designed to hold assorted electronics and media.

The second item (your stock number sku # 25100) is a portable SUV/MINI VAN Organizer. It is Heavy-duty with convenient handles and features a zippered closure.

The third item (your stock number sku # 25110) is a container that fits in a trunk and has convenient handles. It has no zippered closure and no cover.

All three items are made of polypropylene.

The applicable subheading for the item numbers sku # 25080 and sku # 25110 will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other. The rate of duty will be 2.5 percent.

The applicable subheading for the item number sku # 25100 will be 4202.92.9026, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in part, for other containers and cases, with outer surface of textile materials or sheeting of plastic, other. The rate of duty will be 17.6 percent.

Tariff number 4202.92.9026 falls within textile category designation 670. Quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information as to whether quota and visa requirements apply to this merchandise, we suggest that you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" available at our web site at [www.cbp.gov](http://www.cbp.gov). In addition, you will find current information on textile import quotas, textile safeguard actions and related issues at the web site of the Office of Textiles and Apparel, at [otexa.ita.doc.gov](http://otexa.ita.doc.gov).

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 646-733-3008.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY J83474

April 25, 2003

CLA-2-MM:RR:NC:MM:101 J83474

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

MR. STEPHEN C. LIU  
PACIFIC CENTURY CUSTOMS SERVICE  
11099 S. LA CIENEGA BOULEVARD #202  
LOS ANGELES, CALIFORNIA 90045

RE: The tariff classification of a *Car Back Seat Organizer* from China

DEAR MR. LIU:

In your letter dated April 16, 2003 you requested a tariff classification ruling.

You submitted a sample of a *Car Back Seat Organizer* - Style BSON-1815-WB. You state that this item is made of 1680/PU material and used in conjunction with the back of the front seats of a motor vehicle. It consists of seven pockets for maps, pens, glasses, water bottles, etc. You state that it will fit most car front seats and quick-release buckle button strings firmly secure it to the front seat by tying underneath the seat. The organizer is approximately 25 inches long and 15 inches wide.

The applicable subheading for the *Car Back Seat Organizer* will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other Parts and accessories: Other: Other: Other: Other...Other. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 646-733-3008.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY H87607

February 8, 2002

CLA-2-87:RR:NC:MM:101 H87607

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

Ms. BARBARA Y. WIERBICKI  
TOMPKINS & DAVIDSON, LLP  
ONE ASTOR PLAZA  
1515 BROADWAY  
NEW YORK, NY 10036-8901

RE: The tariff classification of a *Backseat Tray Organizer* from China

DEAR Ms. WIERBICKI:

In your letter dated February 6, 2002 you requested a tariff classification ruling on behalf of your client, Avon Products, Inc.

You submitted a sample of a Backseat Tray Organizer, PP236843. You state that the item is a rear seat, drop down tray automobile organizer which measures approximately 15" wide by 11" long by 3" deep. The organizer utilizes four straps of nylon webbing material, each of which incorporates "hook and loop" fasteners to form two horizontal belts for attachment to the rear seat. The front and back of the item is constructed of panels that are completely covered by nylon textile fabric. The organizer also features a double zipper closure along three sides and a center "hook and loop" tab closure. In the open position, the front panel drops down to form a tray, which is held in place by an adjustable cord with toggle. The interior features four pockets incorporated as part of the rear wall panel.

You state that you believe that the Backseat Tray Organizer is correctly classified as HTS 8708.59.5060. That Harmonized Tariff Number does not exist in the 2002 Harmonized Tariff Schedule of the United States.

The applicable subheading for the *Backseat Stray Organizer* will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 646-733-3008.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY G86716

February 6, 2001  
CLA-2-87:RR:NC:MM:101 G86716  
CATEGORY: Classification  
TARIFF NO.: 8708.99.8080

Ms. CECELIA GALLAGHER  
TIGER CREATIONS INCORPORATED  
23623 N. SCOTTSDALE ROAD  
PMB: 129  
SCOTTSDALE, ARIZONA 85255

RE: The tariff classification of "*Pockets*" Car Seat Organizer with vinyl storage bag from Taiwan

DEAR Ms. GALLAGHER:

In your letter dated January 26, 2001 you requested a tariff classification ruling.

On November 8, 2000 you requested a tariff classification ruling on the "*Pockets*" Car Seat Organizer. You submitted a sample of the "*Pockets*" Car Seat Organizer. You state that this item will hang on the back of a pickup truck seat which the user will use for storing maps and various auto accessories for the vehicle in the various pockets. You state that this item is made of 100% non-woven polyester and some nylon for the pockets.

In your letter of January 26, 2001 you state the "*Pockets*" Car Seat Organizer will be put up for retail sale in a vinyl storage bag. You state that this storage bag will be made in China and will not be imported separately.

The vinyl storage bag is 4.5 mil thick and measures approximately 19"L x 13"W x 3"W. There is a zipper at one end and a plastic hanger at the other end by which the entire package will hang on a rack in the stores.

You state that you would like to know if this vinyl bag is to be classified separately from the "*Pockets*" Car Seat Organizer.

Because the vinyl bag is made up for retail display it is considered to be a container as described in GRI-5(b), therefore it is classified with the contents - not separately. The value of the case is prorated over the contents.

The applicable subheading for the "*Pockets*" Car Seat Organizer with vinyl storage bag will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-637-7035.

*Sincerely,*

ROBERT B. SWIERUPSKI  
Director,

National Commodity Specialist Division

NY H82730

June 26, 2001

CLA-2-87:RR:NC:MM:101 H82730

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

Ms. JANE JEWETT  
TALUS CORPORATION  
82 SCOTT DRIVE  
WESTBROOK, MAINE 04092

RE: The tariff classification of *Backseat Media Organizer* from China

DEAR Ms. JEWETT:

In your letter dated June 6, 2001 you requested a tariff classification ruling.

You submitted a sample of the High Road™ Backseat Media Organizer. You state that this organizer is designed to be hung around the headrest of an automotive seat and will hold tissues, CD's, cassette tapes, videotapes, etc. The item is made from 600-denier polyester with a PVC sheet laminated.

The applicable subheading for the *Backseat Media Organizer* will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-637-7035.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY G88263

March 19, 2001

CLA-2-87:RR:NC:MM:101 G88263

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

Ms. JOANNE BALICE  
IMPORT DEPARTMENT  
CBI DISTRIBUTING CORP.  
CLAIRE'S ACCESSORIES  
2400 W. CENTRAL ROAD  
HOFFMAN ESTATES, ILLINOIS 60195

RE: The tariff classification of an auto *Backseat Organizer* from China

DEAR Ms. BALICE:

In your letter dated March 12, 2001 you requested a tariff classification ruling.

You submitted a sample of an auto Backseat Organizer, Style Number 70985, made of nylon material. It is designed to fit over a car's headrest so it will face the rear seat. It has various compartments for storage.

The applicable subheading for the auto *Backseat Organizer* will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-637-7035.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

NY G84567

December 5, 2000

CLA-2-87:RR:NC:MM:101 G84567

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

Ms. KATHLEEN YOUNG

BUYER

CASE LOGIC, INC.

6303 DRY CREEK PARKWAY

LONGMONT, COLORADO 80503-7294

RE: The tariff classification of a motor vehicle “*Automotive Backseat Organizer ‘Mobile Office’*” from the Philippines, China or Indonesia

DEAR Ms. YOUNG:

In your letter dated November 17, 2000 you requested a tariff classification ruling.

You submitted a sample of item ABS-5 MO “Automotive Backseat Organizer ‘Mobile Office’”. You state that this item is intended to be used as a back seat organizer for holding a variety of items, including business cards, notepads, pens, planners/organizer, etc. The Organizer utilizes a “hood” to hang over the headrest of the passenger seat in the motor vehicle. You state that while the outer body material is being decided at the point of submission of this ruling request to our office you are considering either 600D Polyester or 420D Nylon as the production material.

The applicable subheading for the “*Automotive Backseat Organizer ‘Mobile Office’*” will be **8708.99.8080**, Harmonized Tariff Schedule of the United States (HTS), which provides for *Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other...Other*. The rate of duty will be 2.5% *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-637-7035.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,**National Commodity Specialist Division*



NY C89303

June 25, 1998

CLA-2-87:RR:NC:MM:101 C89303

ATEGORY: Classification

TARIFF NO.: 8708.29.5060

MS. SALLY STROM  
CASE LOGIC, INC.  
6303 DRY CREEK PARKWAY  
LONGMONT, CO 80503

RE: The tariff classification of automotive body accessories from the Philippines, China, and Indonesia.

DEAR MS. STROM:

In your letter dated May 20, 1998, you requested a tariff classification ruling.

You have listed four different items which will be principally used in the passenger compartment of a motor vehicle. You state that any one of the five items may be imported from the Philippines, China, or Indonesia.

The first item is a back seat organizer. This item is designed to hang on the back of an automobile seat and offers several types of pockets for organizing maps, a tissue box, sunglasses, magazines, toys, etc. It is attached to the seat with a webbing strap and bayonet clip hardware. It can be secured at the bottom with a cord strung through rivets.

The applicable subheading for the backseat organizer will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The second item is a deluxe back seat organizer with flip-down tray. This item is designed to hang on the back of an automobile seat and offers several types of pockets for organizing maps, a tissue box, toys, magazines, etc.. It also includes a "flip-down tray" feature, and a removable mesh pocket. It is attached to the seat with webbing straps and bayonet clip hardware, both at the top and bottom.

The applicable subheading for the deluxe back seat organizer with flip down tray will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The third item is a back seat pocket. This item attaches to the back of an automobile seat with an adjustable webbing strap. It has pleated pockets made of clear PVC and fabric flaps secured with hook and loop. The clear PVC allows the user to view the contents of the pocket, and is also ideal for storing items such as sunscreen or lotion.

The applicable subheading for the back seat pocket will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

The fourth item is a center seat organizer. This item can be attached to the side of an automobile seat, in-between the driver and passenger seats. The top elastic strap attaches to the headrest, and the lower strap stretches around the upper portion of the seat. There are two pockets, one open at the top and one zippered. There is a mesh pocket on the back to hold maps, tickets, etc.

The applicable subheading for the center seat organizer will be 8708.29.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for other automotive body parts and accessories. The rate of duty will be 2.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-466-5667.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director*

*National Commodity Specialist Division*

NY A87718

October 15, 1996

CLA-2-87:RR:NC:1:101 A87718

CATEGORY: Classification

TARIFF NO.: 8708.99.8080

MS. SANDRA L. HAUPT  
TOWER GROUP INTERNATIONAL, INC.  
128 DEARBORN STREET  
BUFFALO, NY 14207-3198

RE: The tariff classification of automotive accessories from China

DEAR MS. HAUPT:

In your letter dated September 5, 1996 you requested a tariff classification ruling on behalf of Autosshade L.L.C. of Moorpark, California.

The first item concerned (pictured below) is the Trunk Lid Organizer (Item #141306); it is a rectangular textile article of black nylon with PVC backing. Six cords, one attached to each corner and one each to the top-center and bottom-center, with hooks on the unattached ends, are used to attach the Organizer to the inside lid of a vehicle trunk. The Organizer, itself, measures 25" in length and 10" in height. There are two zippered pockets sewn to the outside of the Organizer: one measuring 13"L X 9"H and the other measuring 8"L X 9"H.

You state that the function of the Trunk Lid Organizer is to expand the storage space of a vehicle trunk; in particular, for highway emergency articles.

The second item (pictured below) is the Backseat Travel Tray (Item #142402). It is a rectangular, briefcase-sized, folding article composed of two sewn-in cardboard squares covered with black nylon. There is one, 9"H X 12"L, mesh pocket sewn onto the bottom outside of the "tray" portion of the article and four nylon strips with sewn-in Velcro closures sewn onto the top outside portion which are used to "belt" the Travel Tray to the back of a vehicle seat. A cord passes through two holes in both the "tray" and top portions of the article and passes through a hard, plastic cordlock which provides adjustable tension to allow the "tray" to remain stable at a desirable angle. There are four pockets sewn into the inside of the top portion of the article; three with Velcro closures and one intended as a cup holder. Sewn into the outside of the upper inner pocket is an open-ended rectangular piece of nylon which is intended as a sunglasses' holder. There is a zipper sewn around the outside edge of the items center, when folded; a nylon, strip handle sewn into the center of the exterior flap of the items top portion and, alongside, a nylon strip which can attach to a sewn-on Velcro square at the top of the outside of the "tray" portion of the item thereby keeping the item "closed". The item measures 11"H X 15"W X 3"Depth.

[Closed]

[Open]

You state that the purpose of this item is to allow passengers in the rear seats of vehicles to store things and have a surface to eat, write or play games on, etc.

The third item (shown below) is the Backpack Backseat Organizer (Item #14510). It is an oblong-shaped article of black nylon with an open-topped pocket and a mesh pocket sewn onto the front outside surface along with a

-length zipper around the top portion; on the top of the back outside surface is a sewn-in belt with a hard plastic buckle and clasp and on the bottom of the back outside surface are two sewn-in nylon loops and two short pieces of belt webbing with hard plastic D-rings attached. On the front inside of the item is a sewn-in, multi-looped piece of elastic. On the back inside, are two Velcro-closed pockets. A loose piece of nylon drawcord is included to fit through either the loops or D-rings on the bottom of the back outside surface of the item to tie it down to various lengths of vehicle seats. The item measures 3”L X 11”W X 17”H.

[Closed]

[Open]

You state that the function of this item is to hold or store items in an organized fashion within an automobile.

The last item (shown below) is the Glove Box Litter Bag (Item #14521). It is a 11”H X 8”W X 3”Depth, rectangular, black nylon bag with PVC backing. There is a top flap which has a sewn-on Velcro closure on the front. On the back are two webbed loops. Included are two, soft metal, bendable hooks covered with black rubber material; they “hook” through the webbed loops on the back of the Bag and the other end of the hooks are “hooked” to the Glove Compartment or Glove Box of a vehicle.

You state that the purpose of this item is to hold litter.

All of the items listed above are supplied by A.S. Sheng Chan International and will be imported into the U.S. through the Ports of Los Angeles and Long Beach, California.

The applicable subheading for the Trunk Lid Organizer, Backseat Travel Tray, Backpack Backseat Organizer and Glove Box Litter Bag will be 8708.99.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories for . . . motor vehicles . . . : Other parts and accessories: Other: Other: Other: Other: Other. The rate of duty will be 2.9% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212-466-5667.

*Sincerely,*

ROGER J. SILVESTRI

*Director*

*National Commodity Specialist Division*

NY 886254

May 20, 1993

CLA-2-87:S:N:N1:101-886254

CATEGORY: Classification

TARIFF NO.: 8708.99.5085

MR. R.I. HASSON  
ALBA FORWARDING CO., INC.  
147-39 175TH STREET  
JAMAICA, NY 11434

RE: The tariff classification of an automobile organizer from China

DEAR MR. HASSON:

In your letter dated May 14, 1993, on behalf of Mitzi International Handbags Co., you requested a tariff classification ruling. You have submitted a sample of the product.

The imported product is an automobile organizer that is made of 100 percent nylon. The article is designed to be secured to the back of an automobile seat by means of a loop that is closed by a VELCRO fastener. The organizer measures approximately 19 1/2 inches in length by 17 1/2 inches in width (at the bottom portion). The product is used to neatly store assorted small articles such as maps, gloves, glasses, pens, magazines, books, etc. in its four pockets. The three pockets in the front area have covering flaps that are closed by a VELCRO fastener. The large pocket in the rear area does not have a covering flap.

The automobile organizer is not designed to be carried by a person, but based on its construction and purpose it is fashioned to be solely or principally used in automobiles.

The applicable subheading for the automobile organizer will be 8708.99.5085, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts and accessories of the motor vehicles of headings 8701 to 8705. The rate of duty will be 3.1 percent ad valorem.

The sample will be returned to your office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

*Sincerely,*

JEAN F. MAGUIRE  
Area Director  
New York Seaport

NY 869451

December 17, 1991

CLA-2-87:S:N:N1:101-869451

CATEGORY: Classification

TARIFF NO.: 8708.99.5085

Ms. JULIE M. MILLER  
ARKEY INTERNATIONAL, INC.  
7017 15TH AVENUE NORTHWEST  
SEATTLE, WA 98117

RE: The tariff classification of a backseat organizer from South Korea  
and/or Mexico

DEAR Ms. MILLER:

In your letter dated November 25, 1991 you requested a tariff classification ruling. You have submitted a sample of the product.

The imported product is a backseat organizer made from 100 percent nylon fabric. It measures approximately 24 inches long (not including the straps) by 18 inches wide (at the widest points). The organizer is designed to fit over the back of the front seat of an automobile. It is used to accommodate assorted small articles such as maps, gloves, sunglasses, pens, etc. in its various pockets. The organizer fastens to the top of the front seat by means of adjustable straps that are placed over the headrest. The bottom of the organizer is fastened to the front seat by means of cords (which are affixed to the organizer).

The backseat organizer is not designed to be carried by a person, but based on its construction and purpose it is fashioned to be solely or principally used in automobiles.

The applicable subheading for the backseat organizer will be 8708.99.5085, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts and accessories of motor vehicles. The rate of duty will be 3.1 percent ad valorem.

As you requested, the sample will be returned to your office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

*Sincerely,*

JEAN F. MAGUIRE  
Area Director  
New York Seaport

HQ H312216  
OT:RR:CTF:CPMM H312216 MMM  
CATEGORY: Classification  
TARIFF NO.: 6307.90.9889

MR. JIM GHEDI  
GHEDI INTERNATIONAL, INC.  
8002 BURLESON ROAD  
AUSTIN, TX 78744

RE: Revocation of NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254 and NY 869451 and Modification of NY N087915, NY M80150, NY C89303 and NY A87718; tariff classification of textile backseat automobile organizers

DEAR MR. GHEDI:

This is in regard to New York Ruling Letter (NY) N087915, dated January 13, 2010, regarding the classification of an over-the-seat car organizer under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N087915, CBP classified the backseat automobile organizer in heading 8708, HTSUS, as a motor vehicle accessory. We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY N018628, dated November 8, 2007, NY M80150, dated February 24, 2006, NY J83474, dated April 25, 2003, NY H87607, dated February 8, 2002, NY G86716, dated February 6, 2001, NY H82730, dated June 26, 2001, NY G88263, dated March 19, 2001, NY G84567, dated December 5, 2000, NY C89303, dated June 25, 1998, NY A87718, dated October 15, 1996, NY 886254, dated May 20, 1993, and NY 869451, dated December 17, 1991 and determined they are also incorrect, and for the reasons set forth below, are revoking NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254 and NY 869451 and modifying NY M80150, NY C89303 and NY A87718.

**FACTS:**

In your ruling NY N087915, CBP stated as follows in reference to the subject merchandise:

Item 20446 is an over-the-seat car organizer made of nylon fabric with plastic pockets and mesh pockets. It is designed with a snap clip and drawstring that enable the organizer to be attached to the car seat.

CBP classified the merchandise in heading 8708, HTSUS, as an accessory of a motor vehicle. The subject merchandise in NY N018628,<sup>1</sup> NY M80150,<sup>2</sup> NY J83474,<sup>3</sup> NY H87607,<sup>4</sup> NY G86716,<sup>5</sup> NY H82730,<sup>6</sup> NY G88263,<sup>7</sup>

<sup>1</sup> Backseat Organizer (Part # 62950).

<sup>2</sup> Backseat Organizer with multi pockets, designed to hold electronics and media (sku #25080).

<sup>3</sup> Car Back Seat Organizer (Style BSON-1815-WB).

<sup>4</sup> Backseat Tray Organizer (PP236843).

<sup>5</sup> Pockets Car Seat Organizer.

<sup>6</sup> Backseat Media Organizer.

<sup>7</sup> Auto Backseat Organizer.

NY G84567,<sup>8</sup> NY C89303,<sup>9</sup> NY A87718,<sup>10</sup> NY 886254,<sup>11</sup> and NY 869451<sup>12</sup> are also backseat automobile organizers and all classified in heading 8708.

### ISSUE:

Whether the subject backseat automobile organizers are classifiable in heading 4202, HTSUS, which provides for “similar containers,” under heading 6307, HTSUS, which provides for “Other made up articles, including dress patterns,” or under heading 8708, HTSUS, which provides for “Parts and accessories of the motor vehicles of headings 8701 to 8705.”

### LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2020 HTSUS provisions under consideration are as follows:

- |             |   |
|-------------|---|
| <b>4202</b> | Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers |
| <b>6307</b> | Other made up articles, including dress patterns:   |
| <b>8708</b> | Parts and accessories of the motor vehicles of headings 8701 to 8705:   |

Note 3 to Section XVII states as follows:

References in chapters 86 to 88 to “parts” or “accessories” do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters. A part or accessory which answers to

<sup>8</sup> Automotive Backseat Organizer Mobile Office (ABS-5 MO).

<sup>9</sup> Backseat Organizer and the Deluxe Backseat Organizer with Flip-down Tray.

<sup>10</sup> Backseat Travel Tray (Item #142402).

<sup>11</sup> Backseat automobile organizer

<sup>12</sup> Backseat Organizer.



a description in two or more of the headings of those chapters is to be classified under that heading which corresponds to the principal use of that part or accessory.

EN to Section XVII states, in pertinent part:

### (III) PARTS AND ACCESSORIES

It should, however, be noted that these headings apply **only** to those parts or accessories which comply with **all three** of the following conditions:

(a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).

and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).

and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

EN to 8708 states, in pertinent part:

This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfil **both** the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;

and (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

\* \* \*

In *Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), the court identified two distinct lines of cases defining the word “part.” Consistent with *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (citations omitted), one line of cases holds that a part of an article “is something necessary to the completion of that article. . . . [W]ithout which the article to which it is to be joined, could not function as such article.” The other line of cases evolved from *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. The definition of “parts” was also discussed in *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002), wherein the United States Court of Appeals for the Federal Circuit (“CAFC”) defined parts as “an essential element or constituent; integral portion which can be separated, replaced, etc.”<sup>13</sup> This line of reasoning has been applied in previous CBP rulings.<sup>14</sup>

Insofar as the term “accessory” is concerned, the Court of International Trade (“CIT”) has previously referred to the common meaning of the term

<sup>13</sup> *Id.* at 1353 (citing Webster’s New World Dictionary 984 (3d College Ed. 1988).

<sup>14</sup> See e.g., HQ H255093, dated January 14, 2015; HQ H238494, dated June 26, 2014; and HQ H027028, dated August 19, 2008

because the term is not defined by the HTSUS or its legislative history.<sup>15</sup> We also employ the common and commercial meanings of the term “accessory”, as the CIT did in *Rollerblade, Inc.*, wherein the court derived from various dictionaries “that an accessory must relate directly to the thing accessorized.”<sup>16</sup> In *Rollerblade, Inc.*, the CAFC noted that “an ‘accessory’ must bear a direct relationship to the primary article that it accessorizes.”<sup>17</sup>

The subject merchandise in this case is not a “part” under any of the tests provided in the judicial decisions described above. It is not a “part” under the *Willoughby* test because a car can function without a backseat automobile organizer. It is also not a “part” under the Pompeo test because firstly it is snap clipped onto the back of a seat, which would not constitute being “installed,” and even if it were considered “installed,” the car can still operate without the organizer once attached to the seat.<sup>18</sup> Lastly the subject merchandise is not a “part” because it is not an essential, constituent, or integral part to the vehicle.<sup>19</sup>

The subject merchandise is also not an “accessory” of motor vehicles. Like the protective gear in *Rollerblade, Inc.* and the truck tents classified in HQ H242603, dated April 3, 2015, the backseat automobile organizers at issue do not directly affect the car’s operation nor do they contribute to the car’s effectiveness.<sup>20</sup> Instead, the automobile organizers merely allow the driver and its passengers to store items needed for their enjoyment or convenience but not for the operation of the automobile. The subject merchandise is not classified in heading 8708, HTSUS.

In classifying goods under the residual provision of “similar containers” of heading 4202, HTSUS, the Court of International Trade (CIT) has stated as follows: “As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.”<sup>21</sup> The court found that the rule of *ejusdem generis* requires only that the imported merchandise share the essential character or purpose running through all the containers listed *eo nomine* in heading 4202, HTSUSA., i.e., “...to organize, store, protect and carry various items.”<sup>22</sup>

In *Totes*, the CIT held that a trunk organizer, used to store automotive tools and supplies, was correctly classified in heading 4202. The trunk organizer in

<sup>15</sup> See *Rollerblade, Inc. v. United States*, 24 Ct. Int’l Trade 812, 815–819 (2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002).

<sup>16</sup> See *Rollerblade, Inc.*, 24 Ct. Int’l Trade at 817.

<sup>17</sup> 282 F.3d at 1352 (holding that inline roller skating protective gear is not an accessory because it “does not directly act on” or “contact” the roller skates).

<sup>18</sup> See also *Rollerblade, Inc.*, 282 F.3d at 1353 (the CAFC found that the protective gear was not a part to the roller skates because they did not “attach to or contact” the roller skates, they were “not necessary to make the skates ... work”, nor were “they necessary to make the skates ... work efficiently or safely.”)

<sup>19</sup> See *Id.*

<sup>20</sup> See *Rollerblade, Inc.*, 282 F.3d at 1353; HQ 960950 (Jan. 16, 1998) (stating that “[a]ccessories are of secondary importance,” but must “somehow contribute to the effectiveness of the principal article”).

<sup>21</sup> *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867, 871 (1994), *aff’d*. 69 F. 3d 495 (Fed. Cir. 1995).

<sup>22</sup> *Totes*, 865 F. Supp. at 872.

*Totes* had handles for carrying and Velcro strips that gripped carpeted surfaces and held it in place inside a trunk. The trunk organizer was comprised of a storage section which could be divided into three storage areas using dividers. The subject merchandise in this case is different than the merchandise in *Totes*. The backseat automobile organizer's physical characteristics are particularly dissimilar. They are not comprised of a main storage section, but are a flat-backed organizer to be fastened unto the back of a seat. They include additions such as pockets or pull-down tables but do not include handles.<sup>23</sup> Although the backseat organizers organize and store items, they would not be used to carry items. Additionally, they do not have the same physical characteristics as the containers in heading 4202. The subject merchandise is not classified in heading 4202, HTSUS.

As the subject merchandise in the above rulings are comprised of textile and plastic components and not classifiable at GRI 1, they are composite goods classified at GRI 3(b). According to GRI 3(b), composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Although the GRIs do not provide a definition of "essential character," EN (VIII) of GRI 3(b) provides guidance. According to this EN, the essential character may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

It is well-established that a determination as to "essential character" is driven by the particular facts of the case at hand. Essential character has traditionally been understood as "that which is indispensable to the structure, core or condition of the article, i.e., what it is" and as "the most outstanding and distinctive characteristic of the article." In this instance, the textile components provide the essential character to the backseat organizers. The textile components are the most distinctive characteristic of the organizers, as they make up the bulk of the product while the plastic components are mere additions for the structure of the pockets and the clasps, etc. The subject merchandise is properly classified in heading 6307, HTSUS, as made-up textile articles, specifically under subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

### **HOLDING:**

Under the authority of GRIs 1 and 3(b) the subject textile backseat automobile organizers are classified under heading 6307, HTSUS, specifically under subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other." The 2020 column one, general rate of duty is 7 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at [www.usitc.gov/tata/hts/](http://www.usitc.gov/tata/hts/).

<sup>23</sup> See HQ H295656, dated May 3, 2019 ("While a handle, strap or closure is not dispositive of the issue, in this case, without straps or a handle of some sort, carrying the seat sack while it is filled with heavy books and school supplies would be quite uncomfortable and cumbersome").

**EFFECT ON OTHER RULINGS:**

NY N087915, dated January 13, 2010, NY M80150, dated February 24, 2006, NY C89303, dated June 25, 1998, and NY A87718, dated October 15, 1996, are hereby MODIFIED in accordance with the above analysis.

NY N018628, dated November 8, 2007, NY J83474, dated April 25, 2003, NY H87607, dated February 8, 2002, NY G86716, dated February 6, 2001, NY H82730, dated June 26, 2001, NY G88263, dated March 19, 2001, NY G84567, dated December 5, 2000, NY 886254, dated May 20, 1993, and NY 869451, dated December 17, 1991, are hereby REVOKED in accordance with the above analysis.

*Sincerely,*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*



**COPYRIGHT, TRADEMARK, AND TRADE NAME  
RECORDATIONS  
(NO. 10 2020)**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**SUMMARY:** The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in October 2020. A total of 199 recordation applications were approved, consisting of 8 copyrights and 191 trademarks. The last notice was published in the Customs Bulletin Vol. 54, No. 41, October 21, 2020.

Corrections or updates may be sent to: Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at *iprrquestions@cbp.dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** LaVerne Watkins, Paralegal Specialist, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade at (202) 325–0095.

ALAINA VAN HORN  
*Chief,*  
*Intellectual Property Rights Branch*  
*Regulations and Rulings, Office of Trade*

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 00-00425	10/26/2020	09/20/2030	CALLAWAY	CALLAWAY GOLF COMPANY	No
TMK 00-00614	10/21/2020	07/22/2030	POR LARRANAGA (Stylized)	CUBAN CIGAR BRANDS B.V.	No
TMK 01-00292	10/26/2020	10/24/2030	HONDA & WING DESIGN	HONDA GIKEN KOGYO KABUSHIKI KAISHA	No
TMK 01-00293	10/26/2020	10/24/2030	WING DESIGN	HONDA GIKEN KOGYO KABUSHIKI KAISHA	No
TMK 02-00057	10/08/2020	11/14/2030	NBA & COLOR LOGO DESIGN	NBA PROPERTIES, INC.	No
TMK 02-01002	10/08/2020	10/24/2030	ROYALS	KANSAS CITY ROYALS BASEBALL CLUB, LLC	No
TMK 03-00688	10/08/2020	09/27/2030	CROSS & SHIELD DESIGN	SWISS ARMY BRAND LTD.	No
TMK 04-01132	10/27/2020	08/08/2030	NY JETS and Design	New York Jets LLC	No
TMK 05-00620	10/21/2020	11/15/2030	MINI COOPER	BAYERISCHE MOTOREN WERKE AG-TIENGESELLSCHAFT	No
TMK 07-00760	10/16/2020	01/01/2027	TIDE	THE PROCTER & GAMBLE COMPANY	No
TMK 08-00382	10/08/2020	09/26/2027	PROFOTO	PROFOTO AB	No
TMK 09-00466	10/05/2020	01/03/2026	Configuration of a Fox Head	FOX HEAD, INC.	No
TMK 10-00744	10/08/2020	10/13/2030	SUPERWAND	Garrett Electronics, Inc.	No
TMK 10-00924	10/27/2020	12/07/2030	OAKLAND RAIDERS	RAIDERS FOOTBALL CLUB, LLC	No
TMK 10-01075	10/15/2020	11/22/2030	MIU MIU	PRADA S.A.	No
TMK 10-01087	10/16/2020	11/18/2029	GAIN	THE PROCTER & GAMBLE COMPANY	No
TMK 10-01139	10/30/2020	08/04/2030	GOYARD	GOYARD ST-HONORE	No
TMK 10-01140	10/30/2020	08/18/2030	E. GOYARD and Design	GOYARD ST-HONORE	No
TMK 10-01141	10/30/2020	12/08/2030	GOYARD (Stylized)	GOYARD ST-HONORE	No
TMK 10-01346	10/08/2020	01/12/2031	PUCK	Arla Foods amba	No

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 11-00104	10/20/2020	03/21/2031	GOOD EVIL and DESIGN	MORRO LICENSING, LLC	No
TMK 11-00174	10/30/2020	12/19/2030	MARIO PARTY	Nintendo of America Inc.	No
TMK 11-00360	10/06/2020	12/21/2020	LINSTEAD MARKET JAMAICA & Design	(REGISTRANT) Canco Ltd. CORPORATION JAMAICA Seaforth P.O. St. Thomas JAMAICA	
TMK 11-00631	10/06/2020	10/06/2030	PING	Karsten Manufacturing Corporation	No
TMK 12-00436	10/13/2020	08/05/2030	TYLENOL	JOHNSON & JOHNSON	No
TMK 12-00763	10/26/2020	04/18/2031	WARBY PARKER	JAND Inc.	No
TMK 12-00956	10/22/2020	09/27/2030	HUGO	HUGO BOSS TRADE MARKS MANAGEMENT GMBH & CO. KG	No
TMK 12-01192	10/05/2020	07/06/2030	SUN JAVA	Albani Corporation	No
TMK 15-00030	10/15/2020	01/05/2031	TEAM BEACHBODY	BEACHBODY, LLC	No
TMK 15-00652	10/26/2020	05/15/2030	PRO-THICKS	GILDAN BRANDED APPAREL SRL	No
TMK 19-00236	10/08/2020	02/02/2031	RED SOX (Stylized)	Boston Red Sox Baseball Club Limited Partnership	No
TMK 19-00742	10/13/2020	10/15/2030	H and Design	HAYWARD INDUSTRIES, INC.	No
TMK 19-01126	10/08/2020	07/07/2030	MACE (STYLIZED)	MACE SECURITY INTERNATIONAL, INC.	No
TMK 20-00867	10/01/2020	12/21/2030	CORWIN	Sage Publications, Inc.	No
TMK 20-00868	10/01/2020	11/04/2025	7J1	Trinity Apparel LLC	No
TMK 20-00869	10/01/2020	06/27/2028	SIMPSON STRONG-TIE	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00870	10/01/2020	07/21/2029	SIMPSON STRONG-TIE and Design	Simpson Strong-Tie Company, Inc.	No
TMK 20-00871	10/01/2020	05/06/2027	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No
TMK 20-00872	10/02/2020	04/30/2027	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00873	10/02/2020	07/21/2029	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No
TMK 20-00874	10/02/2020	08/03/2024	SIMPSON STRONG-TIE	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00875	10/02/2020	12/06/2028	SIMPSON STRONG-TIE & DESIGN	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00876	10/02/2020	04/04/2026	STRONG-TIE	SIMPSON STRONG-TIE CO. INC.	No
TMK 20-00877	10/02/2020	10/23/2029	Configuration of a Door Closer	Kason Industries, Inc.	No
TMK 20-00878	10/02/2020	06/04/2023	Configuration of a Metal Door Handle	KASON INDUSTRIES, INC.	No
TMK 20-00879	10/05/2020	03/03/2030	EVOKE	PLANT THERAPY, LLC	No
TMK 20-00880	10/05/2020	05/20/2028	SENSOR BRITE	Trendstar Corporation	No
TMK 20-00881	10/05/2020	11/25/2025	PROFOTO	Profoto AB	No
TMK 20-00882	10/05/2020	09/26/2022	BOWLUS	Open Think Inc.	No
TMK 20-00883	10/05/2020	10/18/2027	ROAD CHIEF	Open Think Inc.	No
TMK 20-00884	10/05/2020	10/14/2030	Flower design	Chanel, Inc.	No
TMK 20-00885	10/05/2020	11/30/2023	PRINCIPAL SECRET	Victoria Principal Productions, Inc.	No
TMK 20-00886	10/05/2020	09/26/2022	BOWLUS ROAD CHIEF	Open Think Inc.	No
TMK 20-00887	10/05/2020	12/01/2030	Tungsten Heavy Powder & Parts - Logo and Design	Tungsten Heavy Powder, Inc. DBA Tungsten Heavy Powder & Parts	No
TMK 20-00888	10/08/2020	01/31/2028	TART OPTICAL ENTERPRISES	Tart Optical Enterprises LLC	No
TMK 20-00889	10/08/2020	08/31/2026	DEPUY SYNTHES	DePuy Synthes, Inc.	No
TMK 20-00890	10/08/2020	12/24/2023	SPECTRA SELIM FIBER CO., LTD. & DESIGN	SELIMFIBER Co., Ltd.	No
TMK 20-00891	10/08/2020	12/29/2030	WOMB	KNOLL, INC.	No
TMK 20-00892	10/08/2020	06/12/2029	Womb Chair	Knoll, Inc.	No

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 20-00893	10/08/2020	10/30/2029	Brennivin Sidan 1935 & DESIGN	Brennivin America, LLC	No
TMK 20-00894	10/08/2020	09/23/2030	ACTIVITY KINGS	WeCool Toys, Inc.	No
TMK 20-00895	10/08/2020	08/05/2030	AVALANCHE	WeCool Toys Inc.	No
TMK 20-00896	10/08/2020	12/15/2030	ALL SEAS CAPITAL	All Seas Capital Partners LTD	No
TMK 20-00897	10/13/2020	12/22/2030	TIDYWRAP	Under the Nail, LLC	No
TMK 20-00898	10/13/2020	11/18/2030	AGOLDE	CITIZENS OF HUMANITY, LLC	No
TMK 20-00899	10/13/2020	12/10/2029	BEARABY	Somnos LLC	No
TMK 20-00900	10/13/2020	02/11/2029	VAL VITA	COTA TRENTI, JUAN FEDERICO FRANCISCO	No
TMK 20-00901	10/13/2020	12/22/2030	PHOTOSCIENCE	Photoscience Japan Corp.	No
TMK 20-00902	10/14/2020	12/11/2028	VEKEN	Shenzhen BuXiang Network Technology Co., Ltd.	No
TMK 20-00903	10/15/2020	12/29/2025	NIOSH (stylized)	U.S. Department of Health and Human Services	No
TMK 20-00904	10/15/2020	03/31/2024	BAMBOO	Albani Corporation	No
TMK 20-00905	10/16/2020	01/06/2031	BLUE TOUCH	Albani Corporation	No
TMK 20-00906	10/19/2020	02/27/2029	PERRIN	ASMC, LTD	No
TMK 20-00907	10/19/2020	07/03/2028	HORTILED	P.L. LIGHT SYSTEMS CANADA INC.	No
TMK 20-00908	10/19/2020	08/26/2030	6 WEEKS OF THE WORK	Beachbody, LLC	No
TMK 20-00909	10/19/2020	09/30/2030	THE MINDSET MEMBERSHIP	Beachbody, LLC	No
TMK 20-00910	10/19/2020	11/18/2030	BODGROUPS	Beachbody, LLC	No
TMK 20-00911	10/19/2020	10/07/2030	YOU CAN DROP IT	Beachbody, LLC	No
TMK 20-00912	10/19/2020	10/19/2026	BIOMAT	Richway & Fujii Bio Inc.	No
TMK 20-00913	10/19/2020	12/29/2030	S SAKUMA and Design	Sakuma International America, Inc.	No



**CBP IPR RECORDATION — OCTOBER 2020**

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TMK 20-00914	10/19/2020	08/26/2030	COOL LIP	MS Tejram Dharam Paul	No
TMK 20-00915	10/20/2020	02/02/2021	PISTOL PETE	MORRO LICENSING, LLC	No
TMK 20-00916	10/20/2020	08/26/2025	LYVE	SEAGATE TECHNOLOGY LLC	No
TMK 20-00917	10/20/2020	03/16/2025	LACIE	SEAGATE TECHNOLOGY LLC	No
TMK 20-00918	10/20/2020	07/25/2027	MAXTOR	Seagate Technology LLC	No
TMK 20-00919	10/20/2020	06/04/2024	NYTRO	SEAGATE TECHNOLOGY LLC	No
TMK 20-00920	10/20/2020	06/19/2026	BARRACUDA	SEAGATE TECHNOLOGY LLC	No
TMK 20-00921	10/20/2020	12/19/2027	IRONWOLF	Seagate Technology LLC	No
TMK 20-00922	10/21/2020	12/29/2030	S SAKUMA & DESIGN	Sakuma International America, Inc.	No
TMK 20-00923	10/21/2020	01/06/2031	DECAL BREAKZ	LaLone, Julie	No
TMK 20-00924	10/21/2020	10/28/2030	NP & Design	Navepoint, LLC	No
TMK 20-00925	10/21/2020	10/28/2030	NavePoint & Design	Navepoint, LLC	No
TMK 20-00926	10/21/2020	09/30/2030	9 WEEK CONTROL BREAK	Beachbody, LLC	No
TMK 20-00927	10/21/2020	09/30/2030	THE MONTHLY FIX	Beachbody, LLC	No
TMK 20-00928	10/21/2020	03/22/2026	Configuration of a swirl design	Seagate Technology LLC	No
TMK 20-00929	10/21/2020	05/11/2030	THERMODYNE	THERMODYNE INTERNATIONAL, LTD.	No
TMK 20-00930	10/21/2020	10/21/2030	BEACHBODY ICED TEA	Beachbody, LLC	No
TMK 20-00931	10/21/2020	11/25/2030	BOD LIFE	Beachbody, LLC	No
TMK 20-00932	10/21/2020	08/05/2030	BAJA KANPACHI	Omega Azul, S. de R.L. de C.V.	No
TMK 20-00933	10/21/2020	06/26/2023	COVER MALE	MORRO LICENSING, LLC	No
TMK 20-00934	10/21/2020	03/16/2025	LACIE & Oval Design	SEAGATE TECHNOLOGY LLC	No
TMK 20-00935	10/21/2020	02/22/2022	SEAGATE	Seagate Technology LLC	No
TMK 20-00936	10/22/2020	05/25/2024	GRABBA LEAF	Michael Andrew Robinson	No

**CBP IPR RECORDATION — OCTOBER 2020**

<b>Recordation No.</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Name of Cop/Tmk/Tnm</b>	<b>Owner Name</b>	<b>GM Restricted</b>
TMK 20-00937	10/22/2020	04/07/2024	GRABBA LEAF and Design	Michael Andrew Robinson	No
TMK 20-00938	10/22/2020	12/01/2030	PARK HILL	Park Hill Collections, LLC	No
TMK 20-00939	10/26/2020	05/26/2029	EXOS	Seagate Technology LLC	No
TMK 20-00940	10/26/2020	12/26/2027	FIRECUDA	Seagate Technology LLC	No
TMK 20-00941	10/26/2020	02/03/2026	RUGGED	SEAGATE TECHNOLOGY LLC	No
TMK 20-00942	10/26/2020	01/18/2027	Backup + Symbol Design	Seagate Technology LLC	No
TMK 20-00943	10/26/2020	07/14/2022	JERZEES	RUSSELL BRANDS, LLC	No
TMK 20-00944	10/26/2020	10/10/2024	5TH AVENUE	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00945	10/26/2020	01/07/2026	KIT KAT	SOCIETE DES PRODUITS NESTLE S.A.	No
TMK 20-00946	10/26/2020	11/23/2030	KRACKEL	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00947	10/26/2020	02/13/2022	MINI KISSES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00948	10/26/2020	03/12/2023	MOUNDS	KRAFT FOODS IRELAND INTELLEC-TUAL PROPERTY	No
TMK 20-00949	10/26/2020	05/10/2028	MR. GOODBAR	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00950	10/26/2020	06/07/2030	ALMOND JOY (STYLIZED)	KRAFT FOODS IRELAND	No
TMK 20-00951	10/26/2020	09/23/2030	WATER FIRST, VEGGIES MOST	BEACHBODY, LLC	No
TMK 20-00952	10/26/2020	07/29/2030	GOLDEN ALMOND	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00953	10/26/2020	01/16/2029	REESE'S OUTRAGEOUS!	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

**CBP IPR RECORDATION — OCTOBER 2020**

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TMK 20-00954	10/26/2020	03/13/2027	REESE'S PIECES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00955	10/26/2020	12/18/2021	REESE'S PUFFS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00956	10/26/2020	09/12/2028	GOOD AND PLENTY (Stylized)	ICONIC IP INTERESTS, LLC	No
TMK 20-00957	10/26/2020	10/14/2028	REESE'S STICKS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00958	10/26/2020	06/27/2028	HAVE A BREAK, HAVE A KIT KAT	Societe des Produits Nestle S.A.	No
TMK 20-00959	10/26/2020	03/13/2027	REESE'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00960	10/26/2020	11/05/2026	HEATH	ICONIC IP INTERESTS, LLC	No
TMK 20-00961	10/26/2020	04/03/2022	ICE BREAKERS DUO	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00962	10/26/2020	02/23/2021	ICE BREAKERS FROST	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00963	10/26/2020	08/21/2029	PAQUI	(REGISTRANT) Paqui LLC LIMITED LIABILITY COMPANY TEXAS 500 West 5th Street, Suite 900 Austin TEXAS 78730	No
TMK 20-00964	10/26/2020	10/11/2027	ICE BREAKERS Logo Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00965	10/26/2020	12/30/2024	ICE BREAKERS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00966	10/26/2020	02/28/2028	ICE CUBES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00967	10/26/2020	04/08/2023	GHOSTBOND	Biomedical Research and Development, Inc.	No

**CBP IPR RECORDATION — OCTOBER 2020**

<b>Recordation No.</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Name of Cop/Tmk/Tm</b>	<b>Owner Name</b>	<b>GM Restricted</b>
TMK 20-00968	10/26/2020	01/20/2031	G CONSULTING LLC	G Consulting LLC	No
TMK 20-00969	10/27/2020	03/13/2027	REESE'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00970	10/27/2020	12/09/2028	REESTER BUNNIES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00971	10/27/2020	11/29/2026	REESTER BUNNY	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00972	10/27/2020	01/12/2024	ROBIN EGGS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00973	10/27/2020	04/08/2028	ROLO	Societe des Produits Nestle S.A.	No
TMK 20-00974	10/27/2020	08/31/2021	SKINNYPOP	SKINNYPOP POPCORN LLC	No
TMK 20-00975	10/27/2020	10/06/2022	SKOR	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00976	10/27/2020	02/17/2023	SPECIAL DARK	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00977	10/27/2020	01/13/2022	SYMPHONY	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00978	10/27/2020	04/26/2026	TAKE 5	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00979	10/27/2020	07/02/2029	TWIZZLERS (Stylized)	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00980	10/27/2020	09/09/2029	TWIZZLERS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00981	10/27/2020	10/16/2026	Configuration of conically-shaped candy piece.	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

**CBP IPR RECORDATION — OCTOBER 2020**

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TMK 20-00982	10/27/2020	11/17/2029	WHATCHAMACALLIT	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00983	10/27/2020	11/07/2023	WHOPPERS	ICONIC IP INTERESTS, LLC	No
TMK 20-00984	10/27/2020	02/09/2021	WINTERCOOL	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00985	10/27/2020	11/14/2027	YORK	KRAFT FOODS IRELAND INTELLEC-TUAL PROPERTY LIMITED	No
TMK 20-00986	10/27/2020	12/08/2027	ZAGNUT	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00987	10/27/2020	06/03/2022	ZERO	ICONIC IP INTERESTS, LLC	No
TMK 20-00988	10/27/2020	06/25/2026	HERSHEY'S HUGS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00989	10/27/2020	11/18/2029	HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S and Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00990	10/27/2020	10/09/2022	HERSHEY'S NUGGETS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00991	10/27/2020	07/23/2023	Configuration of a HERSHEY'S bar	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00992	10/27/2020	03/26/2028	HERSHEY'S GOLD	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00993	10/27/2020	09/13/2027	HERSHEY'S (Stylized) Logo	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00994	10/27/2020	04/26/2030	HERSHEY'S and Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 20-00995	10/27/2020	10/04/2027	HERSHEY'S SYRUP	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00996	10/27/2020	09/13/2027	HERSHEY'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00997	10/27/2020	09/27/2027	HERSHEY'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00998	10/27/2020	01/07/2025	PAED LIJAM and Design	Saiyarah, Yongthong	No
TMK 20-00999	10/30/2020	01/04/2025	NUTRAGEOUS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01000	10/30/2020	07/24/2028	OATMEGA	Boundless Nutrition LLC DBA Boundless Nutrition	No
TMK 20-01001	10/30/2020	06/22/2026	ONE 1 (STYLIZED)	ONE BRANDS, LLC	No
TMK 20-01002	10/30/2020	05/18/2030	ONE 1 PLANT (STYLIZED)	ONE BRANDS, LLC	No
TMK 20-01003	10/30/2020	09/07/2026	BIG KAT	Societe des Produits Nestle S.A.	No
TMK 20-01004	10/30/2020	12/05/2029	PAYDAY	ICONIC IP INTERESTS, LLC	No
TMK 20-01005	10/30/2020	04/30/2027	PELON PELO RICO	Hershey Mexico, S.A. de C.V.	No
TMK 20-01006	10/30/2020	04/02/2028	BITS O' BRICKLE	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01007	10/30/2020	02/26/2027	PIRATE'S BOOTY	AMPLIFY SNACK BRANDS, INC.	No
TMK 20-01008	10/30/2020	08/12/2030	AFA-TUBE	Covaris, Inc.	No
TMK 20-01009	10/30/2020	01/28/2030	POT OF GOLD	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01010	10/30/2020	06/06/2023	BREATH SAVERS	WM. WRIGLEY JR. COMPANY	No
TMK 20-01011	10/30/2020	07/07/2029	REESE'S (STYLIZED)	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

**CBP IPR RECORDATION — OCTOBER 2020**

<b>Recordation No.</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Name of Cop/Tmk/Tm</b>	<b>Owner Name</b>	<b>GM Restricted</b>
TMK 20-01012	10/30/2020	12/11/2028	BROOKSIDE & Design	Hershey Canada Inc.	No
TMK 20-01013	10/30/2020	12/11/2028	BROOKSIDE Tree Logo	Hershey Canada Inc.	No
TMK 20-01014	10/30/2020	05/02/2026	BROOKSIDE	Hershey Canada Inc.	No
TMK 20-01015	10/30/2020	04/07/2025	BUBBLE YUM	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01016	10/30/2020	05/21/2029	CADBURY CREME EGG (Stylized)	CADBURY UK	No
TMK 20-01017	10/30/2020	09/09/2027	CADBURY MINI EGGS & DESIGN	CADBURY UK	No
TMK 20-01018	10/30/2020	10/26/2027	CADBURY	CADBURY UK	No
TMK 20-01019	10/30/2020	09/14/2025	CARAMELLO	CADBURY UK	No
TMK 20-01020	10/30/2020	02/17/2026	Hershey Corporate Logo	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01021	10/30/2020	06/13/2021	FAST BREAK	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01022	10/30/2020	03/26/2028	ILE and Design	Industria Lojana de Especerías	No
TMK 20-01023	10/30/2020	05/14/2022	BD Veritor and Design	Becton, Dickinson and Company	No
TMK 98-00710	10/26/2020	02/07/2026	R RUSSELL ATHLETIC & DESIGN	RUSSELL BRANDS, LLC	No
COP 20-00059	10/01/2020	09/24/2040	PHONE CASE WITH TURTLE ART-WORK - ANTHONY 1.0.	OPEN MIND DEVELOPMENTS CORPO-RATION	No
COP 20-00060	10/05/2020	04/05/2021	Carried by Alien "Pick me Up" Inflatable Costume	AFG Media Ltd	No
COP 20-00061	10/21/2020	10/21/2040	FIXATE (2020) A Fix Approved Cooking Show	Beachbody, LLC	No
COP 20-00062	10/21/2020	10/21/2040	THE ULTIMATE PORTION FIX (English 2020)	Beachbody, LLC	No
COP 20-00063	10/21/2020	10/21/2040	6 Weeks of the Work(English 2020)	Beachbody, LLC.	No

## CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 20-00064	10/21/2020	10/21/2040	THE MONTHLY FIX (2020)	Beachbody, LLC.	No
COP 20-00065	10/26/2020	10/22/2040	Morning Meltdown (English 2020)	Beachbody, LLC.	No
COP 20-00066	10/26/2020	10/23/2040	THE FLINTSTONES (s18) REMIX - FH x 19 - ALL FAMILY- WBCP	Hanna-Barbera	No



**AGENCY INFORMATION COLLECTION ACTIVITIES:**

**Application for Waiver of Passport and/or Visa  
(DHS Form I-193)**

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 60-Day notice and request for comments; Extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 29, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0107 in the subject line and the agency name. To avoid duplicate submissions, please use the following method to submit comments:

*Email.* Submit comments to: *CBP\_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP\_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of

the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Application for Waiver of Passport and/or Visa (DHS Form I-193).

**OMB Number:** 1651-0107.

**Form Number:** DHS Form I-193.

**Current Actions:** This submission is being made to extend the expiration date with no change to the burden hours or to the information collected on Form I-193.

**Type of Review:** Extension (without change).

**Affected Public:** Individuals.

**Abstract:** The data collected on DHS Form I-193, Application for Waiver of Passport and/or Visa, allows CBP to determine an applicant's identity, alienage, claim to legal status in the United States, and eligibility to enter the United States under 8 CFR 211.1(b)(3) and 212.1(g). DHS Form I-193 is an application submitted by a nonimmigrant alien seeking admission to the United States requesting a waiver of passport and/or visa requirements due to an unforeseen emergency. It is also an application submitted by an immigration alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence aboard requesting a waiver of documentary requirements for good cause. The waiver of the documentary requirements and the information collected on DHS Form I-193 is authorized by Sections 212(a)(7), 212(d)(4), and 212(k) of the Immigration and Nationality Act, as amended, and 8 CFR 211.1(b)(3) and 212.1(g). This form is accessible at <https://www.uscis.gov/i-193>.

**Estimated Number of Respondents:** 25,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 25,000.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 4,150.

Dated: November 20, 2020.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, November 30, 2020 (85 FR 76594)]

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**AGENCY INFORMATION COLLECTION ACTIVITIES:  
Create/Update Importer Identity Form (CBP Form 5106)**

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 4, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number

202–325–0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 59815) on September 23, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### Overview of This Information Collection

**Title:** Create/Update Importer Identity Form (CBP Form 5106).

**OMB Number:** 1651–0064.

**Form Number:** CBP Form 5106.

**Current Action:** This submission is being made to extend the expiration date of this information collection with no change to the burden hours or the information being collected.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** The collection of the information on the “Create/Update Importer Identity Form”, commonly referred to as the “*CBP Form*”

5106” is the basis for establishing bond coverage, release and entry of merchandise, liquidation and the issuance of bills and refunds. Members of the trade community use the Create/Update Importer Identification Form to register an entity as an Importer of Record (IOR) on the Automated Commercial Environment. Registering as IOR with CBP is required if an entity intends to transact Customs business and be involved as an importer, consignee/ ultimate consignee, any individual or organization involved as a party, such as 4811 party, or sold to party on an informal or formal entry. The number used to identify an IOR is either an Internal Revenue Service (IRS) Employer Identification Number (EIN), a Social Security Number (SSN), or a CBP-Assigned Number. By collecting, certain information from the importer enables CBP to verify the identity of the importers, meeting IOR regulatory requirements for collecting information. 19 CFR 24.5.

Importers, each person, business firm, government agency, or other organization that intends to file an import entry shall file CBP Form 5106 with the first formal entry or request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection. This form is also filed for the ultimate consignee for whom an entry is being made.

CBP Form 5106 is authorized by 19 U.S.C. 1484 and 31 U.S.C. 7701, and provided for by 19 CFR 24.5. The current version of the form is accessible at: <https://www.cbp.gov/document/forms/form-5106-importer-id-input-record>.

**Estimated Number of Respondents:** 300,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 300,000.

**Estimated Time per Response:** 45 minutes.

**Estimated Total Annual Burden Hours:** 225,000.

Dated: November 30, 2020.

SETH D. RENKEMA,  
Branch Chief,  
Economic Impact Analysis Branch,  
U.S. Customs and Border Protection.

[Published in the Federal Register, December 3, 2020 (85 FR 78142)]

## AGENCY INFORMATION COLLECTION ACTIVITIES:

### Notice of Detention

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than January 4, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 59542) on September 22, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the informa-

tion to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Notice of Detention.

**OMB Number:** 1651-0073.

**Form Number:** None.

**Current Actions:** CBP proposes to extend the expiration date of this information collection with no change to the burden hours or the information collected.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** Customs and Border Protection (CBP) may detain merchandise when it has reasonable suspicion that the subject merchandise may be inadmissible but requires more information to make a positive determination. If CBP decides to detain merchandise, a Notice of Detention is sent to the importer or to the importer's broker/agent no later than 5 business days after the decision to detain the merchandise is made. The Notice must state that merchandise has been detained, the specific reason for the detention, the anticipated length of the detention, the nature of the tests or inquiries to be conducted, and the nature of any information that could be supplied to CBP that may accelerate the disposition of the detention. The recipient of this notice may respond by providing information to CBP in order to facilitate the determination for admissibility or may ask for an extension of time to bring the merchandise into compliance. Notice of Detention is authorized by 19 U.S.C. 1499 and provided for in 19 CFR 151.16, 133.21, 133.25, and 133.43.

**Estimated Number of Respondents:** 1,350.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 1,350.

**Estimated Time per Response:** 2 hours.

**Estimated Total Annual Burden Hours:** 2,700.

Dated: November 30, 2020.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, December 3, 2020 (85 FR 78141)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:**

**Transportation Entry and Manifest of Goods Subject to CBP  
Inspection and Permit**

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 4, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.



**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 44915) on July 24, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit.

**OMB Number:** 1651-0003.

**Form Number:** 7512, 7512A.

**Current Actions:** This submission is being made to extend the expiration date with no change to the burden hours or to the information collected.

**Type of Review:** Extension without change.

**Affected Public:** Businesses.

**Abstract:** 19 U.S.C. 1552-1554 authorizes the movement of imported merchandise from the port of importation to another Customs and Border Protection (CBP) port prior to release of the merchandise from CBP custody. Forms 7512, "Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit" and 7512A, "Continuation Sheet," allow CBP to exercise control over merchandise moving in-bond (merchandise that has not entered the commerce of the United States). Forms 7512 and 7512A are filed by importers, brokers or carriers, and they collect

information such as the names of the importer and consignee, a description of the imported merchandise, and the ports of lading and unloading. Use of these forms is provided for by various provisions in 19 CFR to include 19 CFR 10.60, 19 CFR 10.61, 19 CFR 123.41, 19 CFR 123.42, 19 CFR 122.92, and 19 CFR part 18. These forms are accessible at: <http://www.cbp.gov/xp/cgov/toolbox/forms/>.

**Estimated Number of Respondents:** 6,200.

**Estimated Number of Annual Responses per Respondent:** 871.

**Estimated Number of Total Annual Responses:** 5,400,000.

**Estimated Time per Response:** 10 minutes (0.166 hours).

**Estimated Total Annual Burden Hours:** 896,400.

Dated: November 30, 2020.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, December 3, 2020 (85 FR 78139)]

## AGENCY INFORMATION COLLECTION ACTIVITIES:

### Bonded Warehouse Proprietor's Submission

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 4, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 39757) on July 1, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Bonded Warehouse Proprietor's Submission.

**OMB Number:** 1651–0033.

**Form Number:** CBP Form 300.

**Current Action:** CBP proposes to extend the expiration date of this information collection with an increase in the burden hours. There is no change to the information collected or CBP Form 300.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** CBP Form 300, *The Bonded Warehouse Proprietor's Submission*, is prepared annually by each warehouse proprietor, as mandated under 19 CFR 19.12 (g). The information on CBP Form 300 is used by CBP to evaluate warehouse activity for the year. This form must be completed within 45 days from the end of the business year, pursuant to the provisions of the Tariff Act of 1930, as amended, 19 U.S.C. 66, 1311, 1555, 1556, 1557, 1623 and 19 CFR 19.12. The information collected on this form helps CBP determine all bonded merchandise that was entered, released, and manipulated in the warehouse. CBP Form 300 is accessible at <https://www.cbp.gov/document/forms/form-300-bonded-warehouse-proprieters-submission>.

**Estimated Number of Respondents:** 1,980.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 1,980.

**Estimated Time per Response:** 10 hours.

**Estimated Total Annual Burden Hours:** 19,800.

Dated: November 30, 2020.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, December 3, 2020 (85 FR 78140)]



# U.S. Court of Appeals for the Federal Circuit

STAR PIPE PRODUCTS, Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2019–2381

Appeal from the United States Court of International Trade in No. 1:17-cv-00229-MAB, Judge Mark A. Barnett.

Decided: November 30, 2020

KAVITA MOHAN, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Washington, DC, argued for plaintiff-appellant. Also represented by FRANCIS J. SAILER, ANDREW THOMAS SCHUTZ; NED H. MARSHAK, DAVID M. MURPHY, New York, NY.

PATRICIA M. MCCARTHY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by ELIZABETH ANNE SPECK, JEFFREY B. CLARK, JEANNE DAVIDSON; DANIEL CALHOUN, WILLIAM MITCHELL PURDY, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

Before O'MALLEY, REYNA, and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CHEN.

Opinion concurring-in-part and dissenting-in-part filed by *Circuit Judge* REYNA.

CHEN, *Circuit Judge*.

Star Pipe Products (Star Pipe) appeals from a judgment of the Court of International Trade (Trade Court) upholding the Department of Commerce's (Commerce) interpretation of an antidumping order on steel threaded rod (STR) from the People's Republic of China. The Trade Court held that the STR components included in certain Joint Restraint Kits imported by Star Pipe were subject to the order. The Trade Court further denied as moot Star Pipe's challenge to a liquidation instruction issued from Commerce to U.S. Customs and Border Protection (CBP) following Commerce's interpretation of the order. We affirm.

## BACKGROUND

When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value, they may petition Commerce to impose antidumping duties on the foreign goods. After investigation and related proceedings before the International Trade Commission (ITC), Commerce issues an antidumping duty order if “the subject merchandise is being, or is

likely to be, sold in the United States at less than its fair value.” 19 U.S.C. §§ 1673(d)–(e). This order “includes a description of the subject merchandise, in such detail as [Commerce] deems necessary.” 19 U.S.C. § 1673e(a)(2).

Importers may seek a “scope ruling” clarifying whether their products meet the “description of the subject merchandise” set forth in an antidumping order. 19 C.F.R. § 351.225(a), (c). This case presents the question of whether subject merchandise meeting the literal “description” in the antidumping order can nevertheless be excluded from that order because the subject merchandise is packaged and imported together with non-subject merchandise. Such combinations of non-subject and otherwise-subject merchandise are referred to as “mixed media” items.

The antidumping order at issue here is directed to certain STR imported from China. See *Certain Steel Threaded Rod from the People’s Republic of China*, 74 Fed. Reg. 17,154 (Dep’t of Commerce Apr. 14, 2009) (STR Order). In the order, Commerce described in detail the physical characteristics of the STR, including shape, finish, construction, and metallurgical requirements. *Id.* at 17,154–55. Commerce also prescribed several exclusions for merchandise that, although would otherwise meet the order’s “description” of subject merchandise, would not be considered subject merchandise. *Id.* at 17,155. None of these exclusions relate to mixed media items.

On October 5, 2016, Star Pipe requested a scope ruling to clarify whether its Joint Restraint Kits are within the scope of the STR Order. J.A. 45–58. “These Joint Restraint Kits are used in the water and wastewater industry to connect and secure pipes and to bolt together pipe joints, so that the pipe joints form a water[-]tight restraint to maintain the free and controlled flow of water/[wastewater].” J.A. 46. The Joint Restraint Kits consist of a combination of castings, bolts, bolt nuts, washers, and STR components, which Star Pipe conceded “if imported alone, would be covered under the scope of the [STR] Order.” *Id.* (emphasis in original). Star Pipe contended that its Joint Restraint Kits should be excluded from the STR Order because the STR components were merely incidental components used to secure the castings. J.A. 46–47.

On July 31, 2017, Commerce issued its scope ruling, concluding that the STR components within Star Pipe’s Joint Restraint Kits are within the scope of the STR Order. Commerce explained that its inquiry was guided by the framework set forth by our court in *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013) (MCN). Because Star Pipe had conceded that the STR components of its Joint Restraint Kits are themselves subject merchandise covered

by the scope of the STR Order, Commerce under the *MCN* framework proceeded to consider whether those STR components should be excluded because they are packaged with other components in the Joint Restraint Kits. Commerce found nothing in the STR Order or its history indicating that otherwise-subject merchandise should be treated differently due to its packaging with other merchandise. J.A. 263. Commerce further noted that both the petition and an ITC ruling leading to the STR Order emphasized that STR can be used in the same waterworks applications for which Star Pipe's Joint Restraint Kits are intended. *Id.*; see also *Certain Steel Threaded Rod from China*, USITC Inv. No. 731-TA-1145 (Apr. 2009). Commerce thus concluded that, under the *MCN* framework, Star Pipe's STR components are presumptively within the scope of the STR Order. J.A. 263.

Commerce next considered whether the *MCN* presumption might be overcome on the basis of prior scope rulings on an unrelated antidumping order relating to pencils. J.A. 263; see also *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66,909 (Dep't of Commerce Dec. 28, 1994) (Pencils Order). Star Pipe had argued that these Pencils Order scope rulings established a clear standard as to how Commerce handles mixed media items in the context of scope rulings and, accordingly, the STR Order should be read to include an implicit exception for mixed media. Finding that each of these Pencils Order scope rulings were "based on the facts and circumstances in that particular case, and did not identify a mixed media standard," Commerce concluded that these rulings did not "support[] an interpretation of the scope of the [STR] Order that is contrary to its literal language." J.A. 263–64.

Following its scope ruling, Commerce issued an instruction to CBP to:

Continue to suspend liquidation<sup>1</sup> of entries of steel threaded rod from the People's Republic of China, including the steel threaded rod components of Star Pipe Products' Joint Restraint Kits, imported by Star Pipe Products and described above, subject to the antidumping duty order on steel threaded rod from the People's Republic of China.

J.A. 281. On August 21, 2017, Star Pipe requested clarification from Commerce as to whether the above liquidation instruction was intended to apply antidumping duties to STR components entered *prior* to the date of initiation of the scope inquiry. J.A. 278. The pre-initiation entries of STR components at issue were not suspended at the time of Commerce's scope ruling. CBP thus proceeded to liquidate

<sup>1</sup> Suspension of liquidation is the postponement of "the final computation or ascertainment of duties on entries." 19 C.F.R. § 159.1 (defining "liquidation"); *id.* § 351.102(b)(50).



those entries pursuant to 19 C.F.R. § 351.225(1)(3),<sup>2</sup> which prescribes suspension of liquidation for imports entered “on or after the date of initiation of the scope inquiry,” but not for imports entered prior to the date of initiation of the scope inquiry.

Star Pipe also challenged Commerce’s scope ruling before the Trade Court. The Trade Court assumed jurisdiction over the matter on August 30, 2017, before Commerce responded to Star Pipe’s request for clarification of the liquidation instruction. On October 3, 2017, the Trade Court granted a preliminary injunction enjoining the liquidation of unliquidated entries of Star Pipe’s joint restraint kits.

Before the Trade Court, Star Pipe challenged Commerce’s ruling that Star Pipe’s STR components were subject to the antidumping order. Star Pipe also challenged Commerce’s instruction to CBP to “continue to suspend liquidation” as a violation of 19 C.F.R. § 351.225(1)(3) because, in Star Pipe’s view, the instruction required duties to be assessed on unliquidated entries that had been entered prior to the initiation of the scope inquiry. The Trade Court upheld Commerce’s ruling that Star Pipe’s STR components were subject to the STR Order and found Star Pipe’s challenge to Commerce’s liquidation instruction to be moot because the entries at issue had already been liquidated without assessment of antidumping duties. Star Pipe appeals to this court, and we have jurisdiction under 28 U.S.C. § 1295(a)(5).

## DISCUSSION

### I. Commerce’s Scope Ruling

“We review the Trade Court *de novo*, applying the same substantial-evidence standard of review that it applies in reviewing Commerce’s determinations.” *MCN*, 725 F.3d at 1300. We afford “significant deference to Commerce’s interpretation of a scope order,’ so long as Commerce’s interpretation is not ‘contrary to the order’s terms’ and does not ‘change the scope of the order.’” *Id.* (citing *Glob. Commodity Grp. LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013)).

In *MCN*, we set forth a particularized framework to guide Commerce in interpreting the scope of its antidumping orders as to mixed

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<sup>2</sup> 19 C.F.R. § 351.225(1)(3) states, in relevant part: “Where there has been no suspension of liquidation, the Secretary will instruct the Customs Service to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption *on or after the date of initiation of the scope inquiry.*” (emphasis added).

media items. *Id.* at 1302–03. First, Commerce is to “determine whether the potentially-subject merchandise included within the mixed media item is within the literal terms of the antidumping order.” *Id.* at 1302. Second, if the merchandise is within the literal terms of the order, Commerce should “determine whether the inclusion of that merchandise within a mixed media item should nonetheless result in its exclusion from the scope of the order.” *Id.*

The first stage of the *MCN* framework focuses on the “subject merchandise” of the antidumping order—here, whether the STR components of Star Pipe’s Joint Restraint Kits meet the description of STR set forth in Commerce’s antidumping order. “[T]he procedure for conducting this inquiry is specified in our cases and Commerce’s regulations,” and begins with “the language of the final order.” *Id.* If the language of the final order is ambiguous as to whether Star Pipe’s STR components are in scope, then Commerce under its regulations must consider the “(k)(1)” materials: “[t]he descriptions of the merchandise contained in the petition, [Commerce’s] initial investigation, and the [prior] determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission.” *Id.* (citing 19 C.F.R. § 351.225(k)(1)). If, in turn, “the (k)(1) materials are not dispositive, Commerce then considers the (k)(2) criteria: ‘[t]he physical characteristics of the product,’ ‘[t]he expectations of the ultimate purchasers,’ ‘[t]he ultimate use of the product,’ ‘[t]he channels of trade in which the product is sold,’ and ‘[t]he manner in which the product is advertised and displayed.’” *Id.* (citing 19 C.F.R. § 351.225(k)(2)).

This first stage of the *MCN* framework concludes with a determination of whether the subject merchandise falls within the literal scope of the order. Here, it is undisputed that Star Pipe’s STR components are within the literal scope of the STR Order. Appellant’s Br. at 5 (“Star Pipe recognizes that the component STR included as part of the Joint Restraint Kits themselves would be in scope if imported alone.”). In this instance, then, there was no need to consult either the (k)(1) materials or the (k)(2) criteria in making this determination. The question then is whether Commerce should nevertheless exclude that otherwise-subject merchandise from the scope of the order because it is packaged with non-subject merchandise.

To answer the question of whether the order may be reasonably interpreted to include an exception for mixed media sets, Commerce must again begin with the language of the order itself. *MCN*, 725 F.3d at 1303. Where the order itself does not provide such an exception, Commerce must turn to the “history of the antidumping order,” i.e., the petition and Commerce’s initial investigation. *Id.* If the order’s history likewise fails to establish that subject merchandise should be

treated differently on the basis of its inclusion within a mixed media set, then “a presumption arises that the included merchandise is subject to the order.” *Id.* at 1304. Star Pipe does not contend that the STR Order or its history provides an exception for mixed media. The *MCN* presumption thus applies.<sup>3</sup>

The *MCN* presumption arises because “the primary source in making a scope ruling is the antidumping order being applied,” and “although the scope of a final order may be clarified, it [cannot] be changed in a way contrary to its terms.” *Id.* (citing *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1356 (Fed. Cir. 2010) and *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). Although Commerce “enjoys substantial freedom to interpret and clarify its antidumping orders,” *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002), that freedom is limited to interpretations that are reasonable, reflecting the due-process principle that agencies must “provide regulated parties fair warning of the conduct [the order or regulation] prohibits or requires,” *MCN*, 725 F.3d at 1300–01 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotations omitted)).

“Published guidance issued prior to the date of the original antidumping order” may suffice to overcome the presumption that the literal language of an antidumping order governs in mixed media cases. *MCN*, 725 F.3d at 1304. But, as we explained, such guidance must provide a clear and ascertainable standard sufficient to “allow importers to predict how Commerce would treat their mixed media products.” *Id.* at 1305. Set against the backdrop of an order’s silence on mixed media and the determination that the subject merchandise is within the literal terms of the order, any attempt to carve out a mixed media exception faces an uphill climb to “interpret[] the order contrary to its literal language.” *Id.* at 1304.

One source of such published guidance may be found in Commerce’s scope determinations, if published prior to the date of the antidumping order. *Id.* Star Pipe argues, as it did at the scope inquiry before Commerce, that Commerce’s decisions in five scope rulings<sup>4</sup> specific to the Pencils Order provided clear notice that Commerce intended all antidumping orders to include an unstated mixed media exception in which the mixed media is evaluated based on the (k)(2) criteria.

<sup>3</sup> Moreover, as Commerce emphasized, the STR Order’s history suggests that it was intended to encompass STR used in waterworks applications such as Star Pipe’s Joint Restraint Kits. J.A. 262–63. The petition and the ITC ruling leading to the STR Order emphasized that the STR Order encompasses STR for “bolting together pipe joints in the waterworks industry.” *Id.* Likewise, Star Pipe’s STR components are packaged in Joint Restraint Kits “used in the water and wastewater industry to connect and secure pipes and to bolt together pipe joints.” J.A. 46.

<sup>4</sup> For these Pencils Order scope rulings, see Appellant’s Opening Br. at 30–31.

Specifically, Star Pipe contends that, in these prior Pencils Order scope rulings, Commerce established that the STR Order contains an unstated exception for “incidental components (which, standing alone, would be subject merchandise) contained in mixed media sets.” Appellant’s Br. at 29–30. We have already rejected this view of the Pencils Order scope rulings.

Commerce has not uniformly applied a particular test in determining whether to focus its inquiry on the subject merchandise (here the STR components) or the mixed media set as a whole (here the Joint Restraint Kits). As we explained in *MCN*, Commerce’s scope rulings, including the Pencils Order scope rulings, have been “ad hoc determinations” that “lack clarity” and do not establish “‘formal definition[s],’ ‘generally applicable criteria,’ or ‘bright line rule[s]’ for conducting mixed media inquiries.” *MCN*, 725 F.3d at 1305 (citing *Walgreen*, 620 F.3d at 1355–56). In *MCN*, Commerce “concede[d] that these ad hoc determinations provided no ascertainable standard that would allow importers to predict how Commerce would treat their mixed media products, and that it ‘ha[d] not previously provided a complete listing of the factors it may consider when conducting a mixed[] media analysis.’” *Id.*

In *Walgreen*, Commerce did not address whether a component in that case was merely “incidental” to a mixed media set. Instead, Commerce evaluated as a threshold matter whether the mixed media set (a gift bag) was a unique product or a mere aggregation of components, concluding that Walgreen’s gift bag was the latter. *See* 620 F.3d at 1355; *see also Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the People’s Republic of China*, U.S. Dep’t of Commerce Memorandum from James C. Doyle, Director, Office 9, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, Scope Inquiry No. A–570–894 (Sept. 19, 2008). On the basis of that determination, Commerce focused its scope inquiry on the tissue paper that fell within the literal scope of the order rather than the gift bag as a mixed media set. *Id.* at 1356–57.

In another prior scope ruling on whether a camping set was subject to an antidumping order on certain porcelain-on-steel items used for cooking, Commerce likewise focused its inquiry on the cooking-ware components of the camping set, as opposed to the camping set as a whole. *Recommendation Memo—Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People’s Republic of China*, U.S. Dep’t of Commerce Memorandum from Richard Moreland, Director, Office of Antidumping Compliance, to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance, Scope Inquiry

No. A-570-506 (Aug. 8, 1990) (*Texsport*). In *Texsport*, Commerce assigned duties to the cooking-ware components (a frying pan, stew pot, and coffee pot) and declined to assign duties to the kitchenware components (plates and cups), without consulting the (k)(2) criteria or addressing why the components should be evaluated individually instead of in the context of their packaging with non-subject merchandise. *Id.*

*Walgreen* and *Texsport* thus undermine Star Pipe's argument that Commerce has consistently turned to the (k)(2) criteria when undertaking a scope ruling involving mixed media, let alone any suggestion that Commerce has provided clear guidance that a mixed media exception should be imported into otherwise silent orders. Nor do the Pencils Order scope rulings provide sufficiently clear guidance to establish such a generally applicable mixed media exception. In *Walgreen*, we rejected the importer's argument that "Commerce was required to consider [the importer's] product a 'mixed media' set and to address it under the (k)(2) criteria," explaining that Commerce's Pencils Order scope rulings on mixed media were "ad hoc" determinations that "did not set forth a bright line rule for determining whether imports should be analyzed as 'mixed media' sets, or as combinations of products." 620 F.3d 1350, 1355. As explained above, we reached that same conclusion in *MCN*. In view of the variance in Commerce's approach to mixed media across the Pencils Order scope rulings, *Walgreen*, and *Texsport*, we agree with the government that Commerce's prior scope rulings do not provide clear guidance sufficient to establish a generally applicable exception for mixed media based on the (k)(2) criteria.

Thus, although we have acknowledged that Commerce's "prior scope rulings do establish that there exists in some circumstances an implicit mixed media exception even in the absence of explicit language in the final order," *MCN*, 725 F.3d at 1305, the scope rulings on the Pencils Order that Star Pipe relies upon do not provide the type of clear guidance needed to interpret the STR Order contrary to its literal terms.

Separately, Star Pipe argues that, because the STR Order and its history do not expressly address mixed media, this silence means that the (k)(1) materials cannot be "dispositive" of the scope inquiry. Citing to 19 C.F.R. § 351.225(k), Star Pipe contends that Commerce must therefore consider the (k)(2) criteria. We disagree.

The first stage of the *MCN* framework already considers the (k)(2) criteria to the extent required by Commerce's regulations. Specifically, 19 C.F.R. § 351.225(k) requires Commerce to, "in considering

whether a particular product is included within the scope of an order,” take into account the (k)(1) materials, and if not “dispositive,” then the (k)(2) criteria. Likewise, at the first stage of the *MCN* framework “Commerce must determine whether the potentially-subject merchandise included within the mixed media item is within the literal terms of the antidumping order,” beginning with the language of the order and proceeding to the (k)(1) materials and (k)(2) criteria as necessary to resolve ambiguity. *MCN*, 725 F.3d at 1302.

Here, it is undisputed that Star Pipe’s STR components are in fact within the literal terms of the antidumping order. Moreover, the antidumping order and its history do not provide any exception for mixed media. That conclusion is itself sufficient to end the scope inquiry, in the absence of any pre-established, clear guidance to the contrary. Star Pipe cannot *create* ambiguity simply by contending that the order must be interpreted contrary to its literal language, i.e., to carve out an exception for otherwise-subject merchandise that is packaged with non-subject merchandise. Where, as here, “neither the text of the order nor its history indicates that subject merchandise should be treated differently on the basis of its inclusion within a mixed media item,” such an exception must be clear and ascertainable from Commerce’s prior published guidance. *Id.* at 1304–05. To permit otherwise would authorize the type of ad hoc determinations that fail to “allow importers to predict how Commerce would treat their mixed media products.” *Id.* at 1305. As we made clear in *MCN*, it is true that Commerce has the discretion to issue clear guidance, which may draw from, among other things, the (k)(2) criteria, if relevant. *Id.* But *MCN* also made clear that, absent such clear guidance, employing the (k)(2) criteria in an effort to create an unstated exception to the terms and history of the order is not mandatory. *Id.* And, as we explained above, Star Pipe does not point to any such guidance clearly requiring Commerce to do so in every antidumping order when evaluating a mixed media item.<sup>5</sup> Because Commerce has elected not to publish clear guidance notifying regulated parties of an implicit mixed media exception for otherwise silent antidumping orders, there is no basis for Commerce to reach the (k)(2) criteria at the second stage of the *MCN* framework because such silent orders cannot then be reasonably read to include an implicit mixed media exception.<sup>6</sup>

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<sup>5</sup> Likewise, Star Pipe’s argument that Commerce should have consulted the Harmonized Tariff Schedule of the United States (HTSUS) classification system fails because Star Point points to no published guidance establishing how Commerce would rely on the HTSUS classification system to interpret its STR Order contrary to its literal terms.

<sup>6</sup> In *MCN*, we observed that “many of the problems presented by this case could be avoided if Commerce were to identify in its antidumping orders or in prospective regulations the

Finally, Star Pipe argues that Commerce must consider the (k)(2) criteria whenever it initiates a formal scope inquiry. In Star Pipe's view, Commerce's failure to reach (k)(2) violates 19 C.F.R. § 351.225(e), which provides that Commerce will initiate a scope inquiry if the "application and the descriptions of the merchandise referred to in paragraph (k)(1)" are not sufficient to resolve the issue of whether a product is in-scope. We again disagree. That the "application" submitted by a party to request a scope ruling and the (k)(1) materials are insufficient might simply mean that Commerce requires "further input from the interested parties," for example if Commerce seeks more information on the product in question than provided in the submitted application. J.A. 29–30. That more information is needed does not mean that the (k)(1) materials will not ultimately be dispositive. Thus, Commerce's decision to initiate a scope inquiry does not itself require consideration of the (k)(2) criteria. 19 C.F.R. § 351.225(e) does not recite any such requirement. As the Trade Court noted, "Star Pipe conflates the decision to initiate a scope inquiry with the conclusion that the (k)(1) materials are not dispositive." J.A. 29.

For the reasons above, we agree with the Trade Court that substantial evidence supports Commerce's finding that the STR components of Star Pipe's Joint Restraint Kits are within the scope of the STR Order. Star Pipe does not point to any prior published guidance setting forth an ascertainable standard for reading the STR Order against its literal terms to include an exception for mixed media. "[M]erchandise facially covered by an order may not be *excluded* from the scope of the order unless the order can reasonably be interpreted so as to exclude it." *MCN*, 725 F.3d at 1301.

## II. Commerce's Liquidation Instruction

When Commerce issues a final scope ruling and liquidation of the products in question has not been suspended, then Commerce will instruct CBP to suspend liquidation and demand a monetary deposit for duties on those unliquidated products if entered "on or after the date of initiation of the scope inquiry." 19 C.F.R. § 351.225(l)(3). After the final scope ruling on Star Pipe's products, Commerce issued an instruction to CBP to "[c]ontinue to suspend liquidation" of Star Pipe's STR components:

factors it will consider in resolving mixed media and other cases. *Id.* at 1306. We note that Commerce recently has taken steps to promulgate regulations that provide clear notice to regulated parties that Commerce's future orders will contain an implicit mixed media exception. See *Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 85 Fed. Reg. 49472, 49497 (Dep't of Commerce Aug. 13, 2020) (proposing a three-factor test "to determine whether the component product's inclusion in the larger merchandise results in its exclusion from the scope of the order").

*“Continue to suspend liquidation of entries of steel threaded rod from the People’s Republic of China, including the steel threaded rod components of Star Pipe Products’ Joint Restraint Kits, imported by Star Pipe Products and described above, subject to the antidumping duty order on steel threaded rod from the People’s Republic of China.”*

J.A. 281 (emphasis added).

Star Pipe challenges Commerce’s instruction to CBP to “continue to suspend liquidation” as improperly assessing duties on pre-initiation imports that were not suspended at the time the scope inquiry was initiated. But Star Pipe’s challenge is moot because CBP liquidated the pre-initiation import entries at issue without assessing any antidumping duties. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013) (“A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.”). Moreover, those liquidations are final, as the parties do not dispute that CBP is time-barred from reliquidating those entries to include the assessment of antidumping duties. *See* 19 U.S.C. § 1501 (permitting CBP to reliquidate “within ninety days from the date of the original liquidation”). Regardless of whether Star Pipe is correct in its interpretation of Commerce’s liquidation instruction, Star Pipe is not at risk of any assessment of duties on the entries at issue.

Nevertheless, Star Pipe contends that its challenge to Commerce’s liquidation instruction is not moot because of the existence of a separate “prior disclosure” proceeding in which Star Pipe argues it must pay antidumping duties in order to “perfect” its prior disclosure. We disagree.

An importer that fails to pay antidumping duties may elect to initiate a “prior disclosure” proceeding by disclosing the circumstances of its violation and tendering the owed duties, with interest, to CBP. 19 U.S.C. § 1592(c)(4); *see also* 19 C.F.R. § 162.74. By submitting a prior disclosure “before, or without knowledge of, the commencement of a formal investigation of that violation,” 19 C.F.R. § 162.74, the importer can mitigate or entirely avoid penalties on its failure to pay duties. This statutory framework presents importers with a choice: (1) admit to violating an antidumping order and pay the owed duties, 19 U.S.C. § 1592(c)(4); or (2) remain silent, and risk penalties if CBP later determines that a violation occurred due to “fraud, gross negligence, or negligence,” 19 U.S.C. § 1592(a)(1).

Contrary to Star Pipe’s arguments, importers are not compelled to submit a prior disclosure. Star Pipe is free to choose not to admit to



CBP that Star Pipe imported STR in violation of the STR Order. To the extent that Star Pipe complains of possible penalties associated with that choice, that is a criticism of the statutory framework enacted by Congress and has nothing to do with Commerce's instruction to CBP to suspend liquidations in connection with the scope inquiry at issue in this appeal.

Even if, as Star Pipe demands, Commerce's liquidation instruction were clarified to state that it did not extend to pre-initiation entries, that would not impact or prevent CBP from pursuing an enforcement action under § 1592. 19 C.F.R. § 351.225(1)(3) only limits Commerce's authority to assess duties in the context of a scope inquiry; that regulation does not restrict CBP's authority under § 1592 to assess penalties for fraudulent or negligent violations. Regardless of Commerce's instruction to CBP to suspend and assess liquidation in connection with Star Pipe's scope inquiry, CBP may independently determine that Star Pipe was negligent or fraudulent in its failure to pay duties on its Joint Restraint Kits, even if those Joint Restraint Kits were imported prior to the initiation of the scope inquiry.<sup>7</sup>

At bottom, Star Pipe contends that Commerce improperly instructed CBP to suspend and assess duties on merchandise entered prior to the initiation of the scope inquiry. As the Trade Court correctly concluded, Star Pipe's challenge was rendered moot when those pre-initiation entries were liquidated without assessment of any antidumping duties.<sup>8</sup>

## CONCLUSION

We have considered Star Pipe's remaining arguments and find them unpersuasive. For the reasons stated above, we affirm the Trade Court's decision affirming Commerce's final scope ruling and denying Star Pipe's challenge to Commerce's liquidation instruction.

## AFFIRMED

STAR PIPE PRODUCTS, Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

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<sup>7</sup> Moreover, if CBP were to pursue an enforcement action against Star Pipe's pre-initiation entries, Star Pipe admits that it could raise its challenge to Commerce's liquidation instruction as a defense in that separate, hypothetical proceeding. The Trade Court correctly declined to issue an advisory opinion addressing that scenario.

<sup>8</sup> Although Star Pipe also argues that these pre-initiation entries were liquidated in violation of the Trade Court's preliminary injunction, the Trade Court did not abuse its discretion in declining to exercise its equitable authority to void liquidations that did not result in injury to Star Pipe. That Star Pipe suffered no injury is further emphasized by Star Pipe's failure to "move[] the [Trade Court] to take any action in response to the liquidations." J.A. 32 n.18.

Appeal from the United States Court of International Trade in No. 1:17-cv-00229-MAB, Judge Mark A. Barnett.

REYNA, *Circuit Judge*, concurring-in-part and dissenting-in-part.

I cannot join my colleagues in the majority opinion, which I find both erroneous and unfortunate. The error lies in a clear misapprehension of this court's precedent. And, unfortunately, this precedential opinion casts further confusion on an area of trade law that we in past decisions have bemoaned to lack clarity and predictability. But instead of putting the proverbial cart back on a straight path, we have driven it further into the bog.

I disagree with the majority's conclusion that Commerce could properly find Star Pipe's joint restraint kits to be subject to the steel threaded rods antidumping duty order without considering the characteristics of the kit as a whole. Because both the order and its history were silent as to whether the order was intended to encompass the components of mixed media products, Commerce was required under its own regulations to consider the factors set forth in 19 C.F.R. § 351.225(k)(2) in determining whether the kit's steel threaded rod components should be considered individual "subject merchandise" "products" in the context of the kit as a whole. Our decision in *Mid Continent Nail* did not absolve Commerce of that obligation. Thus, with respect to the majority opinion on Commerce's scope ruling, I dissent.

## I

The majority's reasoning proceeds from a flawed assumption: namely, that when a party seeks a scope ruling under 19 C.F.R. § 351.225 as to whether a "particular product" falls within the "subject merchandise" described in a duty order, the "product" to be compared with the "subject merchandise" is always the individual component of the kit rather than the kit as a whole. Under this reasoning, the importer of an IKEA-type unassembled bookshelf with two steel threaded rod ("STR") components has no basis for avoiding Commerce's duty order, even though the importer of an assembled shelf with the same components may very well escape the same order. *See, e.g., MacLean Power, L.L.C. v. United States*, 359 F. Supp. 3d 1367, 1372 (Ct. Int'l Trade 2019). Indeed, under the majority's reasoning, the unassembled shelf is legally indistinguishable from a package of assorted rods and nails that contains 100 STRs and five nails. All mixed media imports are treated as aggregations of "products" for which Commerce must assess individual duties, regardless of how peripheral a given component is to the kit as a whole.

That was not Commerce's assumption when it issued the antidumping duty order at issue here in 2008. Nor was it the expectation of importers or domestic manufacturers. Rather, the traditional starting

point of Commerce’s mixed-media analysis was the question of whether the kit or its components should be treated as the “product” for comparison to the “subject merchandise.” Our decision in *MCN* acknowledged this:

This case presents the question of whether otherwise-subject merchandise (nails) that is packaged and imported together with non-subject merchandise (assorted household tools) as part of a so-called “mixed media” item (a tool kit) is subject to an antidumping order that in terms covers the included merchandise, and makes no exception for mixed media items. Commerce has historically treated the answer to this question as depending on whether the mixed media item is to be treated as a single, unitary item, or a mere aggregation of separate items.

*Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1298 (Fed. Cir. 2013) (“*MCN*”). This approach was consistent with the overall purpose of scope rulings, namely to assess whether a given product falls within the realm of what a duty order was intended to cover and whether the product in its imported form constitutes an attempt to circumvent the literal language of the order. See 19 C.F.R. § 351.225(a). Where the face of a duty order is silent on whether and when it encompasses individual components of a mixed media product, Commerce must resolve that ambiguity through its established protocols for scope inquiries.

Under Commerce’s own regulations, where a scope inquiry raises an issue not addressed by the face of the order, Commerce turns first to the regulatory history of the order and investigation for guidance on the intended scope of the order. Where those sources provide no “dispositive” answer, Commerce has turned to—and indeed has required itself to consider—a set of practical, fact-based factors relating to the characteristics of the product and the nature of its commercialization. This two-step process of analyzing the so-called (k)(1) and (k)(2) factors is set forth in 19 C.F.R. §§ 351.225(k)(1) and (k)(2):

[I]n considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

(2) When the above criteria are not dispositive, the Secretary will further consider:

(i) The physical characteristics of the product;

- (ii) The expectations of the ultimate purchasers;
- (iii) The ultimate use of the product;
- (iv) The channels of trade in which the product is sold; and
- (v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k) (emphasis added).

Nothing in *MCN* suggests that the court intended to exempt mixed media inquiries from this codified analysis. The court instead recognized in *MCN* that when a final duty order does not explicitly address whether and when mixed media items are included, the order is ambiguous on that question, such that Commerce has the authority to interpret the order as excluding mixed media items in a scope ruling. 725 F.3d at 1301–02. The court further required Commerce, in conducting that interpretive inquiry, to consider the (k)(1) materials in assessing whether a component’s inclusion in a mixed media item takes it outside the scope of the order. *Id.* at 1302. When the (k)(1) materials are silent, the court opined that “a presumption arises that the included merchandise is subject to the order.” *Id.* at 1304.

This “presumption” in *MCN* does not render otherwise silent (k)(1) materials “dispositive” of a scope inquiry. The fact that the court left room for Commerce to find exclusion in such situations means that when the (k)(1) materials are silent as to mixed media, they are not “dispositive” of whether an order that is facially silent on mixed media encompasses a given mixed media product. Commerce is therefore obligated under the plain text of § 351.225(k) to consider the (k)(2) factors with respect to the mixed media product. This includes consideration of how the physical characteristics of the kit, the expectations of its consumers, its intended use, and its channels of trade differ from that of STRs. This has been Commerce’s standard practice under its regulations, and *MCN* does not vitiate that practice.

## II

Contrary to Commerce’s suggestion, this court’s statement in *MCN* that the agency “*may . . .* rely on the (k)(2) factors” in determining whether the presumption of inclusion is overcome does not override the express regulatory requirement that Commerce “*will* further consider” those factors whenever the (k)(1) materials are not dispositive. *Compare MCN*, 725 F.3d at 1305, *with* 19 C.F.R. § 351.225(k)(2). In accepting Commerce’s position, the majority renders the *MCN* presumption un rebuttable by the interested parties. Under the majority’s holding, Commerce alone wields the prerogative of seeking to overcome the *MCN* presumption. Even though the rationale underlying the interpretive framework in *MCN* was rooted in the regulated

parties' right to fair notice, *see* 725 F.3d at 1300, the majority's decision precludes affected importers from compelling Commerce to consider the same factors it had previously considered in a scope analysis so long as Commerce, in its "discretion," declines to "issue clear guidance" defending an approach for doing so. Slip. Op. 13–14. The fact that Commerce has decided to throw in the towel on the mixed media exclusion here (after its failed efforts to defend its prior mixed media approaches in court) essentially means that all mixed media items containing STR automatically fall under the scope of the STR antidumping duty order, in clear incongruity with Commerce's interpretive practice at the time it issued its order.

The majority contends that importers never had a legitimate expectation of a fact-based (k)(2) analysis even before *MCN* because Commerce had ignored the factors in the past. This is incorrect. The cases cited by the majority for this position are inapposite. In *Walgreen*, the (k)(1) materials were not silent on mixed media: the I&D memo expressly stated that "all subject merchandise—cut-to-length tissue paper—is subject to this proceeding, *whether or not it is sold or shipped with non-subject merchandise.*" *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (emphasis added). Commerce was not obligated to consider the (k)(2) factors because the (k)(1) materials were "dispositive." The same is true in *Texsport*, in which Commerce "found it unnecessary to address the four-additional criteria" because the (k)(1) materials clearly defined the product at issue. *Recommendation Memo—Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's Republic of China*, U.S. Dep't of Commerce Memorandum from Richard Moreland, Director, Office of Antidumping Compliance, to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance, Scope Inquiry No. A-570-506, at 3 (Aug. 8, 1990) ("*Texsport*"). Again, stated differently, because the (k)(1) factors were dispositive, it was not necessary for Commerce to address the (k)(2) factors. However, had the analysis of the (k)(1) factors not been dispositive, it would have been necessary for Commerce to review the (k)(2) factors.

In contrast, as *Star Pipe* asserted in its briefing before both Commerce and this court, there is a considerable body of scope rulings on the "Pencils Order," in which Commerce repeatedly relied on the (k)(2) factors in assessing whether various mixed media items fell within the scope of a duty order that was silent on mixed media. *See* Appellant's Br. 30–31; *see also* INTERNATIONAL TRADE ADMINISTRATION, CASED PENCILS FROM THE PEOPLE REPUBLIC OF CHINA,

cased-pencils-ad.asp (“Pencils Order Rulings”). For example, Commerce determined that a 10-piece vanity set including two pencils was not subject to the Pencils Order because the set as a whole was physically comprised of components other than writing instruments and its purchasers bought the product primarily for purposes other than writing. See *Final Scope Ruling—Antidumping Duty Order on Certain Cased Pencils from the People’s Republic of China (PRC)—Request by Creative Designs International, Ltd., A-570–827* (Dep’t of Commerce Feb. 9, 1998). Applying similar analyses, Commerce determined that the following mixed media products also fell outside the scope of the duty order: (1) a tote bag of various fashion items including pencils; (2) a “color set” of markers, pencils, crayons, and paper in a portable plastic storage case; (3) a compass and pencil set; and (4) a Valentine’s card set with pencils. See *Pencils Order Rulings*.

Although, as the majority notes, this court concluded in *Walgreen* and *MCN* that these rulings were “ad hoc” and “did not set forth a bright line rule for determining whether imports should be analyzed as ‘mixed media’ sets, or as combinations of products,” combinations of products,”<sup>1</sup> Commerce did not raise, and we did not consider, whether the Pencils Order Rulings evinced a consistent practice by Commerce of considering the (k)(2) factors in mixed media analysis when the order and (k)(1) materials are silent. *Walgreen*, 620 F.3d at 1355–56; see also *MCN*, 725 F.3d at 1305. Indeed, in light of the explicit language in its regulation, there was little question at the time that the (k)(2) factors were mandatory considerations in that context.

Thus, pursuant to both Commerce’s past practice and the plain terms of its own regulations, Commerce was obligated in this case to apply the (k)(2) factors to the joint restraint kits in determining whether the kits were subject to the STR order. Because Commerce plainly neglected that obligation here, I dissent.

I concur with the majority that the retroactive liquidation issue in this case is moot.

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<sup>1</sup> The majority renews a criticism by this court that Commerce’s analytical framework for scope rulings lacks clarity or predictability. The majority thus joins prior calls by this court urging Commerce to establish a bright line rule that would effectively resolve scope questions of the trade community in one fell swoop. Slip Op. at 14 n.6 (citing *MCN*, 725 F.3d at 1306). This court, however, has not offered a solution or otherwise described what this bright line test should look like. Commerce, to its credit, is seeking to codify an analytical framework the draft of which, in my view, looks strikingly similar to the (k)(2) factors. See *Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 85 Fed. Reg. 49472, 49497 (Dep’t of Commerce Aug. 13, 2020).

DILLINGER FRANCE S.A., Plaintiff-Appellant v. UNITED STATES, SSAB ENTERPRISES LLC, NUCCOR CORPORATION, Defendants-Appellees

Appeal No. 2019–2395

Appeal from the United States Court of International Trade in No. 1:17-cv-00159-GSK, Judge Gary S. Katzmann.

Decided: December 3, 2020

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Before NEWMAN, DYK, and HUGHES, *Circuit Judges*.

DYK, *Circuit Judge*.

Defendant Dillinger France S.A. (“Dillinger”) appeals a decision of the United States Court of International Trade (“Trade Court”). That decision affirmed the final anti-dumping determination of the U.S. Department of Commerce (“Commerce”) for certain carbon and alloy steel cut-to-length plate from France. We affirm in part, vacate in part, and remand.

## BACKGROUND

“Dumping occurs when a foreign firm sells a product in the United States at a price lower than the product’s normal value.” *Home Prods. Int’l, Inc. v. United States*, 633 F.3d 1369, 1372 (Fed. Cir. 2011). Commerce is required to impose antidumping duties on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry. 19 U.S.C. § 1673.

On April 28, 2016, Commerce initiated an antidumping duty investigation into certain carbon and alloy steel cut-to-length plate from France. Commerce chose Dillinger, a European producer of cut-to-length plate, as one of the mandatory importer respondents.

Commerce assigned Dillinger a 6.15% antidumping margin. *See Certain Carbon and Alloy Steel Cut-To-Length Plate from France*, 82 Fed. Reg. 24,096, 24,098 (Dep't of Commerce May 25, 2017). Dillinger appealed to the Trade Court, which initially sustained most of Commerce's determination but remanded to Commerce issues that are not involved in this appeal. The Trade Court then sustained Commerce's remand results and the 6.15 percent duty. Dillinger appeals the Trade Court's judgment, contending that Commerce erred in the antidumping determination. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

## DISCUSSION

We review the Trade Court's decision to sustain Commerce's final results and remand redeterminations de novo. *See U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010). We will affirm Commerce unless its decision is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

### I

Dillinger raises three issues on appeal. We first address Dillinger's argument that, in calculating normal value, Commerce improperly allocated costs between Dillinger's non-prime and prime products based on Dillinger's books and records, which allocate cost based on likely selling price rather than actual cost.<sup>1</sup> Because Dillinger's books and records did not reasonably reflect the costs associated with the production and sale of the merchandise as required by 19 U.S.C. § 1677b(f), we vacate and remand for further proceedings on this issue.

Dillinger sells plates designated as prime and non-prime. Non-prime plates are plates that are rejected after the production process for not meeting the standards for prime plate. Prime plate is sold with a warranty, whereas non-prime plate is not and thus cannot be used in applications that require a warranty. In reporting costs to Commerce, Dillinger reported the cost of non-prime plate as equal to the average actual cost of all plate because, according to Dillinger, "non-prime plate undergoes the same production process as prime plate and . . . is not less costly to produce simply because it cannot be sold at full price." J.A. 1346.

Commerce did not dispute that prime and non-prime plate undergo the same production process, but Commerce noted that Dillinger's

<sup>1</sup> It is unclear from Commerce's final determination and brief whether Commerce's calculation of normal value involved determining constructed value (determining the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise" and other factors under 19 U.S.C. § 1677b(e)), or involved determining cost of production so as to exclude home market sales made below cost of production under § 1677b(b)(3). In either event, § 1677b(f) applies, and the alleged errors would affect either calculation. *See id.* § 1677b(f).



accounting system uses a different approach, valuing “non-prime plate at the likely selling price based on current market conditions and uses this amount to offset the cost of prime plates.” J.A. 1347. Commerce accordingly adjusted Dillinger’s reported costs for non-prime plate “to reflect the sales values recorded in [Dillinger’s] normal books and records” and allocated the difference to the costs for Dillinger’s prime plate. *Id.* at 968, 1347. In doing so, Commerce reduced the cost of non-prime plate and allocated a greater portion of cost to prime plate based on the selling price of non-prime plate. Dillinger argues that Commerce’s reliance on Dillinger’s books and records was improper because the books and records were not based on the costs associated with the production of its products.

The applicable statutory provision, 19 U.S.C. § 1677b(f)(1)(A), provides that “[f]or purposes of subsections (b) [sales at less than cost of production] and (e) [constructed value] . . . , [c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles [(“GAAP”)] of the exporting country (or the producing country, where appropriate) and *reasonably reflect the costs associated with the production and sale of the merchandise.*” *Id.* (emphasis added). Section 1677b(f)(1)(A) thus requires “that reported costs must ‘normally’ be used” only if (1) “they are ‘based on the records . . . kept in accordance with the [GAAP]’” and (2) “‘reasonably reflect’ the costs of producing and selling the merchandise.” *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014) (quoting 19 U.S.C. § 1677b(f)(1)(A)).

The dual nature of the test seems apparent from the face of the statute and is clear as well from our prior decisions and the legislative history. Before § 1677b(f), our case law had established that, “[a]s a general rule, an agency may either accept financial records kept according to [GAAP] in the country of exportation, or reject the records if accepting them would distort the company’s true costs.” *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999)).

In *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992), we held a method that “calculat[ed] costs for both limited-service and prime products on the basis of their relative prices” to be “an unreasonable circular methodology” because it “contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value.” *Id.* at 1061; *see also id.* at 1060 (“The legislative history confirms the statute’s unambiguous intent to provide cost of production as an independent yardstick for deciding whether home and export sales prices are suitable for fair

value comparisons.”). We relied on section 1677b(e), the provision that “expressly covers actual production costs,” for computing constructed value, and section 1677b(b), which “disregards, under specified circumstances, home or export market sales at less than the cost of production.” *Id.* at 1059 (citing 19 U.S.C. § 1677b(b), (e) (1988)). Here, there is no dispute that Commerce relied on the likely selling price of non-prime plate in its determination of cost. Thus, if *IPSCO* governs, Commerce’s reliance on Dillinger’s books and records was impermissible.

Commerce argues that *IPSCO* should not govern because the Tariff Act was amended to add § 1677b(f). When Congress added § 1677b(f), Congress did not repeal §§ 1677b(b) or (e), the sections we relied on in *IPSCO*, which still require determination of “the cost of materials and fabrication or other processing of any kind,” *id.* § 1677b(e),<sup>2</sup> and there is no indication that Congress intended for the addition of section 1677b(f) to overrule *IPSCO*. “Section 224 of [the Uruguay Round Agreements Act] add[ed] new section 773(f) to the [Tariff] Act to incorporate the provisions of the [Antidumping Agreement<sup>3</sup>] regarding the calculation of costs. In addition, section 773(f) harmonize[d] the methods of calculating cost for purposes of examining sales below cost and determining constructed value.” H.R. Rep. No. 103–826, pt. 1, at 91 (1994). The legislative history indicates Congress’s clear intent for Commerce to “continue its current practice of calculating costs,” *id.*, and that such costs should “accurately reflect the resources actually used in the production of the merchandise in question,” S. Rep. No. 103–412, at 75 (1994).

In codifying this rule, Congress noted that “[u]nder [then-]existing U.S. law and practice, Commerce normally calculate[d] costs on the basis of records kept by the exporter or producer of the merchandise, provided such records [were] kept in accordance with [GAAP] of the exporting (or producing) country and reasonably reflect[ed] the costs associated with the production and sale of the merchandise” and that “[u]nder new section [1677b(f)], Commerce [would] continue its current practice.” H.R. Rep. No. 103–826, pt. 1, at 90–91.

Congress also concluded that “[c]osts shall be allocated using a method that reasonably reflects and accurately captures all of the

<sup>2</sup> Subsection (b) at the time of our decision in *IPSCO* required determination of “cost of producing the merchandise,” *IPSCO*, 965 F.2d at 1060 (quoting 19 U.S.C. § 1677b(b) (1988)), and has since been amended to require determination of “the cost of materials and of fabrication or other processing of any kind.” 19 U.S.C. § 1677b(b)(3)(A).

<sup>3</sup> The Antidumping Agreement means the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Uruguay Round Agreements Act §§ 121(9), 101(d)(7), PL 103–465, December 8, 1994, 108 Stat 4809.

actual costs incurred in producing and selling the product under investigation or review.” Statement of Administrative Action (“SAA”), H.R. Rep. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4172. Congress “expect[ed] [Commerce], in determining whether a producer’s or exporter’s records reasonably reflect the costs associated with the production and sale of the product in question, to examine the recorded production costs with a view to determining as closely as possible the costs that most accurately reflect the resources actually used in the production of the merchandise in question.” S. Rep. No. 103–412, at 75. Thus, the legislative history of section 1677b(f), consistent with its plain meaning, indicates Congress intended that Commerce rely on a producer’s or exporter’s books and records if they are in accordance with GAAP and reasonably reflect the costs of production.

Nonetheless, Commerce argues that our decision in *Thai Pineapple*, decided after the Tariff Act was amended to include section 1677b(f) (but deciding issues raised under the pre-amended Tariff Act), supports Commerce’s position here. In *Thai Pineapple*, in determining costs of production and constructed value, Commerce relied on a producer’s allocation methodology for “material cost” for pineapple fruit, which the producer used to make canned pineapple products and juice products. 187 F.3d at 1366. The producer’s books and records “allocate[d] a range of 82 to 91% of the pineapple fruit costs to canned pineapple fruit production, and 9 to 18% to production of juice products.” *Id.* “Commerce’s allocation of the cost of the raw pineapple fruit between canned pineapple fruit and other products was not based on the selling price or output value of these products.” *Id.* at 1369.

“Thus, unlike [*IPSCO* ], the selling price of the [subject] products was not a factor in determining the cost of raw material component in Commerce’s calculation of [costs of production and constructed value].” *Id.* Instead, “Commerce’s methodology reflected the raw material allocations of [the producer] as shown by their books and records.” *Id.* We held that, “[t]o the extent that the records of [the producer] reasonably reflect the costs of production, Commerce may rely upon them.” *Id.* at 1367. The government relies on footnote 5 of *Thai Pineapple*, but that part of the decision simply “note[d] that this rule is now codified in 19 U.S.C. § 1677b(f)(1)(A) (1996).” *Id.* at 1366 n.5. *Thai Pineapple* is not inconsistent with *IPSCO* as to the determination of production costs.<sup>4</sup>

<sup>4</sup> To the extent that *Thai Pineapple* disagreed with *IPSCO*, it was to distinguish Commerce’s use of a weight-based methodology in *IPSCO*. In *IPSCO*, we sustained Commerce’s weight-based allocation because “[t]he steel pipe was manufactured from the same raw

The government also relies on *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751 (Fed. Cir. 2012), but that case does not support Commerce’s position. In *PSC*, we affirmed Commerce’s method of basing the costs of chlorine “upon what [the exporter] would have to spend to purchase the chlorine necessary for its titanium production process.” *Id.* at 757. Thus, *PSC* concerned the use of purchase price to determine cost rather than using likely selling price of the end product to allocate costs as here.

There is no dispute that Dillinger’s records were kept in accordance with GAAP. However, Dillinger’s records that Commerce relied on for the cost of non-prime and prime plate were based on “likely selling price” rather than costs of producing and selling the merchandise. J.A. 1347. Because Dillinger’s books and records were based on “likely selling price” rather than cost of production, *id.*, Commerce erred in relying on them. A remand is required for Commerce to determine the actual costs of prime and non-prime products.

## II

We next consider Dillinger’s argument that Commerce’s use of the average-to-transaction method in determining the dumping margin was improper. The dumping margin is the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” 19 U.S.C. § 1677(35)(A). To determine the dumping margin, Commerce uses one of three methods: the average-to-average method, the transaction-to-transaction method, and the average-to-transaction method.<sup>5</sup> Here, Commerce’s decision used the average-to-transaction method, which may be used if “there is a pattern of export prices . . . for comparable merchandise that differ material and underwent one production process,” but in *Thai Pineapple*, we found that “pineapple fruit [was] not a homogeneous raw material like the raw material used to make the pipe in [*IPSCO* ], and the production process [was] entirely different for the various pineapple products produced.” *Thai Pineapple*, 187 F.3d at 1369. Accordingly, we found that Commerce’s determination not to use a weight-based methodology was reasonable. *Id.*

<sup>5</sup> The average-to-average method compares the weighted average of the normal values to the weighted average of the export prices. 19 U.S.C. § 1677f-1(d)(1)(A)(i). Commerce “will use the average-to-average method unless [Commerce] determines another method is appropriate in a particular case.” 19 C.F.R. § 351.414(c)(1) (2020).

The transaction-to-transaction method compares the normal values of individual transactions to the export prices of individual transactions. 19 U.S.C. § 1677f-1(d)(1)(A)(ii). Commerce “will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.” 19 C.F.R. § 351.414(c)(2).

The average-to-transaction method compares weighted average of the normal values to the export prices of individual transactions for comparable merchandise. 19 U.S.C. § 1677f-1(d)(1)(B). Commerce may use the average-to-transaction method if “there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,” and Commerce “explains why such differences cannot be taken into account using [the average-to-average or transaction-to-transaction methods].” *Id.* § 1677f-1(d)(1)(B)(i)–(ii).

significantly among purchasers, regions, or periods of time.” 19 U.S.C. § 1677f-1(d)(1)(B)(i). This provision addresses situations “where targeted dumping may be occurring.” SAA, 1994 U.S.C.C.A.N. at 4178. Targeted dumping occurs where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.” *Id.* at 4177–78.

To determine a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, Commerce used the Cohen’s *d* test. The Cohen’s *d* coefficient is a “generally recognized statistical measure” of the extent of the difference between the weighted-average price of a test group and the weighted-average price of a comparison group. J.A. 958. Here, the test groups were export prices for a purchaser, region, and time period, and the corresponding comparison groups were all other export prices (i.e., the export sales to all other purchasers, regions, or time periods). If the Cohen’s *d* coefficient is equal to or greater than 0.8, then Commerce considers the difference between the average prices of the test group and the average prices of the comparison group to be significant, and thus the test group passes the Cohen’s *d* test.

Commerce next applied the “ratio test,” in which Commerce calculated the sales value for all test groups that passed the Cohen’s *d* test. “If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method.” J.A. 959.

In its final determination, Commerce determined that 95.78 percent of Dillinger’s U.S. sales passed the Cohen’s *d* test and that this “confirm[ed] the existence of a pattern of prices that differ[ed] significantly among purchasers, regions, or time periods.” *Id.* at 1306. Commerce accordingly used the average-to-transaction method for all U.S. sales to calculate the dumping margin.

Dillinger raises two challenges to Commerce’s determination of a pattern. First, Dillinger contends that Commerce’s use of the Cohen’s *d* test and the ratio test to determine a pattern “ignor[ed] the word ‘pattern’ in section 1677f-1(d)(1)(B)(i).” Appellant’s Br. 15. Dillinger appears to argue that Commerce’s ratio test improperly aggregated sales across categories (purchasers, regions, or time periods) and that comparing aggregated sales across categories cannot be done to es-

establish a pattern. *Id.* at 21 (stating Commerce’s methodology “does not analyze the categories of purchasers, regions and time periods individually”).

Such aggregation is not inconsistent with the statute, which requires that Commerce determine that there is “a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” 19 U.S.C. § 1677f-1(d)(1)(B)(i). The statute is silent as to how Commerce must determine a “pattern.” *See id.* §§ 1677, 1677f-1. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). We find that Commerce’s interpretation of pattern was reasonable.

Dillinger relies on a determination from the World Trade Organization (“WTO”), which reached the opposite conclusion in interpreting Article 2.4.2 of the Anti-Dumping Agreement. Appellate Body Report, *United States – Antidumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R, at 25–31 (adopted Sep. 7, 2016). The WTO Appellate Body determined that Commerce’s methodology of using the Cohen’s *d* test and the ratio test “is inconsistent” with determining “a pattern of export prices which differ significantly among different purchasers, regions, or time periods” because the methodology “aggregates prices found to differ among different purchasers, among different regions, and among different time periods for the purposes of identifying a single pattern.” *Id.* at 25, 31.

The WTO “oversee[s] the application of the various WTO agreements and serve[s] as the framework for member governments to conduct their trade relations under those agreements.” SAA, 1994 U.S.C.C.A.N. at 4043. “WTO decisions are ‘not binding on the United States, much less this court.’” *Corus Staal BV v. Dept of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (quoting *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004)).<sup>6</sup>

Dillinger’s other arguments regarding the interpretation of “pattern” are not adequately developed, and we decline to consider them. *See Agile Def., Inc. v. United States*, 959 F.3d 1379, 1384 n.\* (Fed. Cir. 2020) (because party “fail[ed] to adequately develop [an] argument,”

<sup>6</sup> Dillinger also argues that Commerce’s application of the Cohen’s *d* test applied “an irrebuttable presumption” that a 0.8 Cohen’s *d* coefficient indicates that a price difference is significant. Appellant’s Br. 24. The record does not indicate that Commerce’s use of the Cohen’s *d* test or its thresholds is irrebuttable. To the contrary, Commerce considered Dillinger’s objections to its methodology and provided its reasons for rejecting them.

the court “decline[d] to consider it on appeal”); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (declining to consider argument that “[did] not amount to a developed argument”).

Second, Dillinger argues that Commerce’s use of the Cohen’s *d* test to determine a pattern among export prices was not in accordance with the law because Dillinger’s products are custom-made. Thus, in Dillinger’s view, Commerce was not permitted to use the average-to-transaction test and instead should have used the default average-to-average test.<sup>7</sup> But there is nothing in § 1677f-1 or the regulations promulgated thereunder that requires Commerce to consider custom products differently when determining whether “there is a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time” so long as such comparison is made between “comparable merchandise.” 19 U.S.C. § 1677f-1(d)(1)(B).

Here, Dillinger has not shown how Commerce failed to use “comparable merchandise.” “Comparable merchandise” was defined by product control numbers (“CONNUMs”), which have certain “physical characteristics” that were subject to notification and comment during Commerce’s investigation. J.A. 958, 1310. In making its comparison, Commerce rejected Dillinger’s assertion that “its made-to-order products are inferably so unique and embrace such a wide range of grades within a given [CONNUM] that any comparison of U.S. prices on a CONNUM basis must take into account these inter-CONNUM variations.” *Id.* at 1309–10. We see no error in Commerce’s determination.

### III

Finally, we consider Dillinger’s argument that Commerce erred in determining that Dillinger’s factory sales and sales from its affiliated service centers constituted a single level of trade in France and thus concluding that a level of trade adjustment was not warranted.

Commerce is required to establish normal value “to the extent practicable, at the same level of trade as the export price.” 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce is unable to find sales in the foreign market at the same level of trade as the sales in the United States, normal value shall be “increased or decreased to make due allowance for any difference (or lack thereof) between the export price . . . and [normal value] that is shown to be wholly or partly due to a difference

<sup>7</sup> Dillinger does not argue on appeal that Commerce should have used the transaction-to-transaction method, even though the regulations state that Commerce “will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is *custom-made*.” 19 C.F.R. § 351.414(c)(2) (emphasis added).

in level of trade.” *Id.* § 1677b(a)(7)(A). “[T]he level of trade adjustment is designed to ensure that the normal value and U.S. price are being compared . . . at the same level of trade, that is, at the same marketing stage in the chain of distribution that begins with the manufacturer.” *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314 (Fed. Cir. 2001). Commerce will grant a level of trade adjustment where “there is a difference between the actual functions performed by the sellers at the different levels of trade in the two markets.” SAA, 1994 U.S.C.C.A.N. at 4168.

Dillinger makes sales directly from its factories to end users and distributors and from affiliated service centers to downstream customers. Dillinger argues that Commerce erred in determining that inventory maintenance performed on service center sales did not require a finding of a separate level of trade. “Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.” 19 C.F.R. § 351.412(c)(2). Commerce determined that inventory maintenance alone did not make a substantial difference between the selling activities commonly performed by Dillinger’s factories and service centers, and we find this determination to be supported by substantial evidence and in accordance with law.

In addition to the selling functions performed by its factories, Dillinger’s affiliated service centers also perform service center functions such as cutting, sawing, drilling, and bending. Dillinger argues that Commerce “improperly ignored processing activities such as cutting and sawing of plate into smaller sizes for resale.” Appellant’s Br. 51.

Commerce agreed that Dillinger’s service centers performed service center functions such as cutting and sawing “to make downstream sales.” J.A. 1330. It also determined that “these items (*i.e.*, cutting, sawing, drilling[,] and[] bending) are not selling functions . . . contained in the list provided in [Commerce’s] standard section A questionnaire. . . . Instead, . . . these items are performed in connection with the further processing of the merchandise, which are part of the cost to produce the downstream product.” *Id.* We see no error in Commerce’s refusal to consider these processing activities to be selling functions.

## CONCLUSION

We have considered the parties’ remaining arguments and find them unpersuasive. We vacate the Trade Court’s judgment sustaining Commerce’s decision to rely on Dillinger’s books and records to determine cost. We affirm the Trade Court’s judgment sustaining Commerce’s determinations of the pattern requirement of the average-to-



transaction method and level of trade. We remand the case to the Trade Court for Commerce to recalculate the dumping margin consistent with this opinion.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

**COSTS**

No costs.



# U.S. Court of International Trade

Slip Op. 20–164

STARKIST Co., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge  
Court No. 14–00068

[Denying plaintiff's Rule 56 motion for summary judgment and granting defendant's Rule 56 cross-motion for summary judgment.]

Dated: November 18, 2020

*Michael E. Roll and Brett Ian Harris*, Roll & Harris LLP, for plaintiff.  
*Alexander Vanderweide*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. With him on the brief was *Justin R. Miller*, Attorney-in-Charge, *Jeanne E. Davidson*, Director, and *Ethan P. Davis*, *Acting Assistant Attorney General*. Of Counsel was *Sheryl A. French*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

## OPINION

### Reif, Judge:

Plaintiff StarKist Co. (“StarKist” or “plaintiff”), an importer of tuna fish products, challenges a decision by United States Customs and Border Protection (“Customs”) to classify four tuna salad products under subheading 1604.14.10 of the Harmonized Tariff Schedule of the United States (HTSUS),<sup>1</sup> which covers prepared or preserved fish, specifically “[f]ish, whole or in pieces, but not minced . . . [I]n airtight containers: In oil,” and carries a 35% *ad valorem* duty.

Customs liquidated the entries in question on different dates from February through May 2013, and StarKist filed two separate protests to challenge the tariff classification at liquidation. On January 22, 2016, plaintiff filed a complaint regarding the appropriate classification of these products. Plaintiff argues that the products at issue are correctly classified under subheading 1604.20.05, which covers “prepared meals” that are not “minced,” and carries a 10% *ad valorem* duty. Alternatively, plaintiff argues that the products are correctly classified under subheadings 1604.14.22 and 1604.14.30, which cover tuna that is not “minced” and not “in oil,” and carry 6% and 12.5% *ad valorem* duties, respectively. The question presented is which of these subheadings properly covers the subject merchandise.

<sup>1</sup> All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2013 edition.

## BACKGROUND

This dispute involves the classification of four StarKist tuna fish products. Pl.'s Statement of Material Facts Not in Issue ¶¶ 1, 3–4 (“Pl. Stmt. Facts”); Def.’s Resp. to Pl.’s Statement of Material Facts Not in Issue ¶¶ 1, 3–4 (“Def. Resp. Pl. Stmt.”). The four products at issue are: Tuna Salad Chunk Light (Lunch-to-Go pouches); Tuna Salad Albacore (Lunch-to-Go pouches); Tuna Salad Albacore (24 retail pouches); and Tuna Salad Albacore (60 retail pouches). The subject merchandise contains cooked tuna mixed with celery, water chestnuts and a starch-based dressing. *Id.* Tuna Salad Albacore contains albacore tuna and white meat mayo, while Tuna Salad Chunk Light contains non-albacore tuna and light meat mayo. Pl. Stmt. Facts ¶¶ 3–4; Def. Resp. Pl. Stmt. ¶¶ 3–4. The subject merchandise is exported to the United States in two different forms: as retail pouch packs, which contain individual pouches of tuna, or as Lunch-to-Go kits, which include a tuna pouch and a mint, spoon, napkin and crackers. Pl. Stmt. Facts ¶ 2; Def. Resp. Pl. Stmt. ¶ 2.

All four varieties of the subject merchandise undergo the same four steps in manufacturing: (1) garnish preparation, (2) the dressing phase, (3) the tuna phase, and, (4) the filling and finishing phase. Pl. Stmt. Facts ¶ 5; Def. Resp. Pl. Stmt. ¶ 5. During the garnish preparation phase, celery and water chestnuts are hand mixed. *Id.* During the dressing phase, a mayo base dressing and relish are hand mixed with the blended celery and water chestnuts. *Id.* The white meat mayo and the light meat mayo, which comprise the mayo base dressing for the Tuna Salad Albacore and the Tuna Salad Chunk Light, respectively, are purchased as finished products from an entity unrelated to StarKist. Pl. Stmt. Facts ¶¶ 27, 30; Def. Resp. Pl. Stmt. ¶¶ 27, 30. No additional oil is added to either mayo base beyond its ingredients. Pl. Stmt. Facts ¶ 30; Def. Resp. Pl. Stmt. ¶ 30. Both mayo base products contain approximately 12 to 13 percent soybean oil. *Id.* ¶¶ 28–29.<sup>2</sup>

During the tuna phase, tuna is chopped to a thickness of 0.8–1.0 inches for the Albacore, and 1.0–1.5 inches for the Chunk Light. Pl. Stmt. Facts ¶¶ 21–22, 25; Def. Resp. Pl. Stmt. ¶¶ 21–22, 25. The chopped tuna is then hand mixed with the mayo base dressing, relish, celery, and water chestnuts. *Id.* ¶¶ 5, 21, 24, 33. More than 82% of Tuna Salad Chunk Light contains fish meat with a surface area of less than 0.3 square centimeters, and more than 58% of the Tuna Salad Albacore contains fish meat with a surface area of less than 0.3

<sup>2</sup> Plaintiff asserts that the light meat mayo base contains 12.18 percent soybean oil. Defendant disagrees and posits that it contains 12.82 percent soybean oil. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. The difference is immaterial for classification.

square centimeters. *Id.* ¶¶ 34–35. The mayo base containing oil is added to the tuna during the hand mixing process. Pl. Stmt. Facts ¶ 33; Def. Resp. Pl. Stmt. ¶ 33.

Finally, in the filling and finishing phase, metal funnels are used to fill each pouch with the mixture of tuna, celery, water chestnuts and dressing that is created from the prior steps. *Id.* ¶ 5. No additional oil is added to the final phase of packaging or to any stage of production. *Id.* ¶¶ 5, 30, 33. The parties generally agree on the total percentage of oil by weight in each finished tuna product. As a result of the addition of the mayo base during the tuna phase, that is 4% for the Tuna Salad Albacore and approximately 5% for the Tuna Salad Chunk Light. *Id.* ¶¶ 32–33.<sup>3</sup>

### STANDARD OF REVIEW

Customs' protests are reviewed *de novo* by the court. 28 U.S.C. § 2640(a)(1) (2018). This court has jurisdiction under 28 U.S.C. § 2640(a)(1) because plaintiff contests Customs' denial of plaintiff's protest over the proper classification of the merchandise at issue.

Summary judgment is permitted when “there is no genuine dispute as to any material fact . . .” USCIT R. 56(a). The court must decide materiality by determining whether any factual disputes are material to the resolution of the action. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 247–48 (1986). In making this determination, “all evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party.” *Dairyland Power Coop. V. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). Here, the court does not find any disputes as to material issues of fact, so summary judgment is appropriate to resolve the dispute over the classification.

The court's review of classification cases is limited to the record before the court. 28 U.S.C. § 2640(a). “The plaintiff has the burden of establishing that the government's classification of the subject merchandise was incorrect . . .” *Lerner New York, Inc. v. United States*, 908 F. Supp. 2d 1313, 1317–18 (CIT 2013). But, “plaintiff does not bear the burden of establishing the correct classification; instead, it is the court's independent duty to arrive at the ‘correct result’ . . .” *Id.* (quotations in original) (citations omitted).

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<sup>3</sup> Because the parties dispute the oil content of the light meat mayo base, the parties' calculations for the oil content of the Tuna Salad Chunk Light products as a whole also differ slightly. Plaintiff contends that the total percentage of oil by weight is 4.59% and defendant argues that it is 4.83%. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. This difference is immaterial for classification.

The determination of whether an imported item has been properly classified involves a two-step analysis. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the court must “ascertain[] the proper meaning of specific terms within the tariff provision,” and, second, “determin[e] whether the merchandise at issue comes within the description of such terms as properly construed.” *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The first step is a question of law, while the second is a question of fact. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999).

### LEGAL FRAMEWORK

The General Rules of Interpretation (“GRIs”) of the HTSUS govern the proper classification of merchandise entering the United States. The GRIs “are applied in numerical order.” *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n. 4 (Fed. Cir. 2005). GRI 1 states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 3(a) applies specifically to items in a set put up for retail sale (such as the lunch-to-go pouches). It states that “when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.” According to GRI 3(b), “goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character.”

Finally, GRI 6 states, “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, on the understanding that only subheadings at the same level are comparable.” Further, “the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.”

The HTSUS has the force of statutory law. *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). Absent contrary legislative intent, tariff terms are to be understood according to their common and commercial meanings. *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). When interpreting a tariff term, the court may rely on its own understanding of the term and on secondary sources such as scientific authorities and diction-

aries. *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

Additional U.S. Notes to the HTSUS are also “considered to be statutory provisions of law for all purposes.” *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) (internal quotations omitted) (citations omitted). These are “legal notes that provide definitions or information on the scope of the pertinent provisions or set additional requirements for classification purposes . . .” *Id.*

The court may also refer to the Explanatory Notes to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization (WCO) (“ENs”). ENs may guide the interpretation of a tariff term since they are “intended to clarify the scope of HTSUS subheadings and to offer guidance in their interpretation,” even though the ENs are not controlling. *Len-Ron Mfg. Co.*, 334 F.3d at 1309. The ENs are “generally indicative of the proper interpretation of a tariff provision.” *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007).

## DISCUSSION

### I. Competing Tariff Provisions

Chapter 16 of the HTSUS covers “preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates.” In determining the classification of the subject merchandise, the parties agree that the products are appropriately classified under Heading 1604 of the HTSUS, which covers “[p]repared or preserved fish; caviar and caviar substitutes prepared from fish eggs.” However, the parties disagree on the proper subheading applicable to the subject merchandise. The subheadings under Heading 1604 can be separated into three categories. The first grouping, subheadings 1604.11 – 1604.19, is limited to “fish, whole or in pieces, but not minced.” The second, consisting of only 1604.20, covers “[o]ther prepared or preserved fish; prepared meals,” which includes “minced” fish. The third category, “caviar and other substitutes,” covers subheadings 1604.31–32.

The “not minced” category is divided by type of fish, with tuna and skipjack covered by subheading 1604.14, a subheading that is further subdivided depending on whether the product is “in oil” (1604.14.10), “not in oil” (1604.14.22), or “other” (1604.14.30). As such, the question of whether the product is “minced” is a threshold question. Within HTSUS 1604.14, the question of whether the product is “in oil” follows if the product is determined to be “not minced.”

## II. Positions of the Parties

### A. Plaintiff

Plaintiff claims that the subject merchandise is correctly classified under subheading 1604.20.05 as prepared meals that are “minced” and that the court need not reach the question of whether it is in “in oil.”<sup>3</sup> Pl.’s Mem. in Supp. of Pl. Mot. for Summ. J. (“Pl. Br.”) at 17–18, 22–23. *See* Am. Compl. ¶ 21. Plaintiff argues against classification in subheading 1604.14 on the basis that subheading 1604.14 covers tuna that is “not minced.” According to plaintiff, tuna is “minced” when its production involves chopping and cutting cooked tuna into small pieces, Pl. Br. at 19, and that process accurately characterizes the production process for the subject merchandise. *Id.* The HTSUS does not define the term “minced,” so plaintiff introduces dictionary definitions of the term to support the proposition that the subject merchandise is minced. *Id.* at 18.

In the absence of a defined tariff term, plaintiff cites six dictionary definitions to support what it deems as the “common and popular” meaning of the term “minced.” *Id.* at 18–20. Plaintiff argues that the dictionary definitions of “minced” fit the description of the subject merchandise. *Id.* at 19, 21. The referenced dictionaries define “minced” with the term “small,” and Customs likewise describes the chopped tuna pieces as “small.” *Id.*; Pl. Stmt. Facts ¶ 37. Thus, plaintiff claims that this connection supports the argument that the subject merchandise includes “minced” tuna. Pl. Br. at 19–20. Additionally, Plaintiff emphasizes that only two of the six dictionary definitions reference size requirements and none of the dictionary definitions specifies a uniformity requirement. Pl.’s Opp. to Def.’s Cross-Mot. for Summ. J., at 8–9, 10–12. Thus, plaintiff argues that the term “minced” does not demand specific measurement requirements. *Id.*

Further, plaintiff argues that because the subject merchandise is “minced,” it should be classified under subheading 1604.20.05. Pl. Br. at 22–23. Plaintiff claims that the subject merchandise is correctly classified under subheading 1604.20.05 because the minced tuna products constitute “prepared meals” that consist of more than 20 percent by weight of tuna, vegetables and sauce. *Id.* The Explanatory Notes to Chapter 16 provide that “food preparations fall in this chapter provided that they contain more than 20 percent by weight of . . . fish.” *Id.* Given the record before the court, plaintiff claims that the subject merchandise is correctly classified under 1604.20.05.

Alternatively, plaintiff argues that if the court concludes that the subject merchandise is not “minced,” then the subject merchandise



should be classified under subheading 1604.14.22 or 1604.14.30, rather than subheading 1604.14.10, because the tuna is not “in oil.” Subheading 1604.14.10 requires that the tuna be packed “in oil.” Plaintiff’s argument is that the subject merchandise *includes* oil, but it is not *packed* “in oil.” <sup>4</sup> *Id.* at 23. *See* Am. Compl. ¶ 24. Plaintiff opposes classification under subheading 1604.14.10 on the basis that oil was used to prepare the subject merchandise, but that it is not “packed in oil.” Pl. Br. at 28–29. Plaintiff supports this assertion through application of HTSUS Chapter 16 Additional U.S. Note 1, which provides that “for the purposes of this chapter, the term ‘in oil’ means packed in oil or fat, or in added oil or fat and other substances, whether such oil or fat was introduced at the time of packing or prior thereto.” *Id.* at 23.

Plaintiff also relies on the distinction between preparation and packing made by the court in *Richter Bros.*, which held that oil used in the preparation phase alone does not render the product “packed in oil.” *Richter Bros., Inc. v. United States*, 44 C.C.P.A. 128 (1957); Pl. Br. at 26–27. The *Richter Bros.* court reasoned that this distinction gave effect to the revision of Paragraph 718(a) of the Tariff Act of 1930, which resulted in the insertion of the phrase “prepared or preserved in any manner” before “packed in oil.” *Richter Bros.*, 44 C.C.P.A. at 131. Plaintiff contends that the preparation phase includes not only cooking, but also mixing the cooked tuna with the oil-based mayonnaise dressing, since the mixing process occurs prior to packing. Pl. Br. at 28. For this reason, based on *Richter Bros.*, the presence of oil in the product — resulting solely from “preparation,” according to plaintiff — does not properly result in classification of the product as “in oil.”

## B. Defendant

Defendant claims that the subject merchandise is properly classified under subheading 1604.14.10, because it is comprised of tuna fish that is not “minced” and is packed “in oil.” *See Def.’s Mem. in Supp. of Its Cross-Mot. for Summ. J. and Resp. in Opp’n to Pl.’s Mot. for Summ. J.* (“Def. Br.”) at 6. On this basis, defendant opposes plaintiff’s motion and files a cross-motion for summary judgment.

Defendant argues that the fish is packed in oil because the “pre-cooked tuna pieces are mixed with oil-based mayonnaise dressings,” which means that the tuna salad pouches are packed “in oil” for tariff purposes. *Id.* at 6. Defendant cites case law and Additional U.S. Note 1 to Chapter 16 of the HTSUS to support its claim. *Id.* Defendant notes that Additional Note 1 does not require a specific quantity or proportion of oil for fish to be considered packed “in oil”; Additional

Note 1 does not limit when, how, or for what purpose oil is added; nor does it “distinguish between oil that is alone in a packing medium and oil that is mixed with other ingredients.” *Id.* at 10. Defendant argues that two cases — *Strohmeyer & Arpe Co. v. United States*, 5 Ct. Cust. App. 527 (1917) and *Del Monte Corp. v. United States*, 885 F. Supp. 2d 1315, 1319–20 (CIT 2012), *aff’d*, 730 F.3d 1352 (Fed. Cir. 2013) — support the proposition that “any amount of oil introduced in a tuna salad mixture, base, dressing, packing medium or sauce, renders that tuna product packed ‘in oil’ for tariff purposes.” *Id.* at 10–11.

Further, defendant argues that a third case relied upon by plaintiff — *Richter Bros.* — should be distinguished, because the fish at issue in *Richter Bros.* was fried in oil and packaged in a brine that contained no oil. *See id.* at 20–21. In *Richter Bros.*, the Customs Court found that when no oil was used in the actual packing process and as much of the frying oil as possible was drained from the fish after frying, the product would not be considered “packed in oil.” Because the subject merchandise in this case is in fact packaged in a soybean oil-based mayonnaise dressing, defendant argues that the subject merchandise should be classified as “packed in oil.” *Id.* at 11–12.

With respect to whether the fish is “minced,” defendant argues that it is not “because the pieces of tuna in the pouches are not the product of a minced cut, nor of a minced size, shape, or texture.” *Id.* at 1. The HTSUS does not define the term “minced,” so defendant relies on dictionary definitions and culinary sources to rebut plaintiff’s claim that the court should interpret “minced” simply as “very small.” *See id.* at 13, 17–20. Defendant argues that the culinary and dictionary sources from which plaintiff draws its definition of “minced” are properly understood as supporting defendant’s proposed classification, because these sources — collectively summarized — describe a mince “as the smallest sized pieces that can be measurably cut — an approximate, uniform 1/16th x 1/16th x 1/16th — and not chunky.” *Id.* at 19–20.

Defendant applies its definition of “minced” to the subject merchandise, which defendant notes was analyzed by Customs’ laboratory and found to contain pieces spanning a wide range of sizes, from immeasurably small to twelve times the size of a minced cut. *Id.* at 14. While “a portion of the measured tuna was ostensibly in the approximate range of a mince size, a predominant characteristic of a mince are uniform pieces cut to size.” *Id.* at 15. Defendant argues that Customs’ findings demonstrate that the pieces are not uniformly cut, and that this lack of consistency suggests that the tuna is not minced. *See id.* at 15–16. Further, defendant asserts that plaintiff’s production records show that StarKist does not *intend* for the tuna to be minced —

“rather, [plaintiff] intends for the tuna pieces to be chunky.” *Id.* at 6. Defendant argues that the production process is intended to produce tuna pieces that are chunky and vary in size and shape, “not the uniform product of an exacting minced cut.” *Id.* at 16.

In addition to arguing that the fish has been packed in oil and that it is not minced for HTSUS purposes, defendant also responds to plaintiff’s argument for application of subheading 1604.20 by noting that this subheading is a residual classification: it is intended to cover instances in which another subheading does not more specifically cover the merchandise in question. *See id.* at 12–13. Since the subject merchandise “is specifically described by HTSUS subheading 1604.14 as pieces of fish, it cannot be classified in the residual “other” sub-heading of HTSUS, 1604.20.” *Id.* at 13.

### **III. Classification of the Subject Merchandise**

The subject merchandise is properly classified under HTSUS 1604.14.10 because the subject merchandise consists of “fish, whole or in pieces, but not minced” and is “in oil.” The products at issue are correctly described as “in pieces, but not minced” because, while consisting partially of very small pieces, they vary significantly in shape, size and texture. The pieces are also not produced by a minced cut, but rather by a process that includes both chopping and hand-mixing, which indicates that even the small pieces are not truly minced.

The determination of whether a product is “in oil” depends on whether the oil was added during the preparation phase or afterwards, during the packing phase. In this case, the oil was added to StarKist’s products during the packing phase after the preparation of the tuna. Therefore, the products are properly classified as “in oil.” The court begins by analyzing whether the subject merchandise is “minced” or not, and then turns to the question of whether it is packed “in oil.”

#### **A. Minced**

Based on the interpretive guidance of GRI 1 and GRI 6, all of the subject merchandise at issue is properly classified under HTSUS 1604.14.10, which covers “fish, whole or in pieces, but not minced” that is “in oil.” The subheadings within Heading 1604 fit into three main categories: (1) “Fish, whole or in pieces, but not minced” (1604.11–19); (2) “Other prepared or preserved fish” (1604.20); and (3) “Caviar” (1604.31–32). The product is not caviar and “other” provisions are intended to function as residual classifications. *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998) (using an “other” sub-heading as a “catch-all” provision, appro-

priate when other classifications are not satisfactory). Therefore, the threshold question in this case is whether the subject merchandise consists of “fish, whole or in pieces, but not minced,” such that classification under HTSUS 1604.14 is proper. Specifically, the question is whether the tuna, in its entirety, is properly classified as minced.

The term “minced” is not defined under the HTSUS, so the court analyzes several different factors to interpret the meaning of “minced” under the statute and applies them to determine whether the tuna is correctly classified as minced. Specifically, the court examines (1) whether the pieces, based on their size and physical characteristics, collectively, should be considered “minced,” and, (2) whether the tuna pieces are the product of a minced cut. Based on these factors, the court concludes that the subject merchandise as a whole is properly categorized as “in pieces, but not minced.”

### 1. The Size and Physical Characteristics of the Tuna Pieces Are Not Consistent with a “Mince”

The subject merchandise consists of various pieces of tuna that vary significantly in size, shape and texture. Customs Laboratory Report; Deposition of Luis Quinones (“Quinones Dep.”). The subject merchandise includes some tuna pieces equivalent in size to a minced piece, as well as pieces substantially larger. *See* Customs Laboratory Report at 4; *see also* Quinones Dep. at 14, 22; Ex. 9 (showing histogram pages of Laboratory analysis). The language of the tariff — specifically, the phrase “in pieces, but not minced” — suggests the possibility of small pieces, including pieces that are equivalent in size to a “minced piece.” The language does not, by its own terms, specifically exclude from “[f]ish, whole or in pieces, but not minced” the presence of very small pieces. Thus, the fundamental character of the tuna still may be chunky, despite the incidental presence of very small pieces.

While this case does not implicate GRI 3(b) on the question of whether the tuna is minced,<sup>4</sup> the inquiry — determining which pieces of tuna form the essence of the subject merchandise — ultimately bears sufficient resemblance to a test of “essential character” such that an “essential character” analysis is informative here. This Court has previously held that the essential character of an entry is “that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Oak Laminates D/O Oak Materials Group v. United States*, 8 CIT 175, 180, 628 F. Supp.

<sup>4</sup> To implicate GRI 3(b), the subject merchandise would have to be, *prima facie*, classifiable under two or more subheadings. Here, the product must either be minced or not minced; the product as a whole may not be classified as both.

1577 (1984) (citing *United China & Glass Co. v. United States*, 293 F. Supp. 734, 61 Cust. Ct. 386, C.D. 3637, C.D. 3637 (1968)). Applying this concept to the product at issue, the court must consider whether the minced pieces of the subject merchandise define the character of the subject merchandise. Altogether, the pieces equivalent in size to a mince do not predominate to such an extent that they “distinguish what it is.” *See id.*

Plaintiff and defendant propose different formulas to determine the precise meaning of “minced” under the statute. Neither formula provides a basis for the court to find that the subject merchandise as a whole should be considered minced. Plaintiff’s preferred definition for minced “includes food products that have been chopped or cut into very small pieces with a surface area of 1/16 of an inch or less.” Pl. Br. at 22. Defendant favors a definition that emphasizes uniformity of texture and shape. Def. Br. at 13. For defendant, “[a] mince is not just tiny or very small pieces, but the smallest sized pieces that can be measurably cut . . . .” Def. Br. at 13.

Neither plaintiff’s nor defendant’s framework provides a basis on which the court may conclude that minced pieces define the character of the subject merchandise. According to plaintiff, through its formula, “significantly more than 82% of one product [Tuna Salad Chunk Light] has the requisite surface area to meet the requirement of “minced” and “significantly more than 58%” of the other product [Tuna Salad Albacore] contains the requisite surface area. Pl. Br. at 21. Even these proportions, however, do not meet the plaintiff’s own definition of minced, which states that food products must have been chopped or cut into pieces “with a surface area of 1/16 of an inch or less.” Pl. Br. at 22 (emphasis supplied). Plaintiff’s definition of a minced cut suggests that there is a limit to the size — measured by surface area — of what constitutes a “minced” piece, and as defendant notes, some of the pieces are as much as twelve times that size. *See* Customs Laboratory Reports; Quinones Dep. While some of the pieces are the size of a “mince,” according to plaintiff’s own definition, the variation in the surface area of the pieces shows that the subject merchandise’s character as a whole should not be considered minced because it contains pieces that are varied in size and shape.

The subject merchandise also does not meet defendant’s definition of minced. Even without specific measurements to define a “mince,” the wide range of piece sizes and lack of uniformity contribute to the conclusion that the product is not minced. Significantly, these larger pieces impart the fundamental character of the tuna as a whole, which is comprised of pieces of varying sizes, lacks uniformity and

contains chunks. *See* Laboratory Photos. Indeed, as noted above, some of the pieces are substantially larger than others, and the overall consistency is “chunky.” *See* Laboratory Reports; Quinones Dep. A mince, according to both parties’ definitions, is small and relatively uniform in size, which suggests that a mince is not chunky in texture or shape. However, in StarKist’s products, the presence of certain tuna pieces equivalent in size to minced tuna is purely incidental; the defining character is more accurately described as chunky, with pieces of varying size. One variety of the products at issue is even marketed as “Tuna Salad *Chunk* Light.” (Emphasis supplied). As such, “minced” does not properly characterize the subject merchandise as a whole, no matter which definition is used.

## 2. The Tuna Pieces Are Not the Product of a Minced Cut

The tuna here is not the product of a minced cut, which further compels classification as “in pieces, but not minced.” The tariff language — specifically, the use of the verb form of “minced” rather than the noun “mince” — suggests that the process by which the pieces are created is critical to determining whether they fall within the meaning of the provision.

Both plaintiff’s and defendant’s definitions of “minced” involve consideration of not only the *size* of the pieces but also the *process* by which StarKist cuts or chops the tuna to produce those small pieces. As noted above, defendant’s definition states that “[a] mince is not just tiny or very small pieces, but the smallest sized pieces that can be measurably cut . . . .” Def. Br. At 13. In other words, a mince is the product of cutting pieces as small as they can be cut. Plaintiff’s definition “includes food products that have been chopped or cut into very small pieces with a surface area of 1/16 of an inch or less.” Pl. Br. at 22. This definition is even more explicit that cutting or chopping must serve as the method that produces the small pieces; the process of cutting is as integral to this definition as the small size of the resulting pieces. Thus, based on both definitions, the small pieces of a minced cut are the product of a purposeful process that involves cutting or chopping. Taking into account the size, shape and texture characteristics of what constitute minced pieces as well as the process by which they are produced, the court concludes that mincing may be defined as cutting or chopping into very small pieces.

While StarKist’s production process involves some chopping, Morales Decl. ¶¶ 30–34; Exhibits C and D, ECF No. 60, its process for producing the tuna pieces differs sharply from mincing. Here, for both the Albacore and the Chunk Light tuna, cooked tuna loins are passed through a chopper with four blades, set to achieve a thickness chunk

of 0.8–1.0 inches for Albacore and 1.0–1.5 inches for Chunk Light. Morales Decl. ¶ 34. An operator then hand-folds the tuna pieces and the mayonnaise-based dressing for about 18–20 minutes, breaking up some of the larger pieces. Morales Decl. ¶ 30 and Exhibits C and D. Thus, the pieces produced by the chopping are substantially larger than the plaintiff's own “1/16 of an inch or less” definition of minced. It is only when an operator hand-blends the tuna with the dressing, after the chopping phase is already complete, that the requisite “very small pieces” are produced. The formation of these pieces by hand-blending — rather than the chopping that characterizes production of a minced cut — illustrates that the subject merchandise is not the product of a minced cut.

The products at issue in this case are properly classified as “not minced” because they consist of pieces that are varied in size, some of which are significantly larger than “very small” or “1/16 of an inch”; and because the small pieces are not the product of a minced cut but of a hand-blending process. As such, the fish is properly classified under HTSUS 1604.14.10 because the subject merchandise consists of fish that is “in pieces, but not minced.”

## **B. In Oil**

HTSUS Subheading 1604.14 contains three categories at the six-digit level: 1604.14.10 covers “tunas and skipjack, in airtight containers, *in oil*,” 1604.14.22 covers “tunas and skipjack, in airtight containers, *not in oil*,” and 1604.14.30 covers “other: albacore in foil or other flexible containers; other: in foil or other flexible containers; other.” (Emphasis supplied). The tuna products at issue are “in oil,” so the correct classification is 1604.14.10.

### **1. Any Amount of Oil Is Sufficient to Render a Product Packed in Oil**

To qualify as “in oil” under HTSUS Heading 1604, Additional U.S. Note 1 clarifies that the subject merchandise must be “packed” in oil. HTSUS Chapter 16, Additional Note 1. However, the Note does not provide specific guidance as to how much oil must be present in the packing medium for fish to be packed “in oil.” In 2013, the Court of Appeals for the Federal Circuit (“Federal Circuit”) provided guidance on this issue. In *Del Monte Corp. v. United States*, the merchandise at issue was three varieties of tuna fillets and strips packed in a sauce. 730 F.3d 1352 (Fed. Cir. 2013). The tuna was processed separately from the sauce, which was added only after the tuna was placed into its packaging. *Id.* at 1353. The sauce contained sunflower oil, which constituted a range between 3.1 and 12.4 percent of the sauce’s

weight across the three products. *Id.* The court ruled that the products were properly classified as “in oil” because the tuna was not cooked in oil and the sauce was added after the cooking process:

Del Monte’s products were properly classified as “in oil” under subheading 1604.14.10 according to Additional U.S. Note 1. It is undisputed that the tuna is not cooked in oil, that the tuna is placed in the packaging after being prepared without using any oil, and that a sauce containing some oil is then added to the pouch. That is sufficient to describe the Lemon Pepper and Lightly Seasoned varieties as tuna “packed . . . in added oil . . . and other substances” and thus to bring the goods within the scope of subheading 1604.14.10.

*Id.* at 1355. The court interpreted Additional U.S. Note 1 to clarify that “goods are considered ‘in oil’ even if the liquid substance does not consist entirely of oil, and [Additional U.S. Note 1] sets no minimum threshold for the amount of oil that must be present.” *Id.* (internal quotations in original). The court relied on this interpretation in holding that even a very small percentage of oil, between 0.62 and 2.48 percent of the total weight of the merchandise, was sufficient for the merchandise to be classified as packed “in oil.” *See id.*

## 2. A Product is Packed in Oil If the Oil is Added After the Preparation of the Product

Additional Note 1 to HTSUS Chapter 16 places no temporal requirements on when the addition of oil occurs to render a product “in oil.” Note 1 also specifically covers oil “introduced at the time of packing or prior thereto” and case law further substantiates the plain language of the statute. This Court’s predecessor, the United States Customs Court, first had occasion to interpret the term “in oil” in 1915, when that court held that a fish product that contained oil was properly classified as “in oil” without regard to whether the oil originated from the cooking process or the sauce. *Strohmeyer & Arpe Co.*, 5 U.S. Cust. App. at 527. In *Strohmeyer*, the plaintiff manufactured a fish product that was both fried in oil and packed in a tomato sauce that contained oil. *Id.* The final product contained approximately 5.7 percent oil, with an indeterminate small share that originated from the frying oil. The court held that it did not matter how the oil came to be present in the tomato sauce — the mere presence of oil in the packing medium (i.e., the tomato sauce) was sufficient for the merchandise to be considered “packed” in oil. *Id.*

Over 40 years later, the court qualified its holding in *Strohmeyer* and determined that a clear distinction exists between the preparation and packing stages for the purposes of the tariff provision. In



*Richter Bros.*, the fish product was fried in oil but not mixed with any dressing that itself contained oil. 44 C.C.P.A. at 128. “It appears that whatever oil was contained in the tins in which the herring were packed, if indeed there was any, consisted of the natural oil of the fish, plus any residue from the herring oil and tallow in which the fish were fried.” *Id.* at 129. The court cited revisions to Paragraph 718(a) of the Tariff Act of 1930, which resulted in the addition of the phrase “prepared or preserved in any manner” before “packed in oil.” *Id.* at 130. The court interpreted the revision as clarifying that the provision does not include fish products in which no oil was added after the fish was “prepared or preserved.” *Id.* The court relied on this interpretation in holding that fish, which was fried in oil, drained, and then packed in a liquid without oil, was not “packed in oil” because “no oil whatever [*sic*] was used in the actual packing process.” *Id.* at 131. The key contribution of the *Richter Bros.* court to the precedent of *Strohmeyer* is the distinction between oil added during the preparation stage and oil added during the packing stage. That distinction results in the implication that the preparation stage ends after cooking.

The summation of these prior cases is that if the fish is cooked in oil and no oil is present in the dressing (as in *Richter Bros.*) then the fish cannot be said to be “packed” in oil for HTSUS purposes. But if the fish is mixed with a dressing or sauce that contains oil — as in *Strohmeyer* and *Del Monte*— then it is considered “packed” in oil, regardless of the cooking method. Therefore, *Richter Bros.* and *Del Monte* stand for the proposition that the addition of oil after the fish is prepared (cooked) renders the fish “in oil.” There is a window of time — which begins after the fish is cooked and ends when the package itself is closed — and the addition of any oil within this time period renders the product “in oil.” The introduction of oil during the packing “or prior thereto,” but after cooking, renders the product “in oil.”

### **3. StarKist’s Products are Packed In Oil**

It is undisputed that StarKist’s products contain enough oil to be considered “in oil” for tariff classification purposes because any amount of oil is sufficient. In addition, the oil is added to StarKist’s products after the preparation stage, so the products are “packed” in oil. Therefore, classification under HTSUS 1604.14.10 is proper.

#### **i. StarKist’s Products Contain Enough Oil To Be Classified as In Oil**

The subject merchandise at issue falls squarely within HTSUS 1604.14.10 as fish “in oil.” The tariff provision does not set a minimum

oil content threshold. Moreover, the presence of oil in this case is not seriously in dispute, and the oil content of the subject merchandise here is very similar to the oil content of the products at issue in *Del Monte*, which were found to be “in oil.” See 730 F.3d at 1355.

The subject merchandise in this case contains tuna fish that is packed in a mayonnaise dressing. The parties agree that the white meat mayo base dressing used in the Tuna Salad Albacore products contains 12.82 percent soybean oil by weight. Pl. Stmt. Facts ¶¶ 31–32; Def. Resp. Pl. Stmt. ¶¶ 31–32. The parties disagree about the oil content of the light meat mayo base dressing used in the Tuna Salad Chunk Light products. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. Plaintiff contends the light meat mayo base contains 12.18 percent oil by weight, while defendant argues the light meat mayo base contains 12.82 percent oil by weight. *Id.* However, this slight discrepancy is immaterial because any amount of oil is sufficient. See *Del Monte*, 730 F.3d at 1355.

In addition, the parties agree that the Tuna Salad Albacore products have a total oil content of 4.42 percent by weight. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. The parties disagree about the total oil content of the Tuna Salad Chunk Light products because of the disagreement about the oil content of the light meat mayo base dressing, but the difference between the oil content levels is also immaterial because any amount of oil is sufficient. See *Del Monte* 730 F.3d at 1355; Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. Therefore, the oil content of StarKist’s finished products is well beyond the threshold articulated by the court in *Del Monte* as sufficient to render those products “in oil.” See 730 F.3d at 1355 (holding that a total oil content of only 0.62 percent by weight was enough for a product to be “in oil”).

## ii. The Oil in StarKist’s Products is Added After the Preparation Phase

The facts in this case are similar to *Del Monte*—tuna products that were not fried or otherwise prepared in oil but were mixed with a dressing that contained oil. Plaintiff attempts to distinguish the present case from *Del Monte* by contending that StarKist’s products are combined with the dressing in the preparation phase, before they are placed in the packaging (the packing phase). Pl. Br. at 28. Plaintiff contends that the merchandise in this case is more like that in *Richter Bros.* because here the dressing containing oil was added during the preparation phase, as in *Richter Bros.* — not during the packing phase as with the products in *Del Monte*. *Id.*

To reach this conclusion, plaintiff advances a novel argument that the preparation phase includes an additional step beyond cooking,

namely, hand-mixing the tuna with the dressing containing oil. *Id.* It follows from plaintiff's argument that the preparation stage continues until the product is physically placed in its packaging (the packing phase). *Id.* However, plaintiff mistakenly conflates preparation of the finished product — tuna salad — with preparation of the fish itself. The operative term in HTSUS Heading 1604 is “prepared or preserved fish.” The plain reading of this term is that “prepared or preserved” modifies the word “fish.” Plaintiff's argument that preparation refers instead to the product as a whole misconstrues the plain meaning of Heading 1604. Plaintiff's interpretation also directly conflicts with the interpretation of the *Richter Bros'* court that the term “prepared or preserved in any manner” refers to the fish itself, not the entire manufacturing process of the finished product.

In addition, no prior case has held that the preparation phase includes the addition of other ingredients after cooking. *See Richter Bros.*, 44 C.C.P.A. at 129 (finding that “after the fish had been cooked, as much of the oil as possible was drained off . . . the preceding steps relate to preparation, as distinct from packing”); *see Del Monte*, 730 F.3d at 1353 (finding that “the tuna is not cooked or prepared in oil and is processed separately from the sauce”). Plaintiff's reading of the statute here requires that the court interpret this provision in a way that belies the plain language of the statute and is inconsistent with prior case law.

StarKist carries out the preparation phase by cooking the tuna in a “pre-cooker” that does not use oil. Pl. Stmt. Facts ¶ 12–15. After the cooking phase, the tuna is chopped into smaller pieces and hand-mixed with the mayonnaise dressing, which contains oil. Pl. Stmt. Facts ¶ 22. The mixture is then physically placed in its packaging (“Filling and Finishing Phase”). Pl. Stmt. Facts ¶ 5.

During oral argument, plaintiff argued that the “or prior thereto” language “was inserted . . . to catch a situation where [*sic*] you have a pouch that you first fill with oil and then add fish. That's certainly considered to be in oil, because the oil is part of the packing process.” Transcript of Oral Argument at 40.

Additional U.S. Note 1 makes clear that a product is properly considered to be “in oil” regardless of “whether such oil . . . was introduced at the time of packing *or prior thereto*.” (Emphasis supplied). Plaintiff would like the court to draw an arbitrary distinction between the addition of oil before the fish is placed in its packaging and afterwards. However, if the tuna in *Del Monte* was combined with the oil-based dressing in a separate container minutes before being

placed in the pouch, plaintiff's interpretation would lead to the result that the fish is not "in oil" because the oil was not introduced within the confines of the packaging.

The distinction proffered by plaintiff is not supported either by the plain meaning of the Note, or the holdings in *Richter Bros.* and *Del Monte*. The hypothetical adapted from *Del Monte* bears great similarity to the process used to make StarKist's products. Classifying StarKist's products as "not in oil" simply because the oil was introduced in a large container before the mixture was transferred to several smaller containers would narrow without support the language of Note 1.

The products in this case are properly classified as "in oil" under HTSUS 1604.14.10. Both the Chunk Light and Albacore products contain enough oil to be considered "in oil." In addition, classification under 1604.14.10 is proper because the oil was added to the cooked fish as a separate dressing after preparation and prior to packing.

#### **D. Classification of the Lunch-To-Go-Pouches**

As noted previously, some of the subject merchandise is imported in the form of "Lunch-to-Go" kits. These kits include crackers, mint, napkins and a spoon, in addition to the tuna. Pl. Stmt. Facts ¶ 2. Therefore, the kits consist of materials that are properly classifiable under five different HTSUS headings. When goods are, *prima facie*, classifiable under two or more headings, GRI 3 applies to the classification. Under GRI 3(a), when "two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods." That is the case here, as it is undisputed that the to-go pouches constitute "a set put up for retail sale." Pl. Br. 29–31. Def. Br. 22–23.

Accordingly, the "Lunch-to-go" kits are classified according to GRI 3(b). GRI 3(b) specifies that the product "shall be classified as if they consisted of the material or component which gives them their essential character." Here again, it is undisputed that of the retail kit components, it is the tuna that imparts its essential character. Pl. Br. 29–31. Def. Br. 22–23. Therefore, the "Lunch-to-go" kits are properly classified under the same tariff provision as the tuna pouches: sub-heading 1604.14.10

## CONCLUSION

In the 2002 Walt Disney Feature Animation, *Lilo & Stitch*, Lilo, voiced by Daveigh Chase, arrives late to her hula dance class.<sup>5</sup> Lilo's sister does not see a difference between feeding Pudge a peanut butter sandwich or a tuna sandwich — both, after all, are food. Lilo, however, points out that while the sandwich has many components, it is, first and foremost, fish. The following conversation ensues between Lilo and her hula teacher, voiced by Kunewa Mook:

Hula Teacher: “Lilo, why are you all wet?”

Lilo: “It’s sandwich day. Every Thursday I take Pudge the fish a peanut butter sandwich . . .”

Hula Teacher: “Pudge” is a fish?”

Lilo: “And today we were out of peanut butter. So I asked my sister what to give him, and she said ‘a tuna sandwich’. I can’t give Pudge tuna!”

Lilo (*whispering*): “Do you know what tuna *is*?”

Hula Teacher: “Fish?”

Lilo: [*hysterical*] “It’s fish! If I give Pudge tuna, I’d be an abomination!”

Just like Lilo in *Lilo and Stitch*, the court must nibble on the question of what constitutes the essence of an item. While the subject merchandise consists of different components it is, first and foremost, “prepared or preserved fish,” which, viewed in its entirety, is “not minced” and “in oil.”

Dated: November 18, 2020

New York, New York

*/s/ Timothy M. Reif*  
TIMOTHY M. REIF, JUDGE

Slip Op. 20–169

TMB 440AE, INC. (FORMERLY KNOWN AS ADVANCE ENGINEERING CORPORATION), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge  
Court No. 18–00095  
**PUBLIC VERSION**

[Department of Commerce Scope Determination regarding Seamless Pipe from the People’s Republic of China is sustained.]

Dated: November 27, 2020

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<sup>5</sup> LILO & STITCH (Walt Disney Animation Studios 2002).

*Ned H. Marshak, Jordan C. Kahn, and David M. Murphy*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington D.C., and *Dale E. Stackhouse and Meghann C. T. Supino*, Ice Miller LLP, of Indianapolis, IN for Plaintiff TMB 440AE, Inc.

*Elizabeth A. Speck*, Senior Trial Counsel, and *Patricia M. McCarthy*, Assistant Director, Civil Division, U.S. Department of Justice, of Washington D.C., and of counsel *Vania Y. Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C. for defendant United States. With them on the brief were *Jeffrey B. Clarke*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director.

## OPINION

### Restani, Judge:

Before the court is the United States Department of Commerce’s (“Commerce”) *Final Results of Second Remand Redetermination*, ECF No. 57–1 (Jul. 20, 2020) (“*Second Remand Results*”) following the court’s opinion and order in *TMB 440AE, Inc. v. United States*, Slip Op. 20–44, 2020 WL 1672841 (CIT Apr. 6, 2020) (“*Second Remand Order*”). The court ordered Commerce to reconsider its determination finding that seamless pipe imported by TMB 440AE, Inc. (formerly known as Advance Engineering Corporation) (“AEC”) was within the scope of antidumping and countervailing duty orders on certain seamless pipe from the People’s Republic of China (“PRC”). *Id.* at \*5–7; see also *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 Fed. Reg. 69,052 (Dep’t of Commerce Nov. 10, 2010) (“ADD Order”); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 69,050 (Dep’t of Commerce Nov. 10, 2010) (“CVD Order”) (collectively, the “Orders”). The court required Commerce to consider the sources listed in 19 C.F.R. § 351.225(k)(1) (“(k)(1) sources”) in making its assessment of the scope of the Orders and to proceed to consider the factors listed in 19 C.F.R. § 351.225(k)(2) (“(k)(2) factors”) if these sources were not dispositive. *Second Remand Order* at \*5–7.

Following remand, and after consulting those (k)(1) sources, Commerce continues to find that AEC’s pipe is within the scope of the Orders. See *Second Remand Results* at 2. For the reasons stated below, Commerce’s determination is sustained.

## BACKGROUND

The court presumes familiarity with the facts of this case and will recount them only as necessary. The Orders cover certain seamless pipe from the PRC,<sup>1</sup> but exclude:

- (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A-335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, i.e., outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications.

ADD Order, 75 Fed. Reg. at 69,052–53; CVD Order, 75 Fed. Reg. at 69,051. The Orders were issued on November 10, 2010, but AEC did not receive a Notice of Action from United States Customs and Border Protection (“CBP”) until October 3, 2016, informing AEC that it was subject to duties pursuant to the Orders. *See Second Remand Results* at 1 n.4, 44. On October 20, 2017, AEC requested that Commerce conduct a scope ruling. *See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to the Sec’y of Commerce on behalf of AEC re “Advance Engineering Corporation Scope Request,” A-570–956, C-570–957, P.R. 1–4, C.R. 1–4, at 1 (Oct. 20, 2017) (“AEC Scope Request”).*

Commerce determined that the AEC pipe fell within the language of the Orders and did not meet the criteria to satisfy any exclusion. *See TMB 440 AE, Inc. v. United States*, 399 F. Supp. 3d 1314, 1317 (CIT 2019) (“*First Remand Order*”). AEC asserted that its pipe fell within the “aerospace specification” exclusion or should otherwise be excluded because, in its view, the Orders were not intended to cover its specialized pipe. *See id.* at 1317, 1319. Without consulting the (k)(1) sources, Commerce determined that the Orders were unam-

<sup>1</sup> The Orders cover:

[C]ertain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (e.g., hot-finished or cold-drawn), end finish (e.g., plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (e.g., bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or “hollow profiles” suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials (“ASTM”) or American Petroleum Institutes (“API”) specifications referenced below, or seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A-53, ASTM A-106, ASTM A-334, ASTM A-589, ASTM A-795, ASTM A-1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application[.]

ADD Order, 75 Fed. Reg. at 69,053; CVD Order, 75 Fed. Reg. at 69,051.

biguous and clearly included AEC's pipe. *See id.* The court held that Commerce was required to consult these sources in determining if AEC's pipe was properly included in the scope of the Orders and remanded for reconsideration. *See id.* at 1322. On remand, Commerce consulted the (k)(1) sources and determined that AEC's pipe did not satisfy either the "aerospace specification" exclusion or the ASTM A-335 specialized pipe exclusion. *See Final Results of Remand Redetermination*, ECF No. 44-1, at 6-12, 16-18 (Nov. 11, 2019) ("*First Remand Results*"). The court sustained Commerce's determination that AEC's pipe did not fall within the "aerospace specification" exclusion, *see Second Remand Order* at \*2-4, but determined that Commerce misapprehended the question at hand and needed to further explain whether the Orders covered pipe with the claimed specialized properties of AEC's pipe. *Id.* at \*4-7.

On second remand, after consulting the (k)(1) sources as instructed by the court, Commerce determined once again that AEC's pipe fell within the scope of the Orders. *Second Remand Results* at 1-2. Commerce determined that the (k)(1) sources were dispositive and maintained that the term "commodity" pipe<sup>2</sup> as used in the sources was never meant to define the scope of the Orders to the exclusion of specialized pipe like AEC's pipe. *See id.* at 24, 43. Commerce determined that the properties of AEC's pipe were not sufficiently analogous to ASTM A-335 pipe, ultimately finding that the reasons behind the ASTM A-335 exclusion did not apply to AEC's pipe. *See id.*

AEC contends that Commerce's determination was not supported by substantial evidence because an analysis of the (k)(1) sources revealed that the Orders were intended to apply solely to "commodity" pipe and exclude pipe with AEC's specialized properties. *See Pl.'s Cmts. On Second Remand Redetermination*, ECF No. 60, at 22-25 (Aug. 19, 2020) ("AEC Br."). In addition, AEC argues that the reasons underlying the creation of the A-335 specialized pipe exclusion also apply to AEC's pipe. *See id.* at 7-8. In the alternative, AEC contends that the (k)(1) sources do not clarify the Orders and that Commerce was required to conduct a full scope inquiry and consider the (k)(2) factors. *See id.* at 7. Finally, if AEC's pipe is within the scope of the Orders, AEC contends that Commerce cannot impose antidumping and countervailing duties retroactively, and that its instruction to CBP to continue to suspend liquidation of entries of AEC's pipe was contrary to law. *See id.* at 3, 28-31.

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<sup>2</sup> AEC uses the term "commodity" pipe to refer to standard, "off the shelf" pipe that has no specialized properties. For further discussion of this term see Section I(B) of this opinion.



## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court has authority to review Commerce's determination finding that merchandise falls within an antidumping or countervailing duty order. 19 U.S.C. § 1516a(a)(2)(B)(vi). The determination will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). A remand redetermination is "also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (CIT 2014) (internal quotation and citation omitted).

"Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002). Although Commerce has the authority to clarify an order's scope, it cannot interpret an order "in a way contrary to its terms." *Whirlpool Co. v. United States*, 890 F.3d 1302, 1308 (Fed. Cir. 2018) (internal quotation and citation omitted).

## DISCUSSION

Commerce is required to use the (k)(1) sources to ascertain the meaning of ambiguous language in scope orders. *See* 19 C.F.R. § 351.225(k)(1). These sources are particularly useful in contexts where the language of the orders may have a specific meaning based on the context in which it was used during the underlying investigation. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014) ("[T]he reason why the (k)(1) sources are afforded primacy in the scope analysis is because interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations."). Thus, on second remand, Commerce considered the (k)(1) sources to assess the reasoning behind the ASTM A-335 exclusion to see if that reasoning applied to AEC's pipe. Commerce also examined the (k)(1) sources to ascertain the intended meaning behind the term "commodity," which was used sporadically during the investigation, to determine whether it revealed an intention to exclude specialty pipe (like AEC's) from the Orders. After finding that AEC's pipe fell within the scope of the Orders, Commerce also instructed CBP to continue to suspend liquidation of entries of AEC's pipe. CBP Messages 8110301 & 8110302 re: "Scope Determination on Countervailing/Antidumping Duty Order on Specialized Seamless Pipe (AEC Pipe) from the People's Republic of China

(China) (C-570-957; A-570-956),” (Apr. 20, 2018) *available at* <https://aceservices.cbp.dhs.gov/adcvdweb/#messageDetails> (last visited Nov. 20, 2020) (enter “8110301” and “8110302” into search bar in top left corner; click “Search;” click on “8110301” or “8110302” in the results to access Message Body) (“Instructions to CBP”).

## **I. Inclusion of AEC Pipe in the Scope of the Orders**

Commerce focused its review of the (k)(1) sources on three questions: (1) what standard, line and pressure (“SLP”) applications or end-uses were covered by the Orders, (2) how was the term “commodity” used in the sources, and (3) what reasons motivated Commerce’s exclusion of ASTM A-335 pipe from the scope of the Orders, based on instructions provided by the court when the case was remanded. *See* Def.’s Resp. to the Parties’ Cmts. On the Dep’t of Commerce’s Final Results of Redetermination, ECF No. 63, at 7 (Sept. 17, 2020) (“Gov. Br.”); *Second Remand Results* at 24–34; *see also Second Remand Order*, at \*5–7.

### *A. Standard Application of Pipe as Referenced in Petition and ITC Proceedings*

For the first question, Commerce looked to the language of the Petition and subsequent supplements, as well as language from the ITC proceedings to find that the Petitioners did not intend to exclude pipes designed for non-industrial purposes. *See Second Remand Results* at 24. In reviewing the Petition, Commerce noted that only line and pressure applications are described in industrial terms, whereas the standard application for pipe is defined as “conveyance of water, steam, natural gas, air, and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses.” U.S. Steel Corp., “Petition for the Imposition of Antidumping and Countervailing Duties,” A-570-956 and C-570957, ECF No. 65, P.R. 1–4, C.R. 1–4, Exhibit L at 5, J.A. 246 (Sep. 16, 2009) (“Petition”). Commerce observed that some of these uses and systems (e.g., air conditioning units, sprinkler systems, plumbing and heating systems) are common in non-industrial settings and support an inference that the standard application pipe described in the (k)(1) sources was meant to cover residential uses. *See Second Remand Results* at 8.

As part of its analysis of the (k)(1) sources, Commerce also reviewed its own recommendation to edit and then remove end-use language from the Orders by examining the Petition and subsequent supplements, and found that the Petitioners did not originally include end-use language as a way of limiting the scope to particular industries,

but rather because they were concerned that Chinese producers would circumvent the Orders simply by altering their pipe's specifications. *See id.* at 9–11; *see also* U.S. Steel Corp., “Amendment to the Petition for the Imposition of Antidumping and Countervailing Duties,” A-570–956 and C-570–957, ECF No. 65–1, P.R.R. 7–12, Exhibit 3 at 6–7, J.A. 97–98 (Sep. 25, 2009) (“First Supplement”); U.S. Steel Corp., “Amendment to the Petition for the Imposition of Antidumping and Countervailing Duties,” A-570–956 and C-570–957, ECF No. 65–1, P.R.R. 7–12, Exhibit 5 at 2–3, J.A. 133–34 (Sep. 29, 2009) (“Second Supplement”). Petitioners accepted Commerce’s suggestion to remove end-use language from the scope because they were convinced that the scope as written would sufficiently address this concern. *See Second Remand Results* at 11.

In reviewing the ITC documents as part of its analysis of (k)(1) sources, Commerce also observed that the ITC had a broad view of the industries covered by the Orders because the ITC noted that seamless SLP pipe is used “in mechanical applications for general construction.” *Second Remand Results* at 20; *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China (Preliminary)*, USITC Pub. 4106, Investig. Nos. 701-TA-469, 731-TA1168, at 6 (Nov. 2009) (“ITC Preliminary Report”); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China Prehearing Report to the Commission (Final)*, Investig. Nos. 701-TA-469, 731-TA-1168 at II-1, II-10 (Aug. 30, 2010) (“ITC Prehearing Report”). Commerce inferred that general construction includes more than just industrial or commercial piping systems uses. *See Second Remand Results* at 21. Finally, Commerce noted, however, that AEC’s pipe is used in various industrial settings based on AEC’s description of the pipe’s uses in “Gate Station fabrications,” “meter sets by the natural gas industry” and “dairy, food, agriculture, medical, and aerospace industries.” *See Second Remand Results* at 26; AEC Scope Request at 3.

AEC contends that its pipe is not used in “general construction” but rather serves “a niche market that requires malleable pipes that ...bend without cracking or splitting in tight spaces, whether in residential or other settings.” AEC Br. at 21. In fact, AEC claims that its argument was never about whether the (k)(1) sources reveal that the Orders cover commercial or residential end users, but rather contends that its pipe’s application was non-standard in nature because it served a niche market seeking malleable pipe. *Id.* at 21–22. Thus, it argues that its pipe is not interchangeable with standard pipe. *Id.* at 21. Commerce observed that flexibility and malleability were never

discussed in the (k)(1) sources or in the scope language as relevant characteristics for determining whether pipe is excluded from the Orders. *Second Remand Results* at 26, 38. Thus, flexibility and malleability alone are likely insufficient to establish that AEC's pipe falls outside the scope of the Orders.

Commerce's inference that the scope language covers non-industrial settings drawn from the general description of standard pipe, including its use in "air conditioning units" and "plumbing and heating systems," is reasonable as these systems and units are found in nonindustrial settings. *Second Remand Results* at 8. Commerce's understanding is further supported by ITC's discussion of "general construction," which can reasonably be interpreted to include both residential and industrial settings. See ITC Preliminary Report at 6; see also ITC Prehearing Report at II-1, II-10; *Second Remand Results* at 20–21.

#### B. *The Term "Commodity"*

AEC contends that an analysis of the (k)(1) sources reveals that the Orders were meant to cover "commodity" pipe and exclude specialized pipe. AEC argues that "commodity" is consistently used "to broadly distinguish 'standard' or 'ordinary' from custom or specialized pipe." AEC Br. at 17. Specifically, AEC argues that a review of the use of the term "commodity" in the (k)(1) sources reveals that the Petitioners were concerned with standard, "off the shelf" pipe, and not with specialized pipe for niche markets. See AEC Br. at 16–19. AEC contends its pipe's "tight tolerances and chemical specifications" render it materially different from the pipe covered by the Orders, making it "much more malleable, smoother, less subject to rust and corrosion, and more precise in its dimensions" and that it should thus be excluded as specialized pipe. See AEC Br. at 14; AEC Scope Request at 5–8, Exhibit B, Exhibit C (comparing AEC pipe specifications to subject pipe).

Commerce, in its administrative review, determined that Petitioners did not intend to use the term "commodity" to define the scope of the Orders and exclude certain specialized pipes. Commerce identified inconsistent uses of the term "commodity" throughout the investigation, suggesting that the term did not have a clear meaning and was not meant to create a general exclusion for specialized pipe. Commerce found that "commodity" was used in two ways: (1) to distinguish "mechanical tubing," an explicitly excluded product, from covered pipes, and (2) to describe a subsection of explicitly included

pipes, quad-stenciled pipes. *Second Remand Results* at 24. The (k)(1) sources describe differences between mechanical tubing and “commodity” pipe such as custom sizing, more exacting requirements, and lower prices. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From China: Hearings Before the United States International Trade Commission*, ECF No. 65–1, P.R.R. 7–12, Exhibit 36 at 68, J.A. 1392 (Sept. 14, 2010) (testimony of George Thompson); U.S. Department of Commerce, Memorandum from Analyst to File re: “U.S. Customs and Border Protection’s Inquiry Regarding Mechanical Tubing,” ECF No. 65, P.R. 1–4, C.R. 1–4, Exhibit J at 1, J.A. 240 (June 24, 2010) (“DOC CBP Memo”).<sup>3</sup>

“Commodity” is also used in a Preliminary Conference before the ITC by counsel for one of the Petitioners to describe quad-stenciled pipe, which is pipe stenciled to four specifications: ASTM A-106, ASTM A-53, API 5L-B, and AP15L-X42. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China: Preliminary Conference Before the United States International Trade Commission*, ECF No. 65–1, P.R.R. 7–12, Exhibit 23 at 113, J.A. 444 (Oct. 7, 2009) (“ITC Preliminary Conference”) (testimony of Roger Schagrin); *see also Second Remand Results* at 18. Commerce noted that the Petition explicitly included pipe that is stenciled to specifications outside of these four specifications. *See* Petition at 5–6. On remand, Commerce determined that “commodity” is used in this context to refer to the “predominant (but not sole) focus of the petitioners’ concern,” because if the Orders were only meant to cover quad-stenciled pipe as “commodity” pipe, as implied by counsel’s use of the term in the ITC Preliminary Conference, *see ITC Preliminary Conference* at 113, the scope of the Orders would be severely narrowed. *Second Remand Results* at 18–19; *see also* Petition at 5–6.

Commerce observed that mechanical tubing is distinguished from “commodity” pipe in the (k)(1) sources through its non-standard sizing individually customized for each customer, *Second Remand Results* at 23–24, and while AEC’s pipe may be specialized,<sup>4</sup> it is not customized prior to importation. *Second Remand Results* at 30.

Commerce’s determination that “commodity” is used in different contexts to mean slightly different things, but not to generally exclude all specialized pipe, is also supported by a letter of record. In a

<sup>3</sup> *See* DOC CBP Memo (“Generally, the seamless standard, line and pressure pipes are commodity products made to standard pipe sizes (outside diameters and wall thicknesses) whereas mechanical tubing is custom designed to meet a customer’s needs and is generally not produced with the standard pipe diameters and wall thicknesses found in seamless standard, line, and pressure pipes.”).

<sup>4</sup> AEC points to its pipe’s flexibility, unique end use, and niche market to argue that its pipe belongs in the specialized pipe category. *See* AEC Br. at 17–18.

letter from Salem Steel advocating for an exclusion from the scope for aviation, hydraulic and bearing tubing, Salem Steel pointed out that these tubes should be excluded because they were “types of mechanical tubing and because they [were] not commodity products.” Letter from Dorsey & Whitney LLP to the Sec’y of Commerce on behalf of Salem Steel re: “Response to Commerce Department’s June 23 Proposal to Change Scope Language to Exclude Mechanical Tubing,” A-570–956, ECF No. 65, P.R.R. 1–4, Attachment 3 at 2, J.A. 331 (June 30, 2010) (“Letter from Salem Steel”). This phrasing could suggest that producers thought of mechanical tubing as one category for exclusion under the Orders and “non-commodity” pipe as a separate category for exclusion. Throughout the rest of the letter, however, the writers conflate the two categories, classifying Salem Steel’s pipe as specialized mechanical tubing, and describing how unlike seamless pipe (a “commodity” product), “mechanical tubing is a made-to-order product made according to strict engineering specifications for specific end uses, but with tight physical characteristics specified by the end-user.” *Id.* at 2–5. Other (k)(1) sources follow a similar pattern and support Commerce’s finding that “commodity” is primarily used to differentiate mechanical tubing, an explicitly excluded category, from covered pipe. “Commodity” is used to describe how “mechanical tubing” is different from subject pipe because it is not made to standard sizes, meets stronger engineering specifications, and is customized to a specific customer’s needs. *See* Letter from Salem Steel at 2–4, 6; DOC CBP Memo; Letter from Steptoe & Johnson LLP to the Sec’y of Commerce on behalf of MC Tubular Products, Inc. re: “Comments on the Department’s June 23, 2010 Proposed Scope Modification,” A-570–956, ECF No. 65–1, P.R.R. 7–12, Exhibit 18 at 4–5, J.A. 264 (June 30, 2010) (“Letter from MC Tubular”). This distinction ultimately became an explicit exclusion within the Orders, suggesting that any “non-commodity” pipe that was being referenced in these documents was limited to mechanical tubing. *See* ADD Order 75 Fed. Reg. at 69,053; CVD Order, 75 Fed. Reg. at 69,051 (“Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing...”).

Accordingly, Commerce’s determination that “commodity” as used in the (k)(1) sources was not meant to create a broad exclusion from the Orders for specialized pipe is supported by substantial evidence and is in accordance with law.<sup>5</sup>

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<sup>5</sup> AEC notes that the Petition does not name AEC as a producer, importer, or seller of subject merchandise or in any other capacity. *See* Petition at 5–6, Exhibit I-11, Exhibit I-14; *see also* AEC Scope Request at 10–11. AEC argues that this demonstrates that “Petitioners did not

### C. A-335 Exclusion

The court ordered Commerce to consider if the reasons behind the A-335 pipe exclusion apply equally to AEC's pipe such that AEC's pipe should be excluded from the Orders. *See Second Remand Order* at \*5. During the investigation, language was added to the Orders to explicitly exclude A-335 pipe after a request was made by Wyman-Gordon, a U.S. manufacturer of A-335 pipe. Letter from Wyman-Gordon Forgings Inc. to U.S. Dep't of Commerce re: "Certain Seamless Steel Pipe from China," A-570-956, ECF No. 65-1, P.R.R. 7-12, Exhibit 8 at 2, J.A. 145 (Oct. 27, 2009) ("Letter from Wyman-Gordon"). Commerce contends that no reasoning was explicitly considered or endorsed by Commerce in the creation of this exclusion because Petitioners themselves requested that the exclusion be included in the scope language, *see* Petitioners' Letter, "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Request for Change in Scope Language," ECF No. 65, P.R.R. 1-4, Attachment 4 at 1-2, J.A. 423-24 (July 2, 2010) ("Petitioner's Letter to Exclude A-335"), and Commerce provided only the Wyman-Gordon letter as justification for this change in the scope language. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 75 Fed. Reg. 22372, 22374-75 (April 28, 2010) ("AD Preliminary Determination"). AEC points to language in the ITC proceeding and language provided in Wyman-Gordon's request to illustrate the reasoning behind the A-335 exclusion and to argue that these reasons apply equally to its pipe. AEC Br. at 7, 10-12. AEC also argues that the reasoning behind the A-335 exclusion is similar to that which applied to mechanical tubing, and that its pipe is analogous to both. *See id.*

In its letter to Commerce, Wyman-Gordon requested an exclusion for three products, including A-335 pipe, because "none of the other products covered by the petition are substitutable for any of the three products." Letter from Wyman Gordon at 2. The Commission examined AEC as a market competitor, or AEC Pipe as subject merchandise." *See* AEC Br. at 9. As further support for the argument that the domestic industry has no interest in AEC's pipe and does not consider it to be covered by the Orders, AEC also highlights the fact that Petitioners have not opposed AEC's motion or participated in AEC's scope inquiry. *See* AEC Br. at 9. In response, Commerce noted that the Petitioners specified that the data in this list "represent the best information reasonably available to Petitioners." Petition at 9-10; *See Second Remand Results* at 35-36, and further that it cannot make inferences about Petitioners' silence. *See Second Remand Results* at 36; Gov. Br. at 8 (citing *PT Pindo Deli Pulp & Paper Mills v. United States*, 825 F. Supp. 2d 1310, 1320 (CIT 2012) (holding that "the failure to name foreign producers, of which Petitioners [were] not aware, does not demonstrate an intent to exclude those producers from the investigation").

ined the reasoning behind the A-335 exclusion in more detail based on responses from U.S. producers who highlighted “differences in the customer base and in pricing practices,” and that A-335 pipe is “higher priced than other forms of seamless SLP pipe.” ITC Prehearing Report at I-28, I-30. It also noted A-335’s high temperature applications (as compared to the lower temperature applications of subject pipe), which require different heat treatments and different chemistry. *See id.* at I-26–I-27. The ITC cited reports of lack of interchangeability between seamless pipe and A-335 pipe and noted that while A-335 pipe can be used in certain applications, specifically pressure applications appropriate for X<sup>6</sup> standard pipe, such “substitution was not deemed economical and was not possible in reverse.” *Id.* at I-28.

Commerce interprets the X standard pipe explanation to mean that Petitioners expected pipe that fell into the A-335 exclusion to at least meet the specifications for X standard pipe, a standard that AEC’s pipe does not meet. *Second Remand Results* at 29–30. AEC argues that Commerce’s interpretation cannot be clearly inferred from the ITC report and that the purpose of this section was to highlight the lack of interchangeability between the A-335 pipe and the subject pipe, rather than to establish a clear standard that must be met. *See* AEC Br. at 20. AEC contends that its pipe is not interchangeable with standard pipe because of its flexibility and ability to deliver gas in tight spaces and notes that its pipe is priced higher than seamless SLP pipe. *See* AEC Br. at 14, 26; AEC Scope Request at 5–8. AEC also pointed to its custom stencil: [[

]] to suggest that its pipe is not a “comparable specification” under the Orders but is instead a superior pipe. *See* AEC Scope Request at Exhibit C. Finally, AEC claims that it has been unable to domestically source its pipe. *See id.* at 8–10 (citing exhibits comparing its product to domestically available pipe). Thus, AEC concludes that its pipe is specialized and analogous to Wyman Gordon’s pipe and should be excluded from the scope of the Orders. *See* AEC Br. at 11–13, 22–24.

Commerce appropriately examined each of the (k)(1) sources and determined that the reasoning behind the A-335 exclusion was not elucidated by the Petitioner or accepted by Commerce when Commerce created the A-335 exclusion, as evidenced by Commerce’s stated reasoning for editing the scope language. *See* Letter from Wyman Gordon at 1–2; Petitioner’s Letter to Exclude A-335 at 1; *AD Preliminary Determination* at 22374–75. Commerce has now ad-

<sup>6</sup> In this opinion, X standard pipe will be used refer to an exact pipe specification for the purposes of protecting confidential information. [[ ]].



dressed AEC's claims by reviewing the (k)(1) sources and determining that the A-335 exclusion was granted because A-335 pipe is "superior" to seamless SLP pipe and that this superiority requires meeting at least the standard of X standard pipe. See *Second Remand Results* at 38–39. The ITC specifically noted that A-335 pipe can be stenciled to meet the X standard pipe specifications but that this substitution would be costly and impractical. ITC Prehearing Report at I-28. Commerce found an important distinction between AEC's pipe and A335 pipe by pointing out that AEC's pipe can be stenciled to meet the requirements of [ ] and, unlike A-335 pipe, cannot meet the requirements of X standard pipe. See *Second Remand Results* at 38–39.<sup>7</sup>

Commerce's conclusion in the Second Remand Results that the A-335 exclusion was meant to be narrow is also supported by Commerce's choice to modify the final scope language to exclude only A-335 pipe. See *Second Remand Results* at 12. It did not use other language proposed by Petitioners or further exclusions proposed by Wyman Gordon in its letter to Commerce. Compare Petitioner's Letter to Exclude A-335 at 2, and Letter from Wyman Gordon at 1–2, with ADD Order 75 Fed. Reg. at 69,053 and CVD Order, 75 Fed. Reg. at 69,051 ("all pipes meeting the chemical requirements of ASTM A-335"). Wyman-Gordon's request was based on the specialized nature of the three pipe products it produces. See Letter from Wyman-Gordon at 2 (emphasizing that "none of the other products covered by the petition are substitutable for any of the three products described above for which we believe we are the only US manufacturer"). Despite this alleged specialization, Commerce only excluded A-335 from the final scope, supporting Commerce's determination that the A-335 exclusion is narrow.

Thus, based on: (1) Commerce's interpretation of the ITC investigation to mean that pipe under the A-335 exclusion must meet at least the requirements of X standard pipe, and (2) Commerce's limited modification of the scope language to exclude A-335 pipe and not other products referred to by Petitioners and Wyman Gordon, Commerce's determination that AEC's pipe is included despite the A-335 exclusion is supported by substantial evidence and is in accordance with law.

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<sup>7</sup> While AEC's more generalized view of the ITC documents is another possible reading, this does not in and of itself mean that Commerce's findings are unsupported by substantial evidence. See *Viet I–Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016) (noting that the possibility of drawing multiple conclusions from the same evidence does not preclude Commerce's determinations from being unsupported by substantial evidence).

#### *D. Conclusion*

Upon review of the (k)(1) sources, Commerce has provided substantial evidence that AEC's pipe falls within the scope of the Orders. The court directed Commerce to examine the (k)(1) sources as required by law to understand the meaning of the Orders and, if the (k)(1) sources were not dispositive, to move on to the (k)(2) factors. *See Second Remand Order* at \*7. Here, Commerce has sufficiently analyzed the (k)(1) sources to determine that AEC's pipe falls within the scope of the Orders and is not subject to any exclusion. The (k)(1) sources are dispositive and Commerce's determination is supported by substantial evidence and is in accordance with the law.

## **II. Retroactive Assessment of Duties**

On April 20, 2018, after determining that AEC's pipe fell within the scope of the Orders, Commerce instructed CBP to "continue to suspend liquidation of entries of certain seamless carbon and alloy steel, line and pressure pipe from China, including AEC's AEC Pipe." Instructions to CBP. AEC contends that it would be "fundamentally unfair" to retroactively apply ADD/CVD duties to its product because the plain language of the ADD/CVD Orders did not unambiguously include AEC's pipe, and important records from the scope history that Commerce relied upon in making its scope ruling regarding AEC's pipe were not "readily accessible," as they were available in print and not in Commerce's online document repository, ACCESS. AEC Br. at 30.

AEC argues that the facts in this case are most similar to those in *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794 (Fed. Cir. 2020). AEC argues that in *United Steel*, the U.S. Court of Appeals for the Federal Circuit ("CAFC") found that there was a genuine issue as to whether the product was in scope and that the importer had relied on the government's failure to charge ADD/CVD duties, therefore "it was unlawful for Commerce to assess ADD liability from the issuance date of the ADD order" but rather, pursuant to 19 C.F.R. § 351.225(l)(3), "Commerce may suspend liquidation beginning 'on or after the date of initiation of the scope inquiry.'" *See* AEC Br. at 28–29 (citing *United Steel*, 947 F.3d at 801). Similarly, AEC argues that it was not on notice that its pipe might be subject to the Orders because it was not named in the Petition, *see* Petition at Exhibit I-11, was not invited to participate in the investigations that resulted in the Orders, and it had imported its pipe for years without paying ADD/CVD duties. AEC Br. at 29. In addition, AEC argues that the court has already decided that a portion of the Orders are "facially ambiguous" by deciding that the aerospace exclusion was unclear without review-

ing the (k)(1) sources. AEC Br. at 29 (citing *First Remand Order*, 399 F. Supp. 3d at 1321–23).

In response, the Government argues that the Orders are not ambiguous, that AEC's pipe clearly falls within the scope, and that the court's remand order requiring a (k)(1) source analysis does not necessarily imply that the Orders are facially ambiguous. See Gov. Br. at 16 (citing *First Remand Order*, 399 F. Supp. 3d at 1320). The Government contends that AEC was on notice that its product may fall within Commerce and ITC's investigations and had an opportunity to participate in the process because Commerce published initiation notices and the resulting Orders in the Federal Register as required by law. See Gov. Br. at 19; *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 74 Fed. Reg. 52,945 (Dep't of Commerce Oct. 15, 2009); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 74 Fed. Reg. 52,744 (Dep't of Commerce Oct. 14, 2009); CVD Order, 75 Fed. Reg. 69,050; ADD Order, 75 Fed. Reg. 69,052. In addition, the Government notes that AEC had access to all (k)(1) sources used in the scope ruling in paper form through the Department's Central Records Unit, and that Commerce was under no obligation to publish the documents online. See Gov. Br. at 20; see also *Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) ("Like the Court of International Trade, we conclude that the Federal Register notice did constitute notice as a matter of law.").

Finally, the Government points to recent case law from the CAFC which says that it is proper for Commerce to continue to suspend entries if CBP suspends the entries *before* the scope ruling, regardless of whether the orders were ambiguous. First, the Government notes that under *Quiedan Co. v. United States*, when the product is "clearly within the language of the ADD Order, considering the factors specified in § 351.225(k)(1)," and CBP has suspended entries prior to the scope ruling, Commerce has the authority to continue these suspensions. Gov. Br., at 16, 18 (citing *Quiedan Co. v. United States*, 927 F.3d 1328, 1333 (Fed. Cir. 2019)). The Government notes, and AEC does not dispute, that there is no evidence that CBP did not suspend entries prior to the scope ruling in this case. See Gov. Br., at 18 (citing *Second Remand Results* at 46). Second, even if the court found that the Orders were ambiguous as to the inclusion of AEC's pipe, the Government contends that the CAFC upheld CBP's authority to suspend entries for ambiguous orders and that Commerce can continue to suspend entries because without this authority, 19 C.F.R. §

351.225(l) would be unnecessary. *See* Gov. Br. at 16–17; *see also Sunpreme Inc. v. United States*, 946 F.3d 1300, 1317 (Fed. Cir. 2020) (en banc).

Recent en banc precedent from the CAFC establishes that when determining if ADD/CVD liability attaches for a product subject to a scope ruling, the court’s key consideration must be the timing of suspension of entries of the product by CBP. If CBP decides that a product falls within the scope of ADD/CVD orders and begins suspending entries prior to the scope ruling, and Commerce later determines in a scope ruling that the product is within the scope of the Orders, then Commerce by regulation is to instruct CBP to continue to suspend liquidation. *See Sunpreme Inc.*, 946 F.3d at 1319 (holding that where “a suspension that predates the scope inquiry already exists, subsection... [19 C.F.R. § 351.225](l)(3) ...dictates that the existing suspension ‘will continue.’ ...[and] [n]o retroactivity concerns are raised because no new suspension occurs.”).<sup>8</sup> This holds true even if the court deems the Orders ambiguous. *See id.* at 1321 (holding that “Customs has the authority to suspend liquidation of goods when it determines that the goods fall within the scope of an ambiguous antidumping or countervailing duty order.”). The CAFC noted that this interpretation of the statute and applicable regulation removes perverse incentives that might lead companies to submit unmeritorious scope ruling requests to Commerce in a delayed manner to expand the window between when CBP begins suspending liquidation of entries and when Commerce issues its scope ruling on the product. *See Sunpreme Inc.*, 946 F.3d at 1319–22.<sup>9</sup>

Whether or not the Order at issue can be labeled ambiguous in the abstract, *United Steel*, to the extent it is not limited by *Sunpreme*, is not dispositive. In that case, CBP had not suspended entries prior to Commerce’s scope ruling on the Plaintiff’s product. *See United Steel*, 947 F.3d at 797–798. Accordingly, the court in *United Steel* found that

<sup>8</sup> *See* 19 C.F.R. § 351.225(l)(3) (“If the Secretary issues a final scope ruling, under either paragraph (d) or (f)(4) of this section, to the effect that the product in question is included within the scope of the order, any suspension of liquidation under paragraph (l)(1) or (l)(2) of this section will continue. Where there has been no suspension of liquidation, the Secretary will instruct the Customs Service to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry. If the Secretary’s final scope ruling is to the effect that the product in question is not included within the scope of the order, the Secretary will order any suspension of liquidation on the subject product ended and will instruct the Customs Service to refund any cash deposits or release any bonds relating to this product.”).

<sup>9</sup> The government argues that the approximate one-year delay between when AEC received a Notice of Action from CBP and when AEC requested a scope ruling from Commerce, could be evidence of this circumvention tactic. *See* Gov. Br., at 18–19. The court need not resolve any issue as to AEC’s intent.

Commerce could not instruct CBP to retroactively begin suspension of entries from the date of issuance of the ADD order. *Id.* at 802–03.<sup>10</sup>

As previously discussed, later cases solidified the importance under the applicable regulation of CBP’s timing in initially suspending entries prior to Commerce’s scope ruling. *See Sunprime Inc.*, 946 F.3d at 1319 (noting that there is “nothing ‘retroactive’ about continuing to suspend liquidation where liquidation has already been suspended for the entire relevant time period.”); *Quiedan*, 927 F.3d at 1333 (noting that “that continued suspension of liquidation is proper, at least where the scope ruling confirms a clear meaning”). The Government also argues that AEC admits it was on notice that its pipe might be subject to the Orders prior to Commerce’s issuance of its scope ruling because of CBP’s Notice of Action. *See Second Remand Results* at 46; AEC Br. at 29. Although AEC argues that it did not expect to have to participate in the initial ADD/CVD investigation, and that gaining access to the (k)(1) sources was logistically challenging, *see* AEC Br. 29–30, it has not proffered evidence to contest the timing of CBP’s suspension of entries. It appears that here, CBP suspended entries prior to the initiation of the scope proceeding. Given CBP’s action, and that Commerce’s scope ruling that AEC’s pipe is within the scope of the Orders is supported by substantial evidence and is in accordance with law, an instruction to CBP to “continue to suspend liquidation of entries of certain seamless carbon and alloy steel, line and pressure pipe from China, including AEC’s AEC Pipe,” is proper and in accordance with law. Instructions to CBP.

### CONCLUSION

For the foregoing reasons, the court sustains Commerce’s determination in the Second Remand Results that AEC’s pipe falls within the scope of the Orders and finds no error in an instruction to CBP to continue to suspend liquidation of entries of AEC’s pipe.

Dated: November 27, 2020

New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI, JUDGE

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<sup>10</sup> Commerce has proposed new regulations in response to recent CAFC decisions on this issue including *United Steel* and *Sunprime*. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 85 Fed. Reg. 49,472, 49,476, 49,483, 49,498 (Aug. 13, 2020) (summarizing *Sunprime*, *United Steel*, and other cases that affirm Commerce’s power to order CBP to continue to suspend liquidation of entries in some contexts). Nothing in Commerce’s explanation of the case law in this proposed regulation contradicts the court’s view of current law applicable to this case.

## Slip Op. 20–171

ROYAL BRUSH MANUFACTURING, INC., Plaintiff, v. UNITED STATES,  
Defendant, and DIXON TICONDEROGA CO., Defendant-Intervenor.

Before: Mark A. Barnett, Judge  
Court No. 19–00198

[Remanding U.S. Customs and Border Protection’s affirmative determination as to evasion in EAPA Case No. 7238.]

Dated: December 1, 2020

*Ronald A. Oleynik*, Holland & Knight LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Antonia I. Tzinova*, *Liliana V. Farfan*, and *Dariya V. Golubkova*.

*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Joseph F. Clark*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

*Felicia L. Nowels*, Akerman LLP, of Tallahassee, FL, argued for Defendant-Intervenor. With her on the brief was *Sheryl D. Rosen*.

### OPINION AND ORDER

#### Barnett, Judge:

This matter is before the court on Plaintiff Royal Brush Manufacturing, Inc.’s (“Royal Brush”) motion for judgment on the agency record pursuant to U.S. Court of International Trade (“USCIT” or “CIT”) Rule 56.2. Confidential Pl. [Royal Brush’s] Mot. for J. on the Agency R., ECF No. 33. Royal Brush challenges U.S. Customs and Border Protection’s (“Customs” or “CBP”) affirmative determination of evasion of the antidumping duty order on certain cased pencils from the People’s Republic of China (“China”) issued pursuant to Customs’ authority under the Enforce and Protect Act (“EAPA”), 19 U.S.C. § 1517 (2018).<sup>1</sup> Confidential Pl. [Royal Brush’s] Mem. in Supp. of its Mot. for J. on the Agency R. (“Pl.’s Mem.”) at 1, ECF No. 33–1.<sup>2</sup> Customs issued two relevant determinations: (1) Notice of Final De-

<sup>1</sup> All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition unless otherwise specified. EAPA was enacted as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016).

<sup>2</sup> The administrative record for the underlying proceeding is contained in a Confidential Administrative Record (“CR”), ECF Nos. 24–1 (CR 1–12), 24–2 (CR 13–14), 24–3 (CR 15–19), 24–4 (CR 20–27), 24–5 (CR 28–34), 24–6 (CR 35–37), 24–7 (CR 38–41), 24–8 (CR 42–44), 24–9 (CR 45–47), 24–10 (CR 48–50), 24–11 (CR 51), 24–12 (CR 52–54), 24–13 (CR 55–57), 24–14 (CR 58–69), 24–15 (CR 70–86), 24–16 (CR 87–122), 24–17 (CR 123–24), 24–18 (CR 125–26), 24–19 (CR 127–32), and a Public Administrative Record (“PR”), ECF Nos. 23–1 (PR 1–35), 23–2 (PR 36–43), 23–3 (PR 44–64). The court references the confidential version of the record document unless otherwise specified.

termination as to Evasion, EAPA Case No. 7238 (May 6, 2019) (“May 6 Determination”), CR 131, PR 57; and (2) Decision on Request for Admin. Review, EAPA Case No. 7238 (Sept. 24, 2019) (“Sept. 24 Determination”), PR 64 (Customs’ *de novo* review of the May 6 Determination).

Royal Brush raises four overarching challenges to Customs’ evasion determination. Royal Brush argues that: (1) Customs improperly rejected Royal Brush’s filing seeking to rebut purportedly new factual information contained in Customs’ verification report, Pl.’s Mem. at 9–13; (2) CBP denied Royal Brush procedural due process and redacted material evidence in an arbitrary and capricious manner, *id.* at 13–20; (3) CBP’s use of an adverse inference constituted an abuse of discretion and was arbitrary and capricious, *id.* at 20–24; and (4) Customs drew irrational conclusions from the available evidence, *id.* at 24–26; *see also* Confidential Reply Br. of Pl. [Royal Brush] (“Pl.’s Reply”), ECF No. 43. Defendant United States (“the Government”) and Defendant-Intervenor Dixon Ticonderoga Company (“Dixon”) urge the court to sustain Customs’ evasion determination. Confidential Def.’s Resp. in Opp’n to Pl.’s Mot. for J. on the Agency R. (“Def.’s Resp.”), ECF No. 38; Def.-Int.’s Resp. in Opp’n to Pl.’s Mot. for J. on the Agency R. (“Def.-Int.’s Resp.”), ECF No. 40. For the following reasons, the court remands Customs’ determination for reconsideration and further explanation regarding the aforementioned arguments (1) and (2) and defers resolution of arguments (3) and (4) pending Customs’ redetermination.

## BACKGROUND

### I. Legal Framework for EAPA Investigations

As noted, EAPA investigations are governed by 19 U.S.C. § 1517.<sup>3</sup> Section 1517 directs Customs to initiate an investigation within 15 business days of receipt of an allegation that “reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion.” 19 U.S.C. § 1517(b)(1). “Covered merchandise” refers to “merchandise that is subject to” antidumping or countervailing duty orders issued pursuant to 19 U.S.C. § 1673e or 19 U.S.C. § 1671e, respectively. *Id.* § 1517(a)(3). “Evasion” is defined as:

entering covered merchandise into the customs territory of the United States by means of any document or electronically trans-

<sup>3</sup> On August 22, 2016, CBP promulgated interim regulations that further guide Customs’ conduct of EAPA investigations. *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (CBP Aug. 22, 2016) (interim regulations; solicitation of cmts.); 19 C.F.R. pt. 165 (2017).

mitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

*Id.* § 1517(a)(5)(A).<sup>4</sup>

Once Customs initiates an investigation, it has 90 calendar days to decide “if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion” and, if so, to impose interim measures. *Id.* § 1517(e). Interim measures consist of:

(1) suspend[ing] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation; (2) . . . extend[ing] the period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation; and (3) . . . such additional measures as [Customs] determines necessary to protect the revenue of the United States . . . .

*Id.*

Pursuant to section 1517(c), Customs’ determination whether covered merchandise entered the United States through evasion must be “based on substantial evidence.” *Id.* § 1517(c)(1)(A). Customs may, however, “use an inference that is adverse to the interests of” the person alleged to have engaged in evasion or the foreign producer or exporter of the covered merchandise when “selecting from among the facts otherwise available” if that person “failed to cooperate by not acting to the best of the party or person’s ability to comply with a request for information.” *Id.* § 1517(c)(3)(A).

Within 30 days of Customs’ determination as to evasion, the person alleging evasion, or the person found to have engaged in evasion, may file an administrative appeal with Customs “for *de novo* review of the determination.” *Id.* § 1517(f)(1). From the date that Customs completes that review, either of those persons have 30 business days in which to seek judicial review. *Id.* § 1517(g)(1).

## II. Factual and Procedural History

In 2015, Royal Brush, a U.S. importer, began importing pencils from a company located in the Republic of the Philippines (“the

<sup>4</sup> Section 1517(a)(5)(B) contains exceptions for clerical errors, which are not relevant here. 19 U.S.C. § 1517(a)(5)(B).



Philippines”).<sup>5</sup> Importer Request for Information (Oct. 3, 2018) (“Importer RFI”) at 3, CR 66, PR 26.<sup>6</sup> On February 27, 2018, Dixon lodged an allegation with CBP in which it averred that Royal Brush was transshipping pencils made in China—and subject to an antidumping duty order on certain cased pencils from China—through the Philippines. Allegation under [EAPA] (Feb. 27, 2018) (“Allegation”) at 3–4, CR 1, PR 2; *see also Certain Cased Pencils from the People’s Republic of China*, 59 Fed. Reg. 66,909 (Dep’t Commerce Dec. 28, 1994) (antidumping duty order) (“*Pencils Order*”); *Certain Cased Pencils From the People’s Republic of China*, 82 Fed. Reg. 41,608 (Dep’t Commerce Sept. 1, 2017) (continuation of antidumping duty order). The scope of the *Pencils Order* covers “certain cased pencils . . . that feature cores of graphite or other materials encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened.” 59 Fed. Reg. at 66,909.

On March 27, 2018, CBP initiated an investigation in EAPA Case No. 7238. Initiation of Investigation in EAPA Case No. 7238 (Mar. 27, 2018), CR 4, PR 5. Because CBP had acknowledged receipt of Dixon’s allegation on March 6, 2018, “the entries covered by this investigation are those that were entered for consumption, or withdrawn from a warehouse for consumption, from March 6, 2017 through the pendency of this investigation.” Notice of Initiation of Investigation and Interim Measures (June 26, 2018) (“Initiation Notice”) at 1, CR 8, PR 14.<sup>7</sup> On May 25, 2018 (with revisions submitted on July 19, 2018), Royal Brush responded to CBP’s Form 28 Request for Information. EAPA Case No. 7238 – Resp. to CBP Form 28 (July 19, 2018), CR 10, PR 19.

On June 6, 2018, a CBP Attaché conducted an unannounced site visit at the Philippine Shipper’s facility in Subic Bay, Philippines, and, thereafter, produced a report summarizing the Attaché’s findings. EAPA 7238–Site Visit Report: [Philippine Shipper], Subic Bay, Philippines (June 15, 2018) (“Attaché Report”), CR 5, PR 8; *see also* May 6 Determination at 4 (identifying the date of the visit as June 6,

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<sup>5</sup> The name of the alleged manufacturer is treated as confidential in the parties’ briefs and is immaterial to the outcome of this case; therefore, the court will refer to the company as “the Philippine Shipper.”

<sup>6</sup> When possible, the court refers to the page numbering embedded in the cited document. Otherwise, the court cites to the applicable CBP Bates stamp on the page(s).

<sup>7</sup> Pursuant to 19 C.F.R. § 165.2, subject entries “are those entries of allegedly covered merchandise made within one year before the receipt of an allegation,” but, “at its discretion, CBP may investigate other entries of such covered merchandise.”

2018).<sup>8</sup> The Attaché concluded that the Philippine Shipper had “the capacity to finish some product, but the on-site evidence clearly reveal[ed] the repacking of completely finished products from China.” Attaché Report at CBP0002540. During the visit, the Attaché observed the Philippine Shipper’s “staff . . . making minor alterations or simply sharpening pencils” and “repacking China origin products into boxes labeled, ‘Made in Philippines.’” *Id.* at CBP0002541. The Attaché noted that manufacturing equipment was covered in dust or cobwebs; the “manufacturing warehouse did not indicate production of any products for some time”; raw materials such as lead or cores were absent from the facility; and the storage area contained “boxes with Chinese characters and English language boxes stating, ‘Made in the Philippines.’” *Id.*

On June 26, 2018, CBP informed Royal Brush of the initiation of the investigation and imposition of interim measures. Initiation Notice at 1, 3–6. With respect to the imposition of interim measures, Customs explained that evidence gathered during the Attaché site visit, documents provided by Royal Brush in its response to CBP’s Form 28, and documents submitted by Dixon in support of its allegation<sup>9</sup> “collectively create[d] a reasonable suspicion as to evasion.” *Id.* at 6. Accordingly, Customs suspended liquidation for any entries that entered on or after March 27, 2018, the date of initiation of this investigation, and extended liquidation for all unliquidated entries that entered before March 27, 2018. *Id.*

Following the imposition of interim measures, Royal Brush and the Philippine Shipper responded to Customs’ further requests for information. *See, e.g.*, EAPA Case No. 7238 - Resp. to CBP Importer Request for Information (Part I) – Updated Submission per Request of Sept. 28, 2018 (Oct. 3, 2018), CR 12, PR 24 (submitted by the Philippine Shipper); Importer RFI (submitted by Royal Brush).

From November 14, 2018, through November 17, 2018, Customs conducted a scheduled verification at the Philippine Shipper’s facility. On-Site Verification Report (Feb. 11, 2019) (“Verification Report”) at 2, CR 129.<sup>10</sup> Prior to verification, Customs informed the Philippine

<sup>8</sup> The Attaché Report indicates that the visit occurred on July 6, 2018; however, this appears to be a typographical error given that the report is dated June 15, 2018. Attaché Report at CBP0002540.

<sup>9</sup> Customs pointed to a purchase contract allegedly entered into between the alleged Chinese Manufacturer and a Trading Company that contained instructions on marking merchandise identified in Royal Brush’s online catalog as “Made in Philippines.” Initiation Notice at 2 (citing Allegation, Ex. 1). Customs pointed to additional documentation allegedly demonstrating that the merchandise would be shipped to Subic Bay. *Id.* (citing Allegation, Ex. 2).

<sup>10</sup> Customs released a public version of the verification report on February 25, 2019. *See* On-Site Verification Report (Feb. 25, 2019), PR 47.

Shipper that it would be required to discuss its production process and submit documentation corresponding to five identified invoice numbers. Site Verification Engagement Letter (Nov. 7, 2018) (“Verification Agenda”) at 2, CR 121, PR 33–34.

In the report, Customs explained that it “[i]nterviewed company officials about their company operations and record keeping”; “[t]oured the facilities”; and “[r]eviewed original records to verify the on-the-record responses” submitted by the Philippine Shipper. Verification Report at 2. CBP summarized the “relevant facts and observations” with respect to the Philippine Shipper’s: (1) company ownership, operations, and recordkeeping; (2) co-mingled raw material and Chinese pencils; (3) verification of the five identified invoices plus two additional invoices; (4) production capability and capacity; and (5) payroll records. *Id.* at 3–10. Customs also attached to the Verification Report 32 photographs taken inside the Philippine Shipper’s facility. *Id.*, Attach. II.

Customs explained that the Philippine Shipper was unable to provide inventory receipt records for pencils purchased from Chinese suppliers and, at times, handwrote “pencils” with inventory receipts ostensibly related to the purchase of raw materials. *Id.* at 5. CBP encountered difficulties verifying the identified invoices as a result of the Philippine Shipper’s failure to provide requested documents, deletion of documents, or provision of documents that had been altered or redacted. *Id.* at 6–8. CBP found that the Philippine Shipper’s payroll records indicated that the company’s production capacity was far less than the amount claimed and, thus, that the Philippine Shipper’s amount of exports to the United States substantially exceeded its production capacity as calculated by CBP’s verification team. *Id.* at 8–9. Lastly, “[e]vidence obtained during the verification” indicated that the Philippine Shipper’s previously-submitted payroll documents “were unsupported.” *Id.* at 9; *see also id.* at 10 (stating that the verification team was “unable to verify that the stated employees were, in fact, paid and/or that there was production during those time periods”).

On March 6, 2019, Customs informed Royal Brush that because the Verification Report contained “new information,” Royal Brush was entitled to submit rebuttal information “related specifically to the information that was provided in the verification report.” Email from Kareen Campbell to Ron Oleynik (March 6, 2019, 16:04 EST) at CBP0002287, PR 49. While Royal Brush timely filed its rebuttal, on March 19, 2019, Customs informed Royal Brush that it was rejecting the submission. Email from Kareen Campbell to Ron Oleynik (March

19, 2019, 20:34 EST) at CBP0002295, PR 50. Customs explained that it rejected the rebuttal, in part, because of the inclusion of new factual information that was “not furnished during the verification.” *Id.* On March 21, 2019, Customs stated that it had previously misinterpreted its regulation, 19 C.F.R. § 165.23(c),<sup>11</sup> and now determined that because “the verification report does not contain new information,” Royal Brush’s “rebuttal to the verification report [was] not warranted.” Email from Kareen Campbell to Liliana Farfan (March 21, 2019, 15:14 EST) (“2nd Rejection Email”) at CBP0002290, PR 50.

On March 25, 2019, Royal Brush submitted written arguments pursuant to 19 C.F.R. § 165.26.<sup>12</sup> EAPA Case No. 7238 – Resubmission of Written Arguments to be Placed on the Admin. R. (March 25, 2019) (“Royal Brush’s Case Br.”), CR 130, PR 51. Among other things, Royal Brush argued that its procedural due process rights had been violated by virtue of the extensive redactions to the Allegation, Attaché Report, and Verification Report and CBP’s rejection of Royal Brush’s rebuttal submission. *Id.* at 22–29. CBP further argued that CBP’s rejection of the rebuttal was arbitrary and capricious. *Id.* at 29–35.

On May 6, 2019, Customs issued an affirmative determination as to evasion. *See* May 6 Determination. Customs found “that substantial evidence, in conjunction with an assumption of adverse inferences related to information requested but not provided, indicates [that] Royal Brush’s imports were merchandise entered through evasion.” *Id.* at 5; *see also id.* at 8 (finding substantial evidence to support a finding of evasion based on the available evidence “and the absence of information due to [the] Philippine[] Shipper’s failure to cooperate and comply to the best of its ability”). Customs did not address Royal Brush’s due process arguments except to state that the information

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<sup>11</sup> Section 165.23(c) provides that

[i]f CBP places new factual information on the administrative record on or after the 200th calendar day after the initiation of the investigation (or if such information is placed on the record at CBP’s request), the parties to the investigation will have ten calendar days to provide rebuttal information to the new factual information.

19 C.F.R. § 165.23(c)(1).

<sup>12</sup> Customs permits “parties to the investigation” to submit “written arguments that contain all arguments that are relevant to the determination as to evasion and based solely upon facts already on the administrative record in that proceeding.” 19 C.F.R. § 165.26(a)(1). The term “[p]arties to the investigation” encompasses both the person “who filed the allegation of evasion and the importer . . . who allegedly engaged in evasion.” 19 C.F.R. § 165.1. The term “interested party” is defined more broadly to include, among others, the parties to the investigation and the “foreign manufacturer, producer, or exporter . . . of covered merchandise.” *Id.*

and findings contained in the verification report were “covered by” Customs’ regulation, 19 C.F.R. § 165.25. *Id.* at 5 n.15.<sup>13</sup>

On June 18, 2019, Royal Brush filed a request for an administrative review of Customs’ Determination. Request for Admin. Review (June 18, 2019) (“Req. for Admin. Review”), CR 132, PR 58. On September 24, 2019, CBP completed its *de novo* review. Sept. 24 Determination at 1. CBP concluded that substantial evidence supported a finding that the pencils imported by Royal Brush during the period of investigation were manufactured in China. *Id.* at 11, 18–19; *see also id.* at 12–18 (discussing the evidence). Further, while stating that they were not necessary to its decision, CBP concluded that “adverse inferences were warranted, inasmuch as the importer, as well as the alleged foreign producer and exporter, *failed* to provide sufficient evidence to demonstrate that the pencils imported by Royal Brush were manufactured in the Philippines.” *Id.* at 18. CBP thus “reasonably filled those evidentiary gaps with some adverse inferences.” *Id.*

Royal Brush timely sought judicial review pursuant to 19 U.S.C. § 1517(g)(1). *See* Summons, ECF No. 1; Compl., ECF No. 2. The court heard confidential oral argument on October 6, 2020. Docket Entry, ECF No. 49.

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g), and 28 U.S.C. § 1581(c).

EAPA directs the court to determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review issued pursuant to 19 U.S.C. § 1517(f) was “conducted in accordance with those subsections.” 19 U.S.C. § 1517(g)(1). In so doing, the court “shall examine . . . whether [CBP] fully complied with all procedures under subsections (c) and (f)” and “whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 1517(g)(2).<sup>14</sup>

<sup>13</sup> The regulation states that, following a verification, “CBP will place any relevant information on the administrative record and provide a public summary.” 19 C.F.R. § 165.25(b).

<sup>14</sup> Customs’ regulation refers to an “initial determination,” 19 C.F.R. § 165.41, and a “final administrative determination” that is subject to judicial review, *id.* § 165.46. The statute does not use those terms or explicitly limit the scope of judicial review to Customs’ *de novo* review of the earlier determination. *See* 19 U.S.C. § 1517(g). At oral argument, Royal Brush opined that only the September 24 Determination is judicially reviewable because it constitutes CBP’s *de novo* reconsideration of the May 6 Determination. Oral Arg. 4:40–4:48 (reflecting the time stamp of the recording); *see also* Pl.’s Mem. at 1; Pl.’s Reply at 10 n.11. The Government and Dixon argued that both determinations are subject to judicial review. Oral Arg. 11:05–11:15, 19:11–19:55. The court’s disposition of the matter herein on procedural grounds rather than the substantive merits of Customs’ affirmative evasion determination does not require the court to resolve these competing arguments.

“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, Customs “must examine the relevant data and articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). “An abuse of discretion occurs [when] the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted). “Courts look for a reasoned analysis or explanation for an agency’s decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

## DISCUSSION

### I. CBP’s Rejection of Royal Brush’s Rebuttal Submission

#### A. Parties’ Contentions

Royal Brush contends that CBP’s Verification Report contained new factual information and, thus, CBP’s rejection of its rebuttal submission was arbitrary, capricious, and an abuse of discretion. Pl.’s Mem. at 9–13; Pl.’s Reply at 2–3.<sup>15</sup> Recognizing that neither the EAPA statute nor CBP’s regulations define “factual information,” Royal Brush finds support for its position in the definition used by the U.S. Department of Commerce (“Commerce”) in antidumping and countervailing duty proceedings. Pl.’s Mem. at 10–11 (discussing 19 C.F.R. § 351.102(b)(21) and related case law). Royal Brush further contends that Customs’ assertion that the contents of the Verification Report are “covered by 19 C.F.R. § 165.25” lacks merit because the regulation does not preclude information in the Verification Report from constituting “new factual information.” *Id.* at 12 n.7.

The Government contends that Customs properly rejected Royal Brush’s rebuttal submission because the Verification Report did not

<sup>15</sup> Royal Brush also contends that Customs’ rejection of the rebuttal submission denied Royal Brush “a meaningful opportunity to be heard.” Pl.’s Mem. at 9; *see also* Pl.’s Reply at 4. Royal Brush did not, however, substantiate its due process concerns with respect to this issue and, thus, the court does not further address the contention. *See, e.g., United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) (“It is well established that arguments that are not appropriately developed in a party’s briefing may be deemed waived.”).

contain new factual information. Def.'s Resp. at 14–15. Rather, the Government contends, CBP conducted “a quintessential verification” in order to test the accuracy of the submitted data, *id.* at 16, and simply “summarized its findings in the [V]erification [R]eport,” *id.* at 18. The Government further contends that Customs provided an adequate explanation for its decision to reject Royal Brush's rebuttal submission. *Id.* at 19–20. Dixon advances substantially similar arguments. Def.-Int.'s Resp. at 4–5.

### **B. CBP Must Reconsider and Further Explain its Rejection of Royal Brush's Rebuttal Submission**

Customs' rejection of Royal Brush's rebuttal submission turned on Customs' conclusion that the Verification Report did not contain new factual information. 2nd Rejection Email at CBP0002290. CBP is required to provide “a reasoned analysis or explanation” for that decision, *Wheatland Tube*, 161 F.3d at 1369, but has not done so here.

Customs' regulations permit parties to the investigation “to provide rebuttal information” to any “new factual information” that Customs “places . . . on the administrative record on or after the 200th calendar day after the initiation of the investigation.” 19 C.F.R. § 165.23(c)(1). Customs' conclusory statement that “the verification report does not contain new information,” 2nd Rejection Email at CBP0002290, lacks any identification of the standard CBP used to define “new factual information” or application of that standard to the Verification Report. Customs' subsequent assertion that the Verification Report and its exhibits “are covered by [19 C.F.R.] § 165.25” fares no better. May 6 Determination at 5 n.15; Sept. 24 Determination 16 n.16. While the regulation directs CBP to “place any relevant [verification] information on the administrative record and provide a public summary,” 19 C.F.R. § 165.25, it does not explicitly preclude that information from being “new” for purposes of 19 C.F.R. § 165.23(c)(1).

The Government's argument that the purpose of verification is to test the accuracy of submitted data is not persuasive. Def.'s Resp. at 15–16 (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT \_\_\_, \_\_\_, 61 F.Supp.3d 1306, 1349 (2015); *Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT \_\_\_, \_\_\_, 273 F.Supp.3d 1225, 1242 (2017); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT \_\_\_, 353 F. Supp. 2d 1294, 1304 (2004)). The cited cases indicate Commerce's views on verification, not Customs' views. *See, e.g., Borusan*, 61 F. Supp. 3d at 1349. Further, at oral argument, the Government explained that CBP does not take the position that the contents of a verification report may never constitute new factual information. Oral Arg. at 28:00–28:07. Thus, the

Government's argument sheds no light on CBP's basis for deciding that the Verification Report at issue here did not contain new factual information.

It is not the court's role to "supply a reasoned basis for [Customs'] action that [Customs] itself has not given." *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Accordingly, the court may not adopt Commerce's definition of factual information for purposes of an EAPA proceeding and apply that definition to the Verification Report to resolve the issue.<sup>16</sup> When, as here, the court is tasked with reviewing a decision based on an agency record, and that record does not support the contested decision, the court must remand for further proceedings. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."); *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381–82 (Fed. Cir. 2003). Accordingly, this issue is remanded to CBP for reconsideration and further explanation.<sup>17</sup>

## II. Royal Brush's Procedural Due Process Claims

### A. Parties' Contentions

Royal Brush contends that CBP's administration of the EAPA proceeding denied Royal Brush procedural due process and was arbitrary and capricious. Pl.'s Mem. at 13–20; *see also* Pl.'s Reply at 5–9. In particular, Royal Brush argues: (1) CBP redacted or otherwise withheld substantial amounts of record information, some of which CBP relied on to support its affirmative evasion determination, Pl.'s

<sup>16</sup> At oral argument, the Government opined that, in the absence of a Customs definition of "factual information," the court may find Commerce's definition instructive. Oral Arg. 22:57–23:11, 24:07–24:10.

<sup>17</sup> Because the court is remanding this issue, the court does not reach Royal Brush's alternative argument that Customs failed to weigh the factors set forth in *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 123, 815 F. Supp. 2d 1342, 1365 (2012), regarding the acceptance of untimely information. Pl.'s Mem. at 12–13; *see also* Pl.'s Reply at 4–5. Additionally, Dixon's contention that CBP's determination should be affirmed even if the Verification Report contains new information because CBP relied on evidence other than the information contained in the Verification Report lacks merit. Def.-Int.'s Resp. at 5. If the Verification Report contains new information that Royal Brush is entitled to rebut, CBP will need to incorporate that rebuttal information into its remand redetermination.



Mem. at 14–17; (2) Royal Brush lacked adequate notice concerning the information that would be requested or was considered missing from the record, *id.* at 17–18; (3) CBP “maintain[ed] a secret administrative record” to which Royal Brush lacked full access until it obtained judicial review, *id.* at 18–19; and (4) Customs’ regulatory definition of “parties to the investigation” as a subset of “interested parties” prevented the Philippine Shipper “from fully participating in the proceedings,” *Id.* at 19–20. Royal Brush further contends that Customs’ failure to explain why it redacted or withheld information from Royal Brush amounts to arbitrary and capricious action. *Id.* at 20.

The Government contends that Royal Brush has failed to “identify any protected interest of which it was allegedly deprived” by CBP’s management of the administrative record and, thus, Royal Brush’s due process claims must fail. Def.’s Resp. at 24; *id.* at 27. The Government further contends that Royal Brush had adequate notice of the claim against it, *id.* at 23–24, and its “generalized complaints about the EAPA process do not entitle it to relief,” *id.* at 25.<sup>18</sup>

### **B. A Remand is Required for CBP to Comply with Procedural Requirements Concerning Royal Brush’s Access to Information**

While Royal Brush raises various challenges to CBP’s administration of the underlying proceeding, at oral argument, it inferred that each claim is grounded in Royal Brush’s overarching concern that CBP procedurally erred in failing to disclose information that CBP relied on in its determination. *See* Oral Arg. 1:41:45–1:42:37, 1:56:04–1:57:39, 2:29:22–2:31:07, 2:35:25–2:36:15. As discussed below, the record indicates that Customs failed to ensure that confidential filings were accompanied by the requisite public summaries. Thus, on remand, CBP must address and remedy this deficiency.

“The Fifth Amendment prohibits the deprivation of life, liberty, or property without due process of law.” *U.S. Auto Parts Network, Inc. v. United States*, 42 CIT \_\_\_, \_\_\_, 319 F. Supp. 3d 1303, 1310 (2018) (citing U.S. Const. amend. V). Thus, “[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in property or liberty.” *Int’l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (citation omitted). While “engaging in foreign commerce is not a fundamental right protected by notions of substantive due process,” *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998), an importer participating in an administrative proceeding has a procedural due process right to

<sup>18</sup> Dixon did not respond to Royal Brush’s due process arguments.

“notice and a meaningful opportunity to be heard,” *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) [hereinafter *Avisma*] (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998));<sup>19</sup> see also *Nereida Trading Co. v. United States*, 34 CIT 241, 248, 683 F. Supp. 2d 1348, 1355 (2010) (assuming that the plaintiff had “a protected interest in the proper assessment of tariffs on goods already imported” and further examining “what process is due”) (citation omitted); *Transcom, Inc. v. United States*, 24 CIT 1253, 1271, 121 F. Supp. 2d 690, 707 (2000) (“It is impossible to comprehend how an importer’s lack of a vested right to import merchandise in the future negates the obligation to provide the importer with notice prior to imposing an antidumping duty for the merchandise already imported.”). In general, “notice [must be] reasonably calculated, under all the circumstances, to appri[s]e interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Transcom*, 24 CIT at 1272, 121 F. Supp. 2d at 708 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Such opportunity must occur “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

During the investigation, Royal Brush alerted Customs to its concerns regarding the extent of the redactions to various documents and Royal Brush’s corresponding inability to fully defend its position. See Submission of Written Args. to be Placed on the Admin. R. (Nov. 13, 2018), PR 36 (arguing that due process required CBP to provide copies of the photographs of the Philippine Shipper’s facility attached to the Attaché Report to Royal Brush or to the Philippine Shipper before verification, and there was no reason to withhold the photographs from the Philippine Shipper since the photographs pertained to that company’s business information); Royal Brush’s Case Br. at 4, 22–25 (arguing that Royal Brush had been denied procedural due process based on CBP’s treatment of confidential information in the Allegation, Attaché Report, and Verification Report); Req. for Admin. Review at 24 (same). Customs did not respond to Royal Brush’s request for disclosure of the photographs attached to the Attaché

<sup>19</sup> The Government argues that the court should not address Royal Brush’s arguments because Royal Brush failed to adequately identify a protected interest. Def.’s Resp. at 24, 27. Royal Brush argued, however, that as “an importer[] participating in an administrative proceeding” it had a due process right to “notice and a meaningful opportunity to be heard.” Pl.’s Mem. at 13 (quoting *Avisma*, 688 F.3d at 761–62). Waiver is not implicated when the parties’ briefs on an issue “do[] not deprive [the court] in substantial measure of that assistance of counsel which the system assumes.” *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1579, 659 F. Supp. 2d 1303, 1308 (2009) (alteration original) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)) (discussing, but ultimately declining to apply, the doctrine of waiver). While Royal Brush could have been more explicit as to the nature of the protected interest, the parties’ briefing on these matters is sufficient for the court to address the competing arguments.

Report or address Royal Brush's due process arguments in the May 6 Determination or the September 24 Determination. Customs therefore "failed to consider an important aspect of the problem," resulting in a determination that is arbitrary and capricious. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (quoting *State Farm*, 463 U.S. at 43).

Further, while "procedural due process guarantees do not require full-blown, trial-type proceedings in all administrative determinations," *Kemira Fibres Oy v. United States*, 18 CIT 687, 694, 858 F. Supp. 229, 235 (1994), due process "forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 289 n.4 (1974). Thus, to comply with due process, Customs' procedures must afford adequate opportunity for importers to respond to the evidence used against them.

EAPA does not require or establish a procedure for the issuance of an administrative protective order ("APO") akin to the procedure used in antidumping and countervailing duty proceedings or otherwise address Customs' management of confidential information. Compare 19 U.S.C. § 1517 (governing EAPA investigations), with 19 U.S.C. § 1677f(c)(1)(A)–(B) (establishing procedures for the disclosure of proprietary information pursuant to a protective order in Commerce proceedings). However, Customs has promulgated a regulation governing the release of information provided by interested parties, 19 C.F.R. § 165.4. Subsection (a)(1) of the regulation contains instructions for interested parties to request business confidential treatment of information contained in submissions and states the requirements that must be met. 19 C.F.R. § 165.4(a)(1). Subsection (a)(2) further requires the submitter to file "a public version of the submission" that, when possible, "contain[s] a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." *Id.* § 165.4(a)(2). Subsection (e) also directs that "[a]ny information that CBP places on the administrative record, when obtained other than from an interested party subject to the requirements of this section, will include a public summary of the business confidential information." *Id.* § 165.4(e).

While Royal Brush did not explicitly reference 19 C.F.R. § 165.4 in its papers, CBP's compliance with its regulation concerning public summarization of confidential information is relevant to assessing Royal Brush's claim that CBP denied Royal Brush a meaningful opportunity to participate in the administrative proceeding. See *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1886, 1890–92, 466 F. Supp. 2d 1323, 1327–29 (2006) (due process claim did not

succeed when the agency complied with its statutory and regulatory obligations, which otherwise constituted “a reasonable means to bring an administrative procedure to closure”); *Kemira Fibres*, 18 CIT at 694–95, 858 F. Supp. at 235–36 (failure to comply with regulatory procedures constituted “arbitrary and capricious” conduct that “deprived [the plaintiff] of its constitutional due process right”). The court’s review of the administrative record reveals CBP’s inattention to the requirement for a public summary of information designated business confidential.

The record shows, for example, that the public version of Dixon’s Allegation redacts the confidential information in the narrative portion and omits the exhibits but does not separately summarize the confidential information in a public document. *See generally* Allegation (public version). Likewise, there are no public summaries of the confidential information redacted from the Attaché Report or Verification Report, including their respective photographs or exhibits. *See generally* Attaché Report (public version); Verification Report (public version); Foreign Party – Verification Exhibits (Nov. 30, 2018), PR 39–46. The lack of public summaries accompanying the Attaché Report and Verification Report are particularly concerning given CBP’s reliance on those reports in its determination. *See, e.g.*, Sept. 24 Determination at 13–14 (“The CBP Attaché’s Report, complete with observations and photographs, unequivocally demonstrates repackaging of Chinese pencils into boxes labeled as made in the Philippines and destined for the United States.”). There is no indication that the redacted information was not susceptible to public summarization and CBP has not indicated that is the case. Thus, the court finds that, in this respect, CBP failed to afford Royal Brush “the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>20</sup> *El-dridge*, 424 U.S. at 333.<sup>21</sup>

<sup>20</sup> The Government asserted at oral argument that Royal Brush, after obtaining access to the complete administrative record on judicial review, has failed to articulate arguments it would have made if given greater access during the investigation. Oral Arg. 1:31:53–1:32:43. While Royal Brush’s counsel has access to sealed filings during judicial review pursuant to a protective order, counsel is not able to share that information with Royal Brush for the purpose of forming arguments. *See generally* Protective Order (Dec. 16, 2019), ECF No. 22. Thus, the Government’s argument fails to persuade the court that a remand to produce public summaries in accordance with CBP’s regulation is not required. Furthermore, access to the complete record on judicial review cannot cure improper withholding of information by Customs because the court applies a deferential standard of review to Customs’ evasion determination. *Cf. S.D. v. U.S. Dept. of Interior*, 787 F. Supp. 2d 981, 996–99 (D.S.D. 2011) (failure by administrative agency to provide plaintiffs with 23 documents on which the agency based its decision constituted a due process violation that was not cured by review of the decision by an appellate board before which plaintiffs had access to the complete record because the board applied a deferential standard of review).

<sup>21</sup> As previously noted, Plaintiff’s additional due process arguments are facets of its overarching claim regarding the lack of access to relevant evidence. Because the court is

Accordingly, the court remands the matter to Customs to address and remedy the lack of public summaries by providing Royal Brush an opportunity to participate on the basis of information that it should have received during the underlying proceeding. To be clear, the court does not hold that Royal Brush is entitled to receive business confidential information. Congress has not mandated that Royal Brush be afforded such access and Royal Brush has not shown that due process requires it. However, Customs must ensure compliance with the public summarization requirements provided in its own regulations.<sup>22</sup>

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Customs' evasion determination is remanded to CBP for reconsideration and further explanation regarding the existence of new factual information in the Verification Report and, to the extent the Verification Report contains new factual information, Royal Brush must be afforded an opportunity to rebut that information; it is further

**ORDERED** that Customs' evasion determination is remanded for CBP to comply with the public summary requirement set forth in 19 C.F.R. § 165.4 and afford Royal Brush an opportunity to present arguments based on that information; it is further

**ORDERED** that the court will defer resolution of Royal Brush's remaining arguments pending Customs' redetermination; it is further

**ORDERED** that Customs shall file its remand redetermination on or before March 1, 2021; it is further

**ORDERED** that, within 14 days of the date of filing of Customs' remand redetermination, Customs must file an index and copies of any new administrative record documents; it is further

**ORDERED** that the deadline for filing comments after remand shall be governed by USCIT Rule 56.2(h)(2)–(3); and it is further

**ORDERED** that any comments or responsive comments must not exceed 5,000 words.

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remanding the matter for CBP to remedy this deficiency, the court declines to address Royal Brush's remaining arguments. To the extent these arguments continue to represent live controversies, Royal Brush must renew the arguments on remand to ensure that CBP has adequate opportunity to respond and, thus, produce a judicially reviewable determination on those issues.

<sup>22</sup> The court is mindful that parties sometimes question whether Commerce always complies with a substantially similar requirement in its regulations, 19 C.F.R. § 351.304(c)(1). Commerce's actions are not now before the court and the court cannot ignore the robust APO procedures that mitigate any impact that might result in the case of Commerce's noncompliance.

Dated: December 1, 2020  
New York, New York

/s/ Mark A. Barnett  
MARK A. BARNETT, JUDGE

Slip Op. 20–172

WILMAR TRADING PTE LTD., PT WILMAR BIOENERGI INDONESIA, and WILMAR OLEO NORTH AMERICA LLC, Plaintiffs, and GOVERNMENT OF THE REPUBLIC OF INDONESIA and P.T. MUSIM MAS, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAI TRADE COALITION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Consol. Court No. 18–00006

### JUDGMENT

Before the court is the United States Department of Commerce’s (“Commerce” or the “Department”) remand redetermination (“Remand Results”), ECF No. 77, issued pursuant to the court’s order in *Wilmar Trading PTE Ltd. v. United States*, 44 CIT \_\_, Slip Op. 20–115 (Aug. 11, 2020).

In *Wilmar*, the court directed Commerce to recalculate its subsidy determination of goods provided for less than adequate remuneration for one of the Indonesian tax programs under investigation:

Commerce shall make a new subsidy determination as to the 1994 Export Tariff that is supported by substantial evidence and in accordance with law; or, in the alternative, recalculate its ad valorem subsidy rate for goods provided for less than adequate remuneration, excluding any claimed effects of the 1994 Export Tariff.

*Wilmar*, 44 CIT at \_\_, Slip. Op. 20–115 at 40.

In response, Commerce issued the Remand Results, stating that

it did not undertake any separate or additional subsidy rate calculations pursuant to the 1994 export tariff for either Musim Mas or Wilmar. Upon remand, Commerce now also determines that the entire benefit from the provision of cheap [cheap crude palm oil] is attributable to the 2015 export levy. Therefore, Commerce finds that no adjustment to the *ad valorem* rate is necessary in order to comply with the Court’s order.

Remand Results at 3. In other words, the Department found that it did not need to make an adjustment to the *ad valorem* rate to comply

with the court's order in *Wilmar*, because its subsidy calculation for goods provided for less than adequate remuneration was based solely on the 2015 export levy.

The court finds that Commerce has complied with its instruction in *Wilmar* because the Department determined that its *ad valorem* rate for crude palm oil provided for less than adequate remuneration excluded any claimed effects of the 1994 export tariff.

No party contests the Remand Results. *See* Def.'s Request to Sustain Remand Results, ECF No. 80. There being no further dispute in this matter, it is hereby

**ORDERED** that the Remand Results are sustained.

Dated: December 1, 2020

New York, New York

*/s/ Richard K. Eaton*  
RICHARD K. EATON, JUDGE

Slip Op. 20–173

MANCHESTER TANK & EQUIPMENT CO. and WORTHINGTON INDUSTRIES,  
Plaintiffs, v. UNITED STATES, Defendant, and SAHAMITR PRESSURE  
CONTAINER PLC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge  
Court No. 19–00147

[Sustaining the U.S. Department of Commerce's final determination in the anti-dumping duty investigation of steel propane cylinders from Thailand.]

Dated: December 3, 2020

*Paul C. Rosenthal*, Kelley Drye & Warren LLP, of Washington, DC, argued for Plaintiffs. With him on the brief were *David C. Smith, Jr.*, *Matthew G. Pereira*, and *R. Alan Luberda*.

*Alison S. Vicks*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Ron Kendler*, White & Case LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief was *David E. Bond*.

**Barnett, Judge:**

This matter is before the court following the final determination of the U.S. Department of Commerce (“Commerce” or “the agency”) in the antidumping duty investigation of steel propane cylinders (“cylinders”) from Thailand for the period of investigation April 1, 2017,

through March 31, 2018 (“the POI”).<sup>1</sup> See *Steel Propane Cylinders From Thailand*, 84 Fed. Reg. 29,168 (Dep’t Commerce June 21, 2019) (final determination of sales at less than fair value) (“*Final Determination*”), ECF No. 22–4, and accompanying Issues and Decision Mem., A-549–839 (June 17, 2019) (“I&D Mem.”), ECF No. 22–5.

On June 18, 2018, Commerce initiated this investigation. See *Steel Propane Cylinders From the People’s Republic of China, Taiwan, and Thailand*, 83 Fed. Reg. 28,196 (Dep’t Commerce June 18, 2018) (initiation of less-than-fair-value investigations), PR 40, CJA (Vol. I) Tab 4. During the investigation, Plaintiffs Manchester Tank & Equipment Co. and Worthington Industries (collectively, “Plaintiffs,” or when in reference to the administrative proceeding, “Petitioners”) and Defendant-Intervenor Sahamitr Pressure Container Plc. (“Sahamitr” or “SMPC”)<sup>2</sup> each recommended different model-match criteria.<sup>3</sup> See, e.g., Pet’rs’ Cmts. on the Important Prod. Characteristics and Prod. Matching Hierarchy (July 6, 2018), PR 48, CJA (Vol. I) Tab 5; [SMPC] Cmts. on AD Questionnaire Prod.-Matching Characteristics (July 6, 2018), PR 49, CJA (Vol. I) Tab 6. For the portion of the CONNUM related to the external coating of the cylinder, Commerce initially instructed Sahamitr to report codes that indicate whether a cylinder is coated or uncoated. See Ltr. Physical Characteristics for the Anti-dumping Duty Investigation of Steel Propane Cylinders from Thailand (July 25, 2017) (“Initial Model-Match Ltr.”), Attach. 1B, ECF p. 155, PR 63, CJA (Vol. I) Tab 11. In its questionnaire responses, Sahamitr provided a further breakdown of coated cylinders, distinguishing between zinc-coated and other-coated cylinders in addition to uncoated cylinders. Narrative Resp. of [Sahamitr] to Secs. B, C,

<sup>1</sup> The administrative record for this case is divided into a Public Administrative Record (“PR”), ECF No. 22–2, and a Confidential Administrative Record (“CR”), ECF No. 22–3. The Parties submitted joint appendices containing record documents cited in their briefs. See Nonconfidential Joint Appendix, ECF Nos. 47 (Vol. I), 47–1 (Vol. II), 47–2 (Vol. III), 47–3 (Vol. IV), 47–4 (Vol. V); Confidential Joint Appendix (“CJA”), ECF Nos. 46 (Vol. I), 46–1 (Vol. II), 46–2 (Vol. III), 46–3 (Vol. IV), 46–4 (Vol. V). Citations are to the confidential joint appendix unless stated otherwise.

<sup>2</sup> Commerce selected Sahamitr as the sole mandatory respondent. See Respondent Selection Mem. (July 9, 2018), PR 52, CJA (Vol. I) Tab 7.

<sup>3</sup> In any antidumping proceeding, there may be numerous “models” or “types” of products that meet the description of the product under investigation. In order to ensure an apples-to-apples comparison of sales in the U.S. and home markets, Commerce establishes a set of product criteria, from most to least important, to identify identical and similar products. Within each of these criteria, the distinct characteristics are given different numeric values which, when listed next to each other, constitute the “control number” or “CONNUM” for that “model” or “type.” In other words, the CONNUM is a number designed to reflect the “hierarchy of certain characteristics used to sort subject merchandise into groups” and allow Commerce to match identical and similar products across markets. *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT \_\_\_, \_\_\_, 324 F. Supp. 3d 1344, 1347 (2018).



and D of the Antidumping Duty Questionnaire (Sept. 13, 2018) (“BCDQR”) at B-14, C-12, CR 49–51, PR 84–86, CJA (Vol. I) Tab. 14. For the *Preliminary Determination*, Commerce relied on this additional distinction. See Decision Mem. for the Prelim. Determination (Dec. 18, 2018) (“Prelim. Mem.”) at 9, PR 162, CJA (Vol. III) Tab 31.

Following Commerce’s *Preliminary Determination*, Petitioners submitted comments challenging, in relevant part, the model-match methodology and the reliability of Sahamitr’s cost of production information. Pet’rs’ Case Br. on [Sahamitr] (May 2, 2019) (“Pet’rs’ Case Br.”) at 6–20, 42–50, CR 280, PR 196, CJA (Vol. V) Tab 41; see also Rebuttal Br. of [Sahamitr] (May 9, 2019) at 10–11, CR 282, PR 199, CJA (Vol. V) Tab 42 (responding to Petitioners’ argument regarding cost of production information).

For the *Final Determination*, Commerce continued to use the CONNUM data that distinguished zinc-coated cylinders from other-coated cylinders for model-match purposes. See I&D Mem. at 22–24. Commerce also found Sahamitr’s reported costs to be reliable and rejected Petitioners’ arguments that Sahamitr’s failure to reliably report cost of production data warranted total adverse facts available (or “total AFA”). *Id.* at 36–40. Commerce calculated a weighted-average dumping margin for Sahamitr of 10.77 percent. See *Final Determination*, 84 Fed. Reg. at 29,169.

Before the court, Plaintiffs challenge Commerce’s determinations to rely on the zinc coating distinction in the model-match methodology and Sahamitr’s reported cost data. See Pls.’ Rule 56.2 Mot. for J. on the Agency R., ECF No. 27, and accompanying Confidential Pls.’ Mem. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. (“Pls.’ Mem.”), ECF No. 29; Confidential Pls.’ Reply Br. (“Pls.’ Reply”), ECF No. 44.

Defendant United States (“the Government”) and Sahamitr filed responses supporting the *Final Determination*. See Confidential Def.’s Resp. to Pls.’ Mot. for J. Upon the Agency R. (“Gov’t’s Resp.”), ECF No. 38; Confidential Def.-Int.’s Resp. in Opp’n to Pls.’ Rule 56.2 Mot. for J. Upon the Agency R. (“SMPC’s Resp.”), ECF No. 41.

For the reasons discussed below, the court sustains Commerce’s *Final Determination* and denies Plaintiffs’ motion for judgment on the agency record.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i)

(2018),<sup>4</sup> and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Zinc Coating

#### A. Legal Framework

To calculate a dumping margin, Commerce compares the amount by which normal value exceeds the export price or constructed export price. *See* 19 U.S.C. § 1677(35)(A). To calculate normal value, Commerce determines “the price at which the foreign like product is first sold . . . for consumption in the exporting country . . . in the ordinary course of trade.” 19 U.S.C. § 1677b(a)(1)(B)(i); *see also Pastificio Lucio Garofalo, S.p.A. v. United States*, 35 CIT 630, 632–33 & n.6, 783 F. Supp. 2d 1230, 1233 & n.6 (2011), *aff’d*, 469 F. App’x 901 (Fed. Cir. 2012) (detailing the statutory scheme by which Commerce determines whether sales were made in the ordinary course of trade). Foreign like product is statutorily defined according to a hierarchy of characteristics. *See* 19 U.S.C. § 1677(16).<sup>5</sup> “Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes ‘foreign like product’ under the statute.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) (citation omitted).

Determinations of both identical and like/similar (i.e., non-identical but capable of comparison) merchandise are made using Commerce’s model-match methodology. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1383–84 (Fed. Cir. 2001).<sup>6</sup> The discre-

<sup>4</sup> All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

<sup>5</sup> Those characteristics are, in order of preference:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—(i) produced in the same country and by the same person as the subject merchandise, (ii) like that merchandise in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the subject merchandise.

(C) Merchandise—(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation, (ii) like that merchandise in the purposes for which used, and (iii) which [Commerce] determines may reasonably be compared with that merchandise.

19 U.S.C § 1677(16).

<sup>6</sup> Prior to 1995, the statute used the “term ‘such or similar merchandise’ . . . and was replaced (following the enactment of the [Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994)]) by the term ‘foreign like product.’” *Pesquera*, 266 F.3d at 1384 n.8.

tion that the statute affords Commerce to establish its model-match methodology allows it to find certain products to be identical, notwithstanding minor differences in physical characteristics, if those differences are commercially insignificant. *Id.* at 1384 (Fed. Cir. 2001); *see also* 19 C.F.R. § 351.411(a) (Commerce “may determine that merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the [home] market,” and that Commerce “will make a reasonable allowance for such differences”).

## B. Background

Shortly after initiating this investigation, Commerce issued a letter containing the criteria to be used for the model-match methodology. Initial Model-Match Ltr., Attach. 1B. Although the letter instructed Sahamitr to report a cylinder as coated or uncoated, *id.*, Attach. 1B, ECF p. 155, Sahamitr reported three codes for coating: uncoated, coated-normal, and coated-special (i.e., zinc coating), *see* BCDQR at B-14, C-12.

In a supplemental questionnaire, Commerce directed Sahamitr to correct its response consistent with the Initial Model-Match Letter. *See* Narrative Resp. of [Sahamitr] to the Suppl. Sec. B and Sec. C Questionnaire (Nov. 6, 2018) (“SBCQR”) at SSQ-10, SSQ-25, CR 106–120, PR 134–139, CJA (Vol. II) Tab 22. Sahamitr reported cylinder coatings as instructed but also included an alternative CONNUM field based on the same three coating classifications that it reported in response to the initial questionnaire. *See id.* at SSQ-10 to SSQ-11, SSQ-25 to SSQ-26, Exs. SSQ-9 & SSQ 26.

Sahamitr argued to Commerce that zinc-coated cylinders are not comparable to non-zinc-coated cylinders such that Sahamitr’s margin would be inaccurate or distorted if Commerce relied on the model-match criteria in the Initial Model-Match Letter. *See id.* at SSQ-10 to SSQ-11. Sahamitr explained that it applies zinc coating at its customer’s request and that zinc coating has a “significant and direct bearing on the per-unit prices and per-unit production costs of SMPC’s zinc-coated steel propane cylinders.” *Id.* at SSQ-10; *see also* Narrative Resp. of [Sahamitr] to the First Suppl. Sec. D Questionnaire (Nov. 13, 2018) (“SDQR”) at FSD-11, CR 159–60, PR 141, CJA (Vol. II) Tab 24. Sahamitr pointed out that “products with zinc coating are sold in [Sahamitr’s] home market and, in contrast, are never sold in the United States.” SDQR at FSD-11.

For its *Preliminary Determination*, Commerce used Sahamitr’s dataset that distinguished between zinc-coated cylinders and cylinders with other coatings, notwithstanding Petitioners’ objections.

Prelim. Mem. at 9; Analysis for the Prelim. Determination (Dec. 18, 2018) at 6, CR 196, PR 165, CJA (Vol. III) Tab 32.

For the *Final Determination*, Commerce continued to account for zinc coating in the model-match methodology. See I&D mem. at 22–24. Commerce explained that it confirmed at verification that Sahamitr applies zinc coating at its customer’s request and that zinc coating requires additional steps in the production process. See *id.* at 22 (citations omitted); see also Verification of the Sales Resps. of [Sahamitr] (Apr. 15, 2019) at 16, CR 277, PR 192, CJA (Vol. V) Tab 38 (referencing Sales Verification Exs. For [Sahamitr] (Mar. 12, 2019), Ex. SVE-5A, CR 229–51, PR 183, CJA (Vol. V) Tab 36). Per-unit comparisons showed that the cost of producing zinc-coated cylinders was “significantly higher” than for non-zinc-coated cylinders. I&D Mem. at 23 & n.184 (citation omitted). Citing Sahamitr’s 2016 annual report, Commerce also found that zinc coating “prevent[s] metal from rusting in humid climates.” *Id.* at 22 & n.175 (citing Exs. Accompanying the Narrative Response of [Sahamitr] to Sec. A of the Anti-dumping Duty Questionnaire, (Aug. 13, 2018) (“AQR”), Ex. A-9 at 89, CR 38–47, PR 72–76, CJA (Vol. I) Tab 13).

### C. Parties’ Arguments

Before the court, Plaintiffs advance the following arguments. First, Plaintiffs argue that Commerce departed from its policy of using the model-match methodology announced at the outset of an investigation. Pls.’ Mem. at 14–17. Second, Plaintiffs argue that Commerce did not support its revision to the model-match methodology with compelling reasons or substantial evidence. *Id.* at 17–20. Third, Plaintiffs argue that substantial evidence does not support Commerce’s finding that zinc coating is commercially significant. *Id.* at 20–28.

The Government counters that substantial evidence supports the agency’s determination that zinc coating is a commercially significant characteristic, Gov’t’s Resp. at 9–10, and further assert that compelling reasons support Commerce’s determination to revise the model-match methodology, Gov’t’s Resp. at 17–18; see also SMPC’s Resp. at 4–6. The Government points to evidence that Thai customers request zinc coating, zinc coating requires a special process, and zinc coating extends the useful life of a cylinder and prevents rusting in humid climates. See Gov’t’s Resp. at 10–11.

## **D. Substantial Evidence Supports Commerce’s Use of Zinc Coating in the Model-Match Methodology**

### **1. Standard of Review Applicable to Commerce’s Selection of Model-Match Criteria**

The parties articulate, and Commerce applied, a more rigorous standard concerning its development of the model-match criteria than was necessary. The U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit have looked for “compelling reasons” when Commerce modifies a model-match methodology in a review after having used that methodology in previous segments of the proceeding. *See, e.g., SFK USA*, 537 F.3d at 1380; *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1517–18, 516 F. Supp. 2d 1323, 1331–32 (2007), *aff’d* 551 F.3d 1286 (Fed. Cir. 2008); *Fagersta Stainless AB v. United States*, 32 CIT 889, 894–95, 577 F. Supp. 2d 1270, 1276–77 (2008). “Compelling reasons” require the agency to provide “compelling and convincing evidence that the existing model-match criteria are not reflective of the merchandise in question, that there have been changes in the relevant industry, or that there is some other compelling reason” requiring the change. *Fagersta*, 32 CIT at 894, 577 F. Supp. 2d at 1277 (citation omitted). By comparison, when Commerce develops a model-match methodology in an investigation, it is afforded “considerable discretion” and need only support the methodology with substantial evidence and a reasoned explanation. *Bohler Bleche*, 324 F. Supp. 3d at 1350–54.

Here, the original investigation is being challenged and there was no methodology from a previous segment for Commerce to alter. In the investigation, Commerce was developing, not revising, its model-match methodology. Accordingly, the agency was not required to address the higher “compelling reasons” standard to support including a code for zinc coating. The agency’s model-match methodology need only be supported by substantial evidence. *See id.* at 1354 (stating that the “only question before [the] court is whether the [agency’s] chosen methodology is reasonable, supported by substantial evidence on the record, and otherwise in accordance with the law”) (emphasis omitted).

### **2. Commercial Significance of the Zinc Coating**

Next, the court considers whether substantial evidence supports Commerce’s determination that zinc coating is a commercially significant characteristic (i.e., a characteristic that merits distinguishing between identical and similar products). The court finds that substantial evidence supports Commerce’s determination.

As discussed above, foreign like product includes both identical and similar merchandise and Commerce has considerable discretion to establish its model-match criteria to distinguish between them. *See SFK USA*, 537 F.3d at 1379. “Commerce has wide latitude in choosing what physical characteristics to consider,” and generally will recognize physical differences that are significant in terms of cost and price differences. *New World Pasta Co. v. United States*, 28 CIT 290, 308, 316 F. Supp. 2d 1338, 1354 (2004).

Here, Commerce supported with substantial evidence its conclusion that zinc coating is a commercially significant characteristic.<sup>7</sup> Commerce cited sales documents indicating that zinc coating is optional and selected by Sahamitr’s customers.<sup>8</sup> I&D Mem. at 23 & n.182 (citing, *inter alia*, SBCQR, Ex. SSQ-7 (customer’s terms and conditions requiring spray coating of zinc wire)). Commerce found that zinc coating requires a “special process” in that Sahamitr “prepare[s] the base coat by spraying pure zinc wire’ with certain specified thickness” and applies “other specified base coat or ‘other brands.” *Id.* at 22 & n.171 (quoting SBCQR, Ex. SSQ-7). Commerce also relied on evidence in which Sahamitr identified the price and cost differentials between CONNUMs differing only as to zinc coating. *See id.* 23 & n.184 (citing SBCQR, Ex. SSQ-7, pt. 2; SDQR, Ex. FSD-11). Commerce also cited Sahamitr’s 2016 annual report to support its finding that zinc coating prevents rust and extends the useable life of a cylinder. *See id.* at 22 & n.174 (citing AQR, Ex. A-9 at 89). The 2016 annual report states that Sahamitr offers a hot-dipped galvanized cylinder that is “highly resistant” to the effects of high humidity and, “therefore[,] it helps reduce the maintenance and cost of [the] cylinder, and waste of the obsolete cylinder.” AQR, Ex. A-9 at 89. Although not explicitly stated in the Issues and Decision Memorandum, nothing suggests that Com-

<sup>7</sup> While Plaintiffs fail to identify evidence that detracts from the agency’s findings, their questioning of the evidence is somewhat understandable. Although Commerce cited record evidence in its analysis, certain of its citations are mis-directed and do not obviously support the associated findings. Nevertheless, examining the agency’s reasoning and referenced record evidence as a whole, the court is able to reasonably discern the path of the agency’s reasoning. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

<sup>8</sup> Plaintiffs argue that Commerce’s conclusion that Sahamitr’s customers request zinc coating is unsupported by substantial evidence because Commerce relied on Sahamitr’s 2016 annual report, which does not describe a spraying process, and new information obtained at verification. *See* Pls.’ Mem. at 23–24; Oral Arg. at 15:10–15:20 (time stamp from recording), available at <https://www.cit.uscourts.gov/sites/cit/files/092420–19–00147-MAB.mp3> (last accessed Dec. 3, 2020). However, Commerce also identified the terms and conditions in a contract between Sahamitr and a customer indicating that the customer required the zinc coating. *See* I&D Mem. at 23 & n.182 (citation omitted). Thus, substantial evidence supports this finding.

merce's finding that zinc protects against rust and extends the life of cylinder is dependent on how the zinc coating is applied (i.e., spray or hot dip).<sup>9</sup>

Plaintiffs argue that substantial evidence does not support Commerce's finding that zinc coating results in a pricing premium because Commerce accepted Sahamitr's reporting of home market and U.S. sales on a tare-weight basis but considered the cost and pricing effects of zinc coating on a per-cylinder basis. *See* Pls.' Mem. at 25–26. Commerce explained that although Sahamitr reported sales on a tare-weight basis, Sahamitr conducted sales in both the home and U.S. markets on a per-cylinder basis. I&D Mem. at 23; *see generally id.* at 25–26 (explaining that Sahamitr's home market and U.S. sales databases, which were reported on a tare-weight basis, were reliable). Commerce found it “more meaningful to measure the price differences based on . . . a per-unit cylinder basis.” *Id.* at 23. Although Plaintiffs disagree with Commerce's conclusion, they have not identified any evidence indicating that price and cost comparisons on a per-cylinder basis are less reliable for evaluating the relevance of zinc coating than if they had been performed on a tare-weight basis. Thus, Plaintiffs fail to provide a basis to call into doubt Commerce's analysis.

The Parties also dispute whether Plaintiffs exhausted their administrative remedies with respect to the argument that Commerce failed to address evidence that zinc coating is not commercially significant because non-zinc coatings also extend the life of a cylinder and prevent rust. *See* Gov't's Resp. at 11–15; SMPC's Resp. at 6; Pls.' Reply at 7. The court, however, need not resolve this issue. Assuming that Plaintiffs did exhaust their administrative remedies and that Commerce did not address evidence identified by Plaintiffs, *see* Pls.' Mem. at 22–23, the agency's oversight would not require a remand. Commerce is not “required to explicitly address every piece of evidence presented by the parties,” but only “significant arguments and evidence which seriously undermines its reasoning and conclusions.” *U.S. Steel Corp. v. United States*, 36 CIT 1172, 1174, 856 F. Supp. 2d 1318, 1321 (2012) (citations omitted). Considering the record as a whole, Commerce has supported with substantial evidence its deci-

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<sup>9</sup> Plaintiffs contend that the hot-dipped galvanized cylinders are not the same type of cylinders sprayed with zinc coating, thereby challenging whether the protective properties described in the 2016 annual report can be attributed to the subject merchandise. *See* Pls.' Mem. at 22; Oral Arg. at 13:25–15:07. Plaintiffs, however, agree that zinc protects against rust in humid climates, Oral Arg. at 5:10–5:15, and do not identify evidence that such protection changes depending on the method by which the cylinder is coated. Thus, although the evidence cited by Commerce is less than ideal, the court “cannot find . . . so little evidence on the record as to be less than a mere scintilla or less than that which a reasonable mind might accept as adequate to support a conclusion.” *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984).

sion to accept as commercially significant the distinction between zinc and non-zinc coatings because zinc coating requires unique production processes, is specifically requested by customers, and leads to price variations. *Cf. Bohler Bleche*, 324 F. Supp. 3d at 1350 (finding that “differences in cost and price” attributable to a physical characteristic and that “customers would view” such products as distinct, indicate that a physical characteristic is commercially significant). Any failure to compare protective qualities (or the degree of protection) as between zinc coatings and non-zinc coatings would not undermine that decision. Thus, Plaintiffs’ argument is not sufficient to warrant remand under the substantial evidence standard. *See U.S. Steel*, 36 CIT at 1181, 856 F. Supp. 2d at 1327 (noting that the reviewing court “under the substantial evidence standard must defer to the [agency]” when “there is an adequate basis in support of the [agency’s] choice of evidentiary weight”).

For the foregoing reasons, the court sustains Commerce’s conclusion that zinc coating is a commercially significant characteristic.<sup>10</sup>

## II. Cost of Production Data

### A. Legal Framework

“In assessing the reliability of a respondent’s cost of production,” the agency must confirm, among other things, “that the costs are reasonably and accurately allocated to individual control numbers.” *Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT \_\_\_, \_\_\_, 466 F. Supp. 3d 1303, 1309 (2020) (emphasis omitted) (citation omitted). Typically, Commerce will rely on a respondent’s normal books and records to determine the cost of production, provided that they “reasonably reflect the costs associated with the production and sale of the merchandise.” *See* 19 U.S.C. § 1677b(f)(1)(A).

When necessary information (such as cost of production information) is not available on the record, or an interested party withholds information requested by Commerce, fails to provide requested information by the submission deadlines, significantly impedes a proceed-

<sup>10</sup> Plaintiffs argue that Sahamitr failed to report the portion of the CONNUM related to the external coating of the cylinder consistent with Commerce’s instructions in the Initial Model-Match Letter. *See* Pls.’ Mem. at 15–16. However, at oral argument, Plaintiffs acknowledged that Sahamitr did in fact provide the information as requested by Commerce albeit with alternative CONNUM fields including a code for zinc coating. Oral Arg. at 4:15–4:40. Therefore, Plaintiffs’ argument that Sahamitr failed to comply with Commerce’s reporting instructions must fail.

Similarly, Plaintiffs’ argument that Commerce’s initial model-match criteria, which did not distinguish zinc from other coatings, implies that zinc coating is not commercially significant, *see* Pls.’ Mem. at 15, fails because Commerce obtained information regarding the commercial significance of the zinc coating during the investigation (i.e., after the Initial Model-Match Letter), *see, e.g.*, I&D Mem. at 22–24.



ing, or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall . . . use the facts otherwise available.” *Id.* § 1677e(a).

## B. Background

For the *Final Determination*, Commerce accepted Sahamitr’s reported CONNUM-specific costs notwithstanding Plaintiffs’ arguments that there were cost differences between certain pairs of CONNUMs that appeared to be out of proportion to the differences in physical characteristics based on the CONNUM description. I&D Mem. at 39 & n.269 (citation omitted). Because Commerce found that Sahamitr’s cost of production data were reliable, the agency found it unnecessary to rely on facts otherwise available or use an adverse inference. *See id.* at 39–40. Plaintiffs challenge these conclusions. *See Pls.’ Mem.* at 28–40.

In response to section D of the initial questionnaire, Sahamitr stated that it tracks “production costs on [a] product-specific basis” and reported “weighted-average costs for all products sharing identical CONNUM physical characteristics.” BCDQR at D-17 to D-18. In response to the supplemental section D questionnaire, Sahamitr further explained that it used its “standard cost structure to capture accurately cost differences stemming from the different physical characteristics of the various cylinder types that SMPC produces.” SDQR at FSD-10.

Commerce preliminarily determined that Sahamitr’s cost data were reliable subject to two exceptions that are not relevant here. *See Prelim. Mem.* at 12. At verification, Commerce confirmed that Sahamitr allocated “total actual costs for each cost element [of a CONNUM] on a product-specific basis.” Verification of the Cost Resp. of [Sahamitr] (Apr. 24, 2019) at 15, CR 278, PR 193, CJA (Vol. V) Tab 39.

In their administrative case brief, Petitioners argued that Sahamitr’s cost of production data were unreliable because they had identified several CONNUM pairings that were nearly identical—with the exceptions of two characteristics—but had unexplained cost differences. Pet’rs’ Case Br. at 18; *see also id.* at 15–16 (citing several pairs of CONNUM that purportedly exhibited such cost differences). Petitioners argued to Commerce that Sahamitr’s failure to provide reliable cost of production information warranted the use of total AFA. *Id.* at 19.

Commerce rejected Petitioners’ arguments and continued to find Sahamitr’s cost of production information reliable. *See I&D Mem.* at 36–40. Commerce explained that Sahamitr’s reported costs “derived

from the company's normal accounting records," which Commerce found were "maintained in accordance with the generally accepted accounting principles (GAAP) of Thailand." *Id.* at 37; *see also id.* at 38 (finding that Sahamitr's books and records satisfied the requirements of 19 U.S.C. § 1677b(f)(1)(A)). Commerce found that Sahamitr "classified each cylinder produced into the appropriate CONNUM based on the physical characteristics defined by Commerce and used the product-specific costs from its system to derive weighted average per-unit cost[s] for each unique CONNUM." *Id.* at 38–39 & n.265 (citation omitted).

Commerce acknowledged that the physical characteristics captured by each CONNUM did not reflect all "processing activities" and "physical distinctions" in Sahamitr's cylinders. *Id.* at 39. In particular, the size, weight, and design of collars and foot rings assembled and welded to the cylinders sold in the home market differed from those used on cylinders sold in the U.S. market. *See id.* Commerce acknowledged that the "CONNUM structure [did] not reflect any differences associated with these physical distinctions." *Id.* at 39 & n.270 (citation omitted). Nevertheless, Commerce found that these cost variations were "relatively minor" and insufficient to conclude that Sahamitr did not submit its costs on a CONNUM-specific basis. *Id.* at 39. Commerce also rejected Petitioners' analysis of Sahamitr's cost data as including material costs that were inconsistent with differences associated with one physical characteristic unrelated to coating. *Id.* According to Commerce, Petitioners' analysis of this issue did not account for zinc coating and how "the product costs would differ depending on whether the cylinders are coated with zinc." *Id.*

Accordingly, Commerce concluded that Sahamitr did not withhold cost data, the record did not lack "necessary information," and thus, reliance on total AFA was unnecessary. *Id.* at 40.

### **C. Parties' Arguments**

Plaintiffs argue that Sahamitr reported cost differences that cannot be attributed to the physical characteristics based on Plaintiffs' selected pairs of CONNUMs. *See Pls.' Mem.* at 28. Plaintiffs assert that the unexplained cost differences owe to Sahamitr withholding cost information and not accurately reporting costs on a CONNUM-specific basis. *See id.* at 28–29. Thus, Plaintiffs argue, substantial evidence does not support the agency's conclusion that Sahamitr's cost data were reliable. *See id.* at 28; *Pls.' Reply* at 11. Because, in Plaintiffs' view, Sahamitr's cost data are unreliable, substantial evidence does not support Commerce's refusal to rely on total AFA. *See Pls.' Mem.* at 40.

The Government argues that the cost differences in the pairs of CONNUMs selected by Plaintiffs are explained by differences in costs for the collars and foot rings on the cylinders differing as between the home and U.S. markets. Gov't's Resp. at 23. To that end, the Government contends that most cost variations between CONNUM pairings align with cost variations for different dimensions of collars and foot rings as recognized and explained by Commerce. *Id.* at 22; *see also* SMPC's Resp. at 10–11. The Government acknowledges that one CONNUM comparison identified by Plaintiffs shows more than minor cost differences but contends that this example is an outlier and not representative of the other cost differences. Gov't's Resp. at 20. Finally, the Government argues that total facts available—neutral or adverse—was not appropriate in this case because Commerce reasonably determined that necessary information was not missing from the record. *Id.* at 24; *see also* SMPC's Resp. at 11–14.

**D. Substantial Evidence Supports Commerce's Conclusion that Sahamitr's Cost of Production Information is Reliable**

Commerce acknowledged the cost variances between CONNUM pairs identified by Petitioners and provided a reasoned explanation why the variances did not detract from the reliability of Sahamitr's cost of production data: they were minor and explained by differences in the collars and foot rings that were not accounted for in the physical characteristics used to assign CONNUMs. *See* I&D Mem. at 39 & n.269 (citing Narrative Resp. of [Sahamitr] to the Third Suppl. Questionnaire (Feb. 20, 2019), Exs. TSQ-8 & TSQ-9, CR 214–25, PR 175, CJA (Vol. III) Tab 35). The CONNUM pairs selected by Plaintiffs reflect cost differences across non-identical CONNUMs which Commerce reasonably associated with the processing activities for distinct cylinders sold in the Thai home market and the U.S. market (i.e., the collars and foot rings). *See* I&D Mem. at 39. In other words, this was not a case in which the respondent failed to average cost differences within a CONNUM and Commerce rejected the suggestion that it average those differences across different CONNUMs. Plaintiffs have not presented any evidence undermining this conclusion.

Again, Commerce considered and rejected Plaintiffs' argument based on other comparisons of CONNUM pairings with one physical difference. *See id.* at 39 & n.271 (citing Pet'rs' Case Br. at 15); Pls.' Mem. at 30. Commerce explained that Plaintiffs' argument in this regard was not credible because it was based on an analysis that did not account for cost differences attributable to zinc coating—a com-

mercially significant feature. *See* I&D Mem. at 39. Plaintiffs’ arguments on appeal are little more than an invitation for the court to reweigh the evidence considered and rejected by Commerce, a task that the court will not do. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court does not reweigh the evidence).<sup>11</sup>

Finally, Plaintiffs contend that Sahamitr’s purported failure to report cost data reliably warrants use of total AFA. *See* Pls.’ Mem. at 40. Because substantial evidence supports the agency’s conclusion that Sahamitr reliably reported cost data, substantial evidence also supports Commerce’s determination not to rely on total AFA. *See* I&D Mem. at 39–40.

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby **ORDERED** that Commerce’s *Final Determination* is sustained. Judgment will enter accordingly.

Dated: December 3, 2020

New York, New York

*/s/ Mark A. Barnett*  
MARK A. BARNETT, JUDGE

Slip Op. 20–174

HUNG VUONG CORPORATION, et al., Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, et al., Defendant-Intervenors.

Before: M. Miller Baker, Judge  
Court No. 19–00055

[Plaintiffs’ motion for judgment on the agency record is granted in part and denied in part. The Court remands to Commerce for further proceedings consistent with this opinion.]

Dated: December 3, 2020

*Robert L. LaFrankie*, Crowell & Moring LLP of Washington, DC, argued for Plaintiffs.

<sup>11</sup> Plaintiffs contend that Commerce’s determination is not supported by substantial evidence because the agency did not consider the cost difference evident in a particular CONNUM pair. *See* Pls.’ Mem. at 32–33. As explained above, Commerce supported its determination that the cost data were reliable with substantial evidence. Thus, the absence of a discussion regarding this one specific CONNUM pair that the Government now describes as an outlier does not prevent the agency’s decision from being supported by substantial evidence. *See Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005) (citation omitted) (explaining that the agency is only required to address “issues material to the agency’s determination”).

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## OPINION AND ORDER

### Baker, Judge:

In some quarters, the humble catfish has a bad reputation. It's ugly, often maligned as a "bottom-feeder," and with fins that sting, it's not so easy to remove from a fishing line intended for statelier fish.<sup>1</sup> But as reported in the newspaper of record, the ugly, ungainly, and prickly catfish is, in fact, a delicacy. Craig Claiborne, "Catfish, Long a Southern Delicacy, Branches Out," *N.Y. Times*, Nov. 11, 1981, at C6. As a result, commercial catfish farming is a big business in this country.

Indeed, the demand for catfish is so great that foreign producers have entered the domestic market. Some of those producers are in Vietnam. In 2003, the Commerce Department determined that "catfish"<sup>2</sup> produced in Vietnam and exported to this country were dumped in the U.S., i.e., sold in the U.S. at below the normal sales price in Vietnam,<sup>3</sup> and Commerce imposed import duties.

Under the statutory and administrative scheme, antidumping duties can be reviewed once per year and may be adjusted (upwards or downwards) as to particular entities. This litigation stems from the 14th such review<sup>4</sup> of the antidumping order as to certain frozen fish fillets from Vietnam.

<sup>1</sup> Use of pliers is highly recommended.

<sup>2</sup> In 2002, Congress amended the Federal Food, Drug, and Cosmetic Act to provide that "the term 'catfish' may only be considered to be a common or usual name (or part thereof) for fish classified within the family Ictaluridae" and, further, that "only labeling or advertising for fish classified within that family [i.e., Ictaluridae] may include the term 'catfish.'" 21 U.S.C. § 321d(a)(1)(A)–(B). The Vietnamese-produced fish at issue in this case are of the species *pangasius* and thus may not legally be marketed in the United States under the name "catfish." Nevertheless, the domestic market apparently perceives the Vietnamese species as functionally equivalent to homegrown catfish.

<sup>3</sup> As explained further below, determining the "normal" sales price in a country with a non-market economy such as Vietnam adds another layer of complexity in antidumping cases.

<sup>4</sup> Lest the reader unfamiliar with trade law conclude "14th administrative review" suggests this case is an administrative law version of *Jarndyce v. Jarndyce*, fear not. On the anniversary of an antidumping order, various affected parties (e.g., foreign producers and exporters and domestic competitors) may request an "administrative review" to determine the actual assessment rates as to particular subject merchandise for the preceding twelve-month period. See *infra* Statutory and Regulatory Background Part B. In short, each review is distinct, factually and legally, from any preceding review(s) and is best understood as periodic maintenance of the original antidumping order.

In that review, Commerce found that it could not verify information submitted by the Vietnamese producer and that the administrative record was otherwise incomplete in several respects. Commerce further found that these information deficiencies resulted from the producer’s failure to cooperate to the best of its ability and therefore supplied the missing information by assuming facts most adverse to the producer, which resulted in the highest possible import duty.

The Vietnamese producer then brought this action challenging Commerce’s decision. After briefing and argument on the producer’s motion for judgment on the agency record, the Court grants the motion in part, denies the motion in part, and remands for further proceedings consistent with this opinion.

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**Statutory and Regulatory Background**

**A. Antidumping Orders**

The federal antidumping statute provides a mechanism for imposing remedial duties on imported merchandise sold, or likely to be sold, in the United States at “less than its fair value.” 19 U.S.C. § 1673(1). The gist of the process is that an “interested party” as defined in the

Tariff Act of 1930<sup>5</sup> files a petition simultaneously with Commerce and the International Trade Commission alleging that a U.S. domestic industry is materially injured or threatened with material injury by such imports. U.S. Int'l Trade Comm'n, Publication 4540, *Antidumping and Countervailing Duty Handbook*, at I-3 (14th ed. June 2015), available at [https://www.usitc.gov/trade\\_remedy/documents/handbook.pdf](https://www.usitc.gov/trade_remedy/documents/handbook.pdf) (accessed Nov. 17, 2020).

Commerce then investigates whether the petition contains sufficient allegations of dumping and, if so, whether dumping is occurring, while the ITC investigates whether the relevant domestic industry is being, or is likely to be, materially injured. If both agencies find in the affirmative, Commerce publishes an antidumping order in the Federal Register imposing an antidumping duty “in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673.<sup>6</sup> The antidumping duty is in addition to any other duty imposed on the subject merchandise. 19 U.S.C. § 1673.

## B. The Administrative Review Process

### 1. Purpose of the review

Because relevant background facts and market conditions change over time, the statutory and regulatory framework provides for administrative reviews of antidumping orders to adjust the rate. During the order’s anniversary month,<sup>7</sup> domestic interested parties<sup>8</sup> may submit written requests asking Commerce to conduct an administrative review of specific foreign exporters or producers covered by the

<sup>5</sup> The statute provides that an “interested party” described in subparagraph (C), (D), (E), (F), or (G) of Section 771(9) of that Act (codified at 19 U.S.C. § 1677(9)) may file a petition on behalf of a domestic industry. See 19 U.S.C. § 1673a(b)(1). The specified subparagraphs refer to various domestic entities involved in the production of a “domestic like product.” *Id.* § 1677(9)(C)–(G).

<sup>6</sup> “Normal value” essentially refers to the price at which the subject merchandise is sold in the country from which it is exported. *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1337 (Fed. Cir. 2002). For example, the normal value of a widget exported from Country Q is the price at which that widget is sold in Country Q. The terms “export price” and “constructed export price” are nuanced and discussed in detail in note 34, *infra*; for now, and ignoring nuance, think broadly of the antidumping duty as the price at which the hypothetical Country Q widget is sold in Country Q (normal value) minus the price at which that same Country Q widget is sold in the United States (export price or constructed export price). If the Country Q home market price exceeds the price in the United States, the difference is the extent to which that product is “dumped.”

<sup>7</sup> The term “anniversary month” is defined, in relevant part, as referring to “the calendar month in which the anniversary of the date of publication of an order . . . occurs.” 19 C.F.R. § 351.102(b)(5). In this case, the original antidumping order was issued in August 2003, so parties seeking administrative review of that order submit requests during subsequent Augusts.

<sup>8</sup> See *supra* note 5.



order. 19 C.F.R. § 351.213(b)(1). Exporters or producers covered by an antidumping order, or importers of exporters' or producers' merchandise covered by such an order, may similarly request a review of that order as it applies to them individually (in the case of an exporter or producer) or merchandise imported by them (in the case of an importer). *Id.* § 351.213(b)(2), (3).

The period of review covers the 12 months immediately preceding the most recent anniversary month. *Id.* § 351.213(e)(1)(i). Completion of the review is subject to strict time limits. *See* 19 U.S.C. § 1675(a)(3)(A); 19 C.F.R. § 351.213(h)(1)–(2).

If no domestic interested party, affected foreign exporter, producer, or importer requests an administrative review, the then-current antidumping rate, referred to as the “preexisting rate,” continues to apply.

## 2. Selection of respondents

If Commerce undertakes an administrative review, the Department must “determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.” 19 U.S.C. § 1677f-1(c)(1). Commerce may invoke an exception, however, “[i]f it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review,” *id.* § 1677f-1(c)(2), in which case Commerce is to make the determination “for a reasonable number of exporters or producers by limiting its examination to” either a “statistically valid” sampling of exporters or producers, *id.* § 1677f-1(c)(2)(A), or “exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined,” *id.* § 1677f-1(c)(2)(B).

When Commerce implements this statutory exception, it identifies some exporters or producers as to whom it will make the “individual” determination; they are referred to as “mandatory respondents,” who will receive individual antidumping rates at the end of the review, while exporters or producers not individually reviewed will receive either an “all others” rate or a nationwide single rate. 19 U.S.C. § 1673d(c)(1)(B)(i), (c)(5).<sup>9</sup>

<sup>9</sup> A review may also include “voluntary respondents,” which refers to interested parties who apply for that treatment pursuant to 19 C.F.R. § 351.204(d). Commerce must establish individual antidumping rates for voluntary respondents who timely submit the information required of the mandatory respondents, provided examination of voluntary respondents will not be unduly burdensome to Commerce such that it “inhibit[s] the timely completion of the investigation or review.” 19 U.S.C. § 1677m (a)(1)(B). As a practical matter, therefore, a “voluntary respondent” is likely to be an exporter or producer that believes it can get a lower antidumping rate by seeking separate examination.

Commerce then sends questionnaires to mandatory respondents seeking information for purposes of the review. 19 C.F.R. § 351.221(b)(2). The questionnaires give precise instructions on what information Commerce wants, in what form it must be reported, and when it is due.

The questionnaire answers are critical as respondents have the burden of creating an accurate administrative record. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). Respondents have this burden because they control the information that Commerce needs to complete its review. *Id.*

### 3. Verification of respondents' answers

After the respondents answer the questionnaires, Commerce may conduct “verification.” “Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness.” *Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (CIT 1990) (cleaned up).<sup>10</sup> Commerce admonishes respondents that submission of new information at verification is inappropriate unless the need for the information was not already apparent; the information makes minor corrections to information already on the record; or the information corroborates, supports, or clarifies information already on the record.<sup>11</sup> “Although Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with interested parties and not with Commerce.” *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (cleaned up).

### 4. “Adverse facts available”

In certain statutorily-defined situations, Commerce is required to supply facts not in the administrative record to complete its anti-dumping investigation or administrative review. In limited circumstances, the statute also permits Commerce—when supplying such facts—to take the additional step of choosing facts that are adverse to the respondent in an investigation or administrative review. The case

<sup>10</sup> Commerce has latitude in how it conducts verification, and there is no requirement to verify everything in a respondent’s questionnaire. *U.S. Steel Corp. v. United States*, 953 F. Supp. 2d 1332, 1348 (CIT 2013).

<sup>11</sup> Commerce is permitted to limit its acceptance of new information at the verification stage to “minor corrections and clarifications.” *China Steel Corp. v. United States*, 393 F. Supp. 3d 1322, 1342 (CIT 2019) (citing *Maui Pineapple Co. v. United States*, 264 F. Supp. 2d 1244, 1257–58 (CIT2003)); see also *Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216, 1231–32 (CIT 2012) (finding Commerce acted reasonably in refusing to accept post-verification submissions due to time limits, inability to issue supplemental questions and verify the new submissions, and because “allowing a party to wait until Commerce discovers an omission would allow the party to game the system”).

law and litigants frequently use the shorthand terms “adverse facts available” or “AFA” to describe this two-step analysis, but that jargon is potentially misleading because it collapses together the two distinct steps.

In the first step, the statute requires Commerce to apply “facts otherwise available,” i.e., facts not in the record, in various defined circumstances. *If* Commerce applies facts otherwise available, Commerce then proceeds to the next step. In step two, *if* Commerce determines that a respondent has not cooperated to the best of its ability, it may then apply an adverse inference, i.e., select from among facts that are most unfavorable to the respondent, in applying facts otherwise available.

In short, Commerce’s application of facts otherwise available is a necessary, but not sufficient, condition to the Department’s application of an adverse inference in selecting among those facts. The Court describes each of these steps below.

#### **a. Facts otherwise available**

Commerce is required to apply “facts otherwise available” in specified situations:

(a) In general. If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by [Commerce] . . . under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

[Commerce] . . . *shall*, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (emphasis added).

Subsection 1677e(a) has several layers and multiple uses of the disjunctive. Notably, paragraphs (1) and (2) are in the alternative, joined by the word “or,” meaning that Commerce must use facts

otherwise available if *either* necessary information is not available or the circumstances in paragraph (2) apply.

Paragraph (2), in turn, contains four subparagraphs that are likewise joined by the word “or,” meaning that if any one (or more) of the conditions listed in paragraph (2) applies, Commerce must use facts otherwise available.

The first pathway for applying the “facts otherwise available” analysis—paragraph (1) of subsection 1677e(a)—focuses solely on the *absence* of necessary information, not on the reason why it is missing. If “necessary information is not available on the record,” for any reason, Commerce must use facts otherwise available. *See* 19 U.S.C. § 1677e(a)(1).

The alternative pathway for applying “facts otherwise available”—paragraph (2) of subsection 1677e(a)—focuses on the respondent’s acts and omissions affecting the administrative record. Notably, whereas paragraph (1) asks whether “*necessary* information is not available on the record,” *see* 19 U.S.C. § 1677e(a)(1), paragraph (2) omits the word “necessary” and focuses on whether a respondent has withheld *any* requested information (regardless of whether it seems tangential or trivial), *id.* § 1677e(a)(2)(A), has failed to comply with deadlines or provided information in the wrong form or manner, *id.* § 1677e(a)(2)(B),<sup>12</sup> significantly impeded the proceeding, *id.* § 1677e(a)(2)(C), or provided information that could not be verified, *id.* § 1677e(a)(2)(D).<sup>13</sup>

<sup>12</sup> Section 1677e(a)(2)(B) in turn is further qualified by 19 U.S.C. §§ 1677m(c)(1) and 1677m(e), which impose limits on Commerce’s ability to apply facts otherwise available when a respondent has failed to comply with Commerce’s deadlines or requirements as to the form and manner requested.

<sup>13</sup> In *Nippon Steel Corp. v. United States*, the Federal Circuit characterized § 1677e(a) as follows: “Under subsection(a), if a respondent ‘fails to provide [requested] information by the deadlines for submission, Commerce shall fill in the gaps with ‘facts otherwise available.’ The focus of subsection (a) is respondent’s *failure to provide information*. The reason for the failure is of no moment.” 337 F.3d 1373, 1381 (Fed. Cir. 2003) (brackets and emphasis in original).

*Nippon Steel’s* characterization of subsection (a) is overbroad and overlooks the provision’s careful nuances. The court only quoted subparagraph (B) of paragraph (2) of subsection (a)—§ 1677e(a)(2)(B), which addresses the respondent’s failure to provide information *in a timely fashion* or *in the form and manner* requested. But § 1677e(a)(1), which the *Nippon Steel* court did not discuss, asks solely “whether necessary information is not available on the record.” 19 U.S.C. § 1677e(a)(1). If necessary information is missing, *whatever the reason*, regardless of whether it is due to the respondent’s failure to provide it, then Commerce applies “facts otherwise available.” *Alternatively*, if the respondent acts or omits to act in specified ways in connection with the administrative record—*regardless* of the reason for the act and whether the information in question is necessary—then Commerce also applies “facts otherwise available.” *See id.* § 1677e(a)(2)(A)–(D). In short, *Nippon Steel’s* statement that “the focus of subsection (a) is respondent’s *failure to provide information*” is accurate only insofar as it applies to subparagraph (A) of paragraph (2) of subsection (a). *See id.* § 1677e(a)(2)(A) (allowing the use of “facts available” if a respondent “withholds information that has been requested” by Commerce).

Finally, § 1677e(a) provides that Commerce’s resorting to “facts otherwise available” is “subject to section 1677m(d) of this title.” Section 1677m(d) in turn provides that when information submissions are noncompliant with Commerce’s requirements, the Department “shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.” 19 U.S.C. § 1677m(d). Thus, Commerce is to give notice of a deficiency and an opportunity to cure it, but the statute qualifies that obligation by allowing Commerce to consider whether it would be “practicable” to do so and whether the statutory deadline for completing the review would allow it.

### **b. Adverse inference**

The second step in the “adverse facts available” analysis focuses on whether “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information” from Commerce. 19 U.S.C. § 1677e(b)(1). If Commerce finds such a failure to cooperate, the Department “may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available” and “is not required to determine, or make any adjustments to, a . . . weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.” *Id.* § 1677e(b)(1)(A)–(B). The statute allows Commerce to use any dumping margin from any “segment of the proceeding under the applicable antidumping order,” including the highest such margin, and further provides that Commerce need not corroborate any dumping margin applied in any other segment. *Id.* § 1677e(d)(1)(B), (d)(2), (c)(2).

The “adverse inference” analysis focuses on the respondent’s “failure to cooperate to the best of its ability, not its failure to provide requested information.” *Nippon Steel*, 337 F.3d at 1381 (cleaned up). For Commerce to conclude that a respondent failed to cooperate “to the best of its ability” such that an adverse inference is appropriate, “Commerce need only make two showings.” *Id.* at 1382.

First, Commerce must make “an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations.” *Id.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir.

2002), for the point that Commerce had reasonably expected an importer to maintain records of an accused antidumping activity).

Second, Commerce must show that the respondent's failure to fully respond stems from "either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* (emphasis added).

The key is whether "it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.* at 1383. Intentional conduct is not necessary—"[t]he statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.*

### **C. Reviews Involving Non-Market Economies**

As noted above, the antidumping statute requires that Commerce determine the subject merchandise's "normal value" and then compare that value to the export price or constructed export price. 19 U.S.C. § 1677b(a). When goods subject to an antidumping investigation are produced in a country with a "non-market economy," the statute requires Commerce to assume that home-market sales are not reliable indicators of normal value because the economy is presumed to be under state control. *Taian Ziyang Food Co. v. United States*, 637 F. Supp. 2d 1093, 1105 (CIT 2009).

A "non-market economy" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

#### **1. Factors of production**

For merchandise imported from a non-market economy country, the statute requires Commerce to

determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he valuation of the *factors of production* shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

19 U.S.C. § 1677b(c)(1) (emphasis added).

“Factors of production” in § 1677b(c)(1) include, but are not limited to, hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost (including depreciation). *Id.* § 1677b(c)(3). In valuing factors of production as described above, Commerce must “utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” *Id.* § 1677b(c)(4).

In other words, for purposes of this case, “factors of production” means all the different things that go into farming fish—fish feed, electricity, labor, etc. All these things cost money, so theoretically the product’s price should reflect these costs. The statute essentially requires Commerce to determine what the producer would have spent to prepare the subject merchandise if the country of origin had a market economy rather than a non-market economy. *See Lasko Metal Prods., Inc. v. United States*, 810 F. Supp. 314, 316–17 (CIT 1992) (“With respect to [non-market economy] goods, the statute’s goal is to determine what the cost of producing such goods would be in a market economy.”), *aff’d*, 43 F.3d 1442 (Fed. Cir. 1994); *see also Baoding Yude Chem. Indus. Co. v. United States*, 170 F. Supp. 2d 1335, 1345 (CIT 2001) (explaining that the task is not to construct the cost of producing the subject merchandise in a particular market economy, but rather to use data from comparable market-economy countries to construct what the cost of production would have been in the actual country of origin if it were a market economy country).

## 2. Control numbers

To tie the factors of production to the subject merchandise in a meaningful way, Commerce uses a reporting system it calls “control numbers.” This term is “Commerce jargon for a unique product defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding.” *GODACO Seafood Joint Stock Co. v. United States*, 435 F. Supp. 3d 1342, 1348 n.1 (CIT 2020) (cleaned up) (quoting *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1349 (CIT 2012)). “All products whose product hierarchy characteristics are identical are deemed to be part of the same [control number] and are regarded as ‘identical’ merchandise’ for the purposes of comparing export prices to [normal value].” *Am. Tubular Prods., LLC v. United States*, Slip Op. 15–98, at 5 n.1, 2015 WL

5236010, at \*2 n.1 (CIT Aug. 28, 2015) (quoting *Union Steel*, 823 F. Supp. 2d at 1349).<sup>14</sup>

Control numbers vary from case to case. Commerce’s questionnaires provide the control numbers applicable in a particular review. See *An Giang Fisheries Import & Export Joint Stock Co. v. United States*, 287 F. Supp. 3d 1361, 1367 n.7 (CIT 2018). Commerce insists that respondents tie their factors of production to control numbers because “Commerce uses the respondents’ [control number–]specific [factors of production] to construct the value of the product sold by the respondent company in the United States to ensure that a fair comparison is made between the U.S. price and normal value.” *Thuan An Prod. Trading & Serv. Co. v. United States*, 348 F. Supp. 3d 1340, 1353 (CIT 2018) (cleaned up).

Commerce employs the “control number” system because often an antidumping investigation will involve a range of products that are similar but not identical. Commerce uses “control numbers” to distinguish such products from each other to allow a comparison of normal value and export price as to each unique product, as determined based on physical characteristics (for example, in this case, whether a frozen fish fillet is glazed or unglazed). Each unique product is assigned a particular control number based on its characteristics.<sup>15</sup>

### 3. Country-wide versus separate rates

Another special consideration in non-market economy cases involves the “country-wide rate” versus “separate rates.” Because Commerce presumes that all commercial industries in a non-market economy country operate under government control, all entities within such a country producing subject merchandise will receive a single country-wide antidumping duty rate unless an individual entity demonstrates that it is both *de jure* and *de facto* independent of the central government. *Sigma Corp. v. United States*, 117 F.3d 1401,

<sup>14</sup> To be clear, a control number is not a serial number. Whereas a serial number might denominate a specific widget to distinguish it from otherwise identical widgets, a control number serves a more abstract purpose: describing the characteristics of a class or group of widgets.

<sup>15</sup> Because similar products may have different physical characteristics despite falling within the same antidumping order, the products may have different factors of production unique from one another (for example, the glazed fish fillet will involve some expense for whatever is used in the glazing process, while the unglazed fillet will not). “Because some of these specific factors of production may cost more than others, Commerce compares the U.S. sales price and factors of production for unique products, i.e., those with the same [control numbers], to obtain the most accurate dumping margins.” *Yantai Xinhe Steel Structure Co. v. United States*, 36 CIT 1035, 1051 (2012).



1405 (Fed. Cir. 1997); *see also* *Zhejiang Zhaofeng Mech. & Elec. Co. v. United States*, 355 F. Supp. 3d 1329, 1333 (CIT 2018) (explaining what the entity must establish to receive a separate rate).

Thus, in the context of an administrative review of an antidumping order applicable to merchandise from a non-market economy country, the most recent single country-wide rate applicable to the subject merchandise continues to apply unless (a) Commerce reviews, and revises, the country-wide rate or (b) a particular respondent applies for, and receives, a separate rate (in which case the nationwide single rate continues to apply to other companies who do not receive separate rates). *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review, Preliminary Determination of No Shipments and Partial Rescission of the Antidumping Duty Administrative Review; 2016–2017*, 83 Fed. Reg. 46,479, 46,480 (Dep’t Commerce Sept. 13, 2018).

### **Factual and Procedural Background**

This litigation stems from a 2003 antidumping order on frozen fish fillets imported from Vietnam. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Dep’t Commerce Aug. 12, 2003). That order found that certain frozen fish fillets from Vietnam were being sold in the U.S. at less than fair value and imposed cash deposits based on the estimated weighted-average margins. The order imposed specific rates for certain exporters and a “Vietnam-wide” rate for anyone not specifically listed. *See id.* at 47,909–10.<sup>16</sup> In the intervening seventeen years, that order underwent multiple administrative reviews as described above.

#### **A. The Review**

Commerce commenced the 14th administrative review of the 2003 antidumping order after receiving a request from Catfish Farmers of America<sup>17</sup> and several of its constituent members (collectively, “Catfish Farmers”) to review the rate as to multiple entities, including several affiliated Vietnamese producers known collectively as the

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<sup>16</sup> Commerce had previously determined that Vietnam is a “non-market economy” for purposes of U.S. antidumping laws. *See Notice of Final Antidumping Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116, 37,119 (Dep’t Commerce June 23, 2003). That designation remains in effect.

<sup>17</sup> Catfish Farmers of America is a trade association representing domestic catfish farmers and processors.

Hung Vuong Group.<sup>18</sup> The period of review was August 1, 2016, to July 31, 2017, the 12-month period preceding the anniversary month of the original August 2003 antidumping order. *See* ECF 61–1, at 62.<sup>19</sup>

No party asked Commerce to review the Vietnam-wide rate as part of the 14th administrative review, so the preexisting rate of \$2.39 per kilogram continued to apply to companies who had not applied for, and received, a separate rate. 83 Fed. Reg. at 46,480. Commerce selected mandatory respondents for the review; among them was Hung Vuong.

### **1. Commerce preliminarily assigned Hung Vuong a \$0.00 dumping margin.**

After selecting Hung Vuong as a respondent, Commerce pro-pounded a series of lengthy questionnaires.<sup>20</sup> Hung Vuong submitted extensive information in response.

Commerce preliminarily determined that Hung Vuong was entitled to separate rate status and assigned it a dumping margin of zero. 83 Fed. Reg. at 46,480.<sup>21</sup> Commerce based its preliminary determination on the U.S. sales and factors of production databases Hung Vuong submitted during the review process in response to Commerce’s questionnaires. ECF 61–1, at 691.

### **2. Commerce issued supplemental questionnaires and conducted verification in Vietnam.**

Meanwhile, Catfish Farmers requested that Commerce verify Hung Vuong’s questionnaire answers. ECF 61–1, at 1160. After Commerce issued its preliminary determination, but prior to verification, Catfish Farmers also asked Commerce to issue a supplemental questionnaire to probe Hung Vuong’s relationship with its American customers,

<sup>18</sup> Hung Vuong includes the following companies: An Giang Fisheries Import & Export Joint Stock Company, also known as Agifish; Asia Pangasius Company Limited; Europe Joint Stock Company; Hung Vuong Joint Stock Company; Hung Vuong Mascato Company, Limited; Hung Vuong–Vinh Long Co., Ltd.; and Hung Vuong–Sa Dec Co., Ltd. ECF 25–5, at 1 n.2.

<sup>19</sup> In this opinion, pagination references in citations to the Court record are to the pagination found in the ECF header at the top of each page.

<sup>20</sup> Commerce’s original questionnaire is part of the public joint appendix. ECF 61–1, at 99–212.

<sup>21</sup> “When either a respondent’s weighted-average dumping margin is zero or *de minimis*, or an importer-specific *ad valorem* assessment rate is zero or *de minimis*, Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.” 83 Fed. Reg. at 46,480–81 (citing 19 C.F.R. § 351.106(c)(2)). Thus, under Commerce’s preliminary determination, Hung Vuong’s frozen fish fillets would have been subject to no anti-dumping duty at all, though they would still have been subject to normal import duties, if any, that would otherwise apply.

alleging that “the record evidence seriously calls into question whether [Hung Vuong’s] sales with its U.S. customers constitute arm’s-length transactions.” *Id.* at 708–09.

Commerce then issued a supplemental questionnaire partially related to Hung Vuong’s sales data and partially related to Hung Vuong’s customers. The portion relating to customers directed Hung Vuong to respond to the questions or, if Hung Vuong were unable to do so, to forward the questions to the customers for responses. *Id.* at 753–61 (questionnaire). Hung Vuong responded to the sales data portion of the questionnaire, *id.* at 763–818, and forwarded the “customer” portion to its customers for their input, but many of the customers refused to respond in whole or in part, *id.* at 820–52 (redacted customer responses).

Commerce thereafter conducted verification in Vietnam. Before doing so, Commerce provided Hung Vuong a detailed outline of the matters the agency expected to examine and the types of documents Commerce would ask to review. *See id.* at 854–71.

### **3. Commerce issued its final decision and assigned Hung Vuong a \$3.87/kg dumping margin after applying facts available with an adverse inference.**

After verification, the parties submitted briefing, and then Commerce rendered an “issues and decision memorandum” assigning Hung Vuong an antidumping duty rate of \$3.87 per kilogram. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Fourteenth Antidumping Duty Administrative Review: 2016–2017* (Apr. 29, 2019), ECF 25–5, at 37.<sup>22</sup>

In reaching this determination, Commerce first addressed four principal issues: (1) Hung Vuong’s failure to retain source documents, ECF 25–5, at 18–24; (2) Hung Vuong’s customer relationships, *id.* at 25–29; (3) Hung Vuong’s control number reporting, *id.* at 29–32; and (4) the accuracy of Hung Vuong’s factors of production, *id.* at 32–36. As to each of these issues, Commerce determined that the administrative record was deficient for various reasons, which warranted using “facts otherwise available” to complete the record pursuant to 19 U.S.C. § 1677e(a), and that Hung Vuong had failed to cooperate to the best of its ability to complete the record, which in turn warranted

<sup>22</sup> Commerce also published the results of this final decision in the Federal Register. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review: 2016–2017*, 84 Fed. Reg. 18,007 (Dep’t Commerce Apr. 29, 2019).

using an inference that is adverse to the interests of Hung Vuong “in selecting among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A).

Commerce then applied “total AFA,” trade law jargon for total “adverse facts available.” ECF 25–5, at 35–36; *see also supra* Statutory and Regulatory Background at B.4.a.–b. (explaining “AFA”). In selecting among facts otherwise available, Commerce used an adverse inference by exercising its discretion under the statute to apply the highest antidumping margin previously applied under authority of the original 2003 antidumping order, \$3.87 per kilogram. *See* ECF 25–5, at 36–37.

## **B. This Lawsuit**

In response to Commerce’s final decision imposing a \$3.87-per-kilogram antidumping margin, Hung Vuong commenced this litigation. ECF 1. Its complaint asks the Court to reject Commerce’s final decision as “not supported by substantial evidence and otherwise not in accordance with law,” ECF 10, at 19, and remand the matter to Commerce for further proceedings. *Id.*

Catfish Farmers intervened as of right to defend Commerce’s final decision. ECF 19. Thereafter, Hung Vuong moved to require Commerce to add additional documents to the administrative record, including correspondence between members of Congress and Commerce and narrative materials Hung Vuong provided to Commerce during verification. ECF 29. In response, the government acknowledged the omissions, ECF 33, and the Court granted the motion, ECF 34.

Hung Vuong then filed the pending motion for judgment on the agency record. ECF 38; *see also* USCIT R. 56.2. After full briefing and oral argument, Hung Vuong submitted certain additional record materials in response to a question the Court asked during argument. *See* ECF 69 (public); ECF 68 (confidential).

## **Jurisdiction and Standard of Review**

Hung Vuong brings this suit under 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (a)(2)(B)(iii). The Court has subject-matter jurisdiction over such actions pursuant to 28 U.S.C. § 1581(c).

In actions brought under 19 U.S.C. § 1516a(a)(2), “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the Court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce’s conclusion.

Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

*Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

## Analysis

### I. Hung Vuong Fails to Overcome the Presumption That Commerce Acted in Good Faith.

Hung Vuong asserts that after Commerce’s preliminary determination initially assigned Hung Vuong an antidumping margin of zero, Commerce “reversed its position in response to . . . congressional pressure.” ECF 38–1, at 18. Hung Vuong contends Commerce’s volte-face after such congressional intervention amounts to bad faith. *Id.* at 19.<sup>23</sup>

The administrative record shows that members of Congress pressured Commerce about this case<sup>24</sup> and that Commerce failed to memorialize that pressure in the administrative record as required by law.<sup>25</sup> The question is whether those facts have any legal significance.

The D.C. Circuit, with its heavy administrative law docket, has a body of case law on this subject. Notably, ex parte communications do not automatically void an agency decision. Rather, the decision is

<sup>23</sup> This issue was not raised in Hung Vuong’s complaint as a ground for relief. Hung Vuong later moved to supplement the administrative record to reflect communications between members of Congress and Commerce, see ECF 28 (confidential motion); ECF 29 (public motion), but never moved to amend its complaint to assert bad faith as a ground for relief. Nevertheless, the government and Catfish Farmers do not object to Hung Vuong’s raising the issue now. Rule 15(b)(2) provides that “[w]hen an issue not raised in the pleadings is tried by the parties’ express or implied consent it will be treated in all respects as if it had been raised in the pleadings,” and while a party may move for leave to amend, “failure to amend does not affect the result of the trial of that issue.” USCIT R. 15(b)(2). There is no reason to apply a different principle to consideration of a dispositive motion, so the Court will consider Hung Vuong’s bad faith claim as if it had been raised in the complaint.

<sup>24</sup> See ECF 61–1, at 750–51; *id.* at 900. Most notably, a group of senators sent a letter to the Secretary of Commerce asking him to make sure his personnel conducted Hung Vuong’s verification “rigorously.” *Id.* at 750.

<sup>25</sup> See 19 U.S.C. § 1677f(a)(3)(B) (“[Commerce] shall maintain a record of any ex parte meeting between— . . . (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding, if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.”).

*voidable* if the reviewing court finds the agency process to be so “irrevocably tainted” as to make the agency’s decision unfair, “either to an innocent party or to the public interest that the agency was obliged to protect.” *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982).

It is also important to consider whether the party allegedly aggrieved by the communications can demonstrate prejudice and can identify what arguments the party would have made had the communications been disclosed. *See id.* at 572. Ultimately, “absent a strong showing to the contrary, an agency adjudicator is presumed to act in good faith and to be capable of ignoring considerations not on the record.” *Id.* at 573 (cleaned up); *cf. Am-Pro Prot. Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002) (discussing presumption that government officials act in good faith and requiring clear and convincing evidence to show otherwise).

Here, the Court agrees with Hung Vuong that Commerce breached its statutory obligation to memorialize its communications with third parties in the administrative record. *See supra* note 25. Commerce communicated with members of Congress shortly before verification but failed to place anything on the record reflecting those communications until August 12, 2019, almost four months after Commerce issued its final decision. *See* ECF 61–1, at 1074–92. Moreover, Commerce only placed the information on the record after Hung Vuong learned of the communications and moved the Court for an order directing Commerce to supplement the record. Commerce’s actions certainly create an appearance of impropriety.

That said, “appearance of impropriety” is not the applicable standard the Court must apply—rather, the question is whether Hung Vuong has clearly and convincingly demonstrated that Commerce’s proceedings were so “irrevocably tainted” as to make the agency’s decision unfair, *PATCO*, 685 F.2d at 564, or otherwise demonstrated prejudice resulting from the *ex parte* communications. *Id.* at 572.

Hung Vuong has not carried that heavy burden. First, although members of Congress did request that Commerce conduct its review “rigorously,” there is no evidence in the administrative record to suggest that Commerce’s procedures in this case were any more or less “rigorous” than in other cases or that Commerce’s officials were so wholly cowed by Congress that they acted as Congress wished and disregarded the administrative record.

Second, Commerce’s failure to memorialize its communications with members of Congress simply has no bearing on whether substantial evidence in the administrative record permitted Commerce to apply facts otherwise available and to do so with an adverse

inference. As explained below, the Court concludes that substantial evidence mostly (but not entirely) supports Commerce’s conclusions.

Finally, Hung Vuong’s counsel could not say what his client would have done had Commerce timely updated the administrative record to reflect communications from members of Congress. ECF 70, at 21:2–23:4. That is, Hung Vuong cannot point to any prejudice resulting from Commerce’s failure to update the administrative record in real time to reflect those communications.

In sum, even though Commerce’s failure to timely memorialize the congressional communications in the administrative record is inexcusable and reflects poorly on the Department, Hung Vuong has not shown any evidence at all—let alone clear and convincing evidence—that Commerce based its final decision on those communications rather than on the administrative record or that Hung Vuong was somehow thereby prejudiced. Accordingly, Hung Vuong has not carried its burden of rebutting the presumption of good faith that attaches to official action.

## **II. The Court Sustains in Part and Remands in Part Commerce’s Determination to Apply Facts Otherwise Available with an Adverse Inference.**

The second principal issue before the Court is whether substantial evidence in the administrative record permitted Commerce to apply facts otherwise available with an adverse inference to Hung Vuong.

Commerce concluded that the administrative record’s deficiencies were so “pervasive and persistent” as to prevent Commerce from using the record at all, and further concluded that these deficiencies resulted from Hung Vuong’s “failure to cooperate.” ECF 25–5, at 35–36. In light of these findings, Commerce applied “total [adverse facts available]” because “it would be unduly difficult to apply partial [adverse facts available] by selecting from the facts available to remedy each of the deficiencies that impact each sale.” *Id.* at 36. Commerce then used the highest margin applied in a previous review of the 2003 antidumping order and currently in effect, \$3.87 per kilogram, and applied this rate to Hung Vuong. *Id.* at 36–37.

The Court addresses in turn each of the four categories of record deficiencies found by Commerce and then addresses Commerce’s decision to apply “total adverse facts available.”

### **A. Failure to Retain Source Documents<sup>26</sup>**

Commerce found that Hung Vuong discarded “documents kept in the normal course of business.” ECF 25–5, at 18 (title case removed).

<sup>26</sup> This discussion corresponds to Commerce’s findings in ECF 25–5, at 18–24.

Commerce explained that Hung Vuong is an experienced respondent<sup>27</sup> represented by experienced counsel and should therefore “be expected to maintain essential records concerning the production of frozen fish fillets and be able to respond to Commerce’s reporting requirements.” ECF 25–5, at 18. “During verification, Commerce discovered that [Hung Vuong] did not maintain source documents beyond a few months for certain key areas of inquiry during verification. Specifically, [Hung Vuong] stated that it does not maintain source documents for farming feed consumption, production orders related to its [period-of-review] sales, and sales correspondence emails.” *Id.* at 19.

## 1. Commerce’s findings

### a. Feed consumption

Commerce explained that fish feed, a producer’s largest farming cost, is a critical factor of production for respondents. ECF 25–5, at 19. Accordingly, Commerce’s questionnaire sought specific data and documentation showing, essentially, how much fish feed Hung Vuong used and what that fish feed cost. *Id.*; see also ECF 61–1, at 205–06 (Appendix X questions 15– 25). Commerce also asked for further fish feed data in a supplemental questionnaire. ECF 25–5, at 19. “An examination of [Hung Vuong’s] responses to these questions shows that [Hung Vuong] provided monthly summary charts of feed inventory and usage, purchase invoices and daily inventory in and out records.” *Id.*

During verification, however, Commerce discovered a problem:

It was unexpected, therefore, that when attempting to examine the source documents kept by [Hung Vuong] in the normal course of business [Hung Vuong] announced it had discarded its fish feed source documents and only kept the monthly summary sheets for Commerce to examine. In fact, [Hung Vuong] stated that it only keeps such source documents for a few months before discarding them. This is in sharp contrast to other [factors of production] that Commerce examined at verification,

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<sup>27</sup> Commerce noted that Hung Vuong member Agifish was a mandatory respondent in the antidumping investigation conducted in connection with the original 2003 order and that Commerce had conducted verification of Agifish’s questionnaire answers; Commerce also noted that Agifish had been a separate rate respondent in three administrative reviews. Commerce further noted that Hung Vuong—which included Agifish—was a mandatory respondent in the 9th, 10th, and 11th administrative reviews and underwent verification in the 11th review. “As such, because [Hung Vuong] or one of its collapsed members, Agifish, have been respondents in many administrative reviews and the investigation, and in several of those segments were verified, thus [Hung Vuong] is an experienced respondent.” ECF 25–5, at 18–19.



where [Hung Vuong] did keep various original source documents. For example, [Hung Vuong] retained source documents for the Daily Production Report consistent with the narrative from its questionnaire responses. *It is also in sharp contrast to its answers in its questionnaire responses, where it stated it kept such records for many years.*

*Id.* (cleaned up and emphasis added).

### **b. Production records**

Commerce noted that in prior administrative reviews of the Vietnamese frozen fish antidumping order, the agency has emphasized that respondents must report their information on a control number-specific basis.<sup>28</sup> Moreover, Commerce noted that in the 11th administrative review Commerce applied facts otherwise available (but not an adverse inference) to Hung Vuong “for failing to report [factors of production] on a [control number-]specific basis that reflected its production of fillet types it sold to the United States during the [period of review], and failing to report [factors of production] that accurately accounted for the water soaking levels of the fillets they sold to the United States.” ECF 25–5, at 20.

In the current (14th) review, Commerce’s reliance on the control number methodology prompted the agency to send Hung Vuong supplemental questionnaires that, *inter alia*, asked that control number-specific data be tied to source documents. *Id.* at 20–21. Hung Vuong’s responses said the production process began with whole live fish and that the only production-related documents the company produced were a “Daily Production Report” and a “finished goods inventory report.” *Id.* at 21.

At verification, Commerce learned that Hung Vuong’s production process actually begins with a “production order” instructing each factory on the quantity and specifications to be produced, but when

<sup>28</sup> Commerce has enforced its control number reporting requirement since at least the 8th administrative review. *See An Giang*, 287 F. Supp. 3d at 1369. The Department includes references to control number reporting in the standard non-market economy questionnaire template posted on its website. *See* <https://enforcement.trade.gov/questionnaires/nme/20131101/q-rev-nme-20131101.pdf> at A-5 & n.8, C-5, D-2, D-6, and E-7 (accessed Nov. 17, 2020).

The cover letter accompanying the initial questionnaire in the 14th review now before the Court admonished respondents to comply with the control number requirement, with the following sentence italicized in its entirety: “Accordingly, the Department is again reminding respondents that the [factors of production] reported in your submitted Section D must be reported on a [control number-]specific basis, as outlined in the reporting requirements of this questionnaire.” ECF 61–1, at 101 (italics removed). The referenced Section D of the questionnaire Commerce sent to the respondents echoed the reminder quoted above, and the questionnaire also emphasized that the respondent must provide information about the quantity and value of all factors of production, *id.* at 194–95, and contained a series of questions tying factors of production to control numbers, *id.* at 204–05, 208.

Commerce asked to examine these documents, company officials said they discard production orders. “Although in its questionnaire responses [Hung Vuong] stated that its [sic] keeps this type of original production source documents [sic] for many years, in the end, Commerce was unable to examine any production orders at verification. This is in sharp contrast to other production documents Commerce examined at verification, where [Hung Vuong] did keep various source documents.” *Id.* (cleaned up).

### c. Sales correspondence

Commerce observed that “[a]s an experienced respondent which has undergone verification before, [Hung Vuong] is well aware that for many, many years the verification outline has stated that . . . Commerce will examine sales negotiation correspondence.” ECF 25–5, at 22. During verification, however, Commerce learned Hung Vuong deletes sales confirmation e-mails after a few months to save server space and to “reduce clutter” in the company’s records, and Commerce also learned Hung Vuong deleted the entirety of one salesperson’s e-mail correspondence when she left the company. *Id.* Accordingly, Commerce was “unable to verify the negotiation of prices, quantities, and terms of sales because [Hung Vuong] deleted the emails that would have provided this information.” *Id.*

## 2. The administrative record permitted Commerce to apply facts otherwise available with an adverse inference as to the failure to retain source documents.

### a. Facts otherwise available

Based on the foregoing source document deficiencies, Commerce concluded that necessary information was missing from the administrative record for purposes of 19 U.S.C. § 1677e(a)(1), ECF 25–5 at 23, and that by discarding source documents for fish feed, production records, and sales negotiation e-mails, Hung Vuong withheld requested information for purposes of 19 U.S.C. § 1677e(a)(2)(A), significantly impeded Commerce’s investigation for purposes of 19 U.S.C. § 1677e(a)(2)(C), and provided information that could not be verified for purposes of 19 U.S.C. § 1677e(a)(2)(D). *Id.* at 22–24. Any one of these four findings allowed Commerce to apply “facts otherwise available” under 19 U.S.C. § 1677e(a).<sup>29</sup>

<sup>29</sup> At oral argument, Hung Vuong’s counsel conceded that source documents had been discarded but disputed whether any of that information mattered. ECF 70, at 11:25–12:23. Hung Vuong’s briefing likewise argues that the missing source documents were not, in Hung Vuong’s opinion, “necessary” information, asserting that the absence of “necessary”

Here, the Court need not address each statutory basis invoked by Commerce to apply facts otherwise available, as substantial evidence permitted Commerce's conclusion that Hung Vuong provided information that "cannot be verified." 19 U.S.C. § 1677e(a)(2)(D). It is undisputed that Hung Vuong did not retain source documents for fish feed consumption, production orders related to control numbers during the period of review, and sales correspondence e-mails. *See, e.g.*, ECF 38–1, at 33 (Hung Vuong admission that it routinely "discards" source documents).

Commerce sought this source document information precisely to verify Hung Vuong's responses to Commerce's initial and supplemental questionnaires. Because the discarded source documents prevented verification, Commerce permissibly applied facts otherwise available. *See, e.g., Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1375 (CIT 2007) (Commerce permissibly "resort[ed] to facts available" when respondent "supplied information regarding rebates and commissions that could not be verified and further failed to provide source documents requested by Commerce").

This is so even though Hung Vuong offered secondhand "summary reports" purporting to reflect information in original source documents. As the Federal Circuit has noted, Commerce is entitled to insist on the original records because "failure to submit primary source documentation" means that Commerce is "unable to verify the accuracy of the information submitted." *Thyssen Stahl AG v. AK Steel Corp.*, No. 97–1509, 1998 WL 455076, at \*5 (Fed. Cir. July 27, 1998) ("Thyssen's internally generated commercial invoices . . . presumably depended upon information contained in actual source documents, but the internally generated documents cannot, for the purpose of verification, replace the actual source documents.").

Finally, § 1677e(a) provides that Commerce's resort to "facts otherwise available" for deficiencies in the administrative record is "subject to section 1677m(d) of this title." 19 U.S.C. § 1677e(a). Section 1677m(d) provides that if Commerce "determines that a response to a request for information under this subtitle does not comply with the request," Commerce must "promptly inform the person submitting

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information is "required" before Commerce can resort to facts otherwise available. *See, e.g.*, ECF 58, at 13–14. Hung Vuong overlooks the statute's use of the disjunctive "or." As discussed above, *see supra* Statutory and Regulatory Background Part B.4.a., the "facts otherwise available" statute is a multi-layered provision that uses the word "or" multiple times, such that any one(or more) of the enumerated conditions is an independent basis for Commerce to apply facts otherwise available. One such ground is when "*necessary* information is not available *on the record*." 19 U.S.C. § 1677e(a)(1) (emphasis added). Another such ground, however, is when a respondent provides "information [requested by Commerce] but the information *cannot be verified*." 19 U.S.C. § 1677e(a)(2)(D)(emphasis added). As discussed below, the problem here is that Hung Vuong's discarding of source documents prevented verification of information in the administrative record.

the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of” the applicable time limits. 19 U.S.C. § 1677m(d).

Here, as the government’s counsel noted at oral argument, Hung Vuong’s admission that the source documents no longer existed made it impracticable for Commerce to give Hung Vuong a chance to supplement the record. ECF 70, at 64:9–65:23. As Hung Vuong had discarded the relevant source documents, it would have been futile for Commerce to give Hung Vuong another chance to produce them. *Cf. Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338 (Fed. Cir. 2002) (“[Section 1677m(d)] only applies when a ‘response to a request’ is deemed to not comply. A failure to respond is not the same as a ‘response’ as required by the statute.”).

More importantly, the Court construes § 1677m(d) as inapplicable at the verification stage. Verification—unlike Commerce’s questionnaires sent to respondents at the beginning of an investigation or an administrative review—does not entail a “request for information under this subtitle.” 19 U.S.C. § 1677m(d). Instead, verification entails “verify[ing] information” previously provided by a respondent in its questionnaire answers. *Id.* § 1677m(i).

Thus, insofar as a respondent’s questionnaire answers on their face comply with Commerce’s information requests, § 1677m(d) does not apply if Commerce, upon verification, determines that those questionnaire answers are inaccurate. In short, verification is not an opportunity for a do-over; instead, the purpose of verification is to confirm information previously submitted by a respondent in response to Commerce’s requests for information.

### **b. Adverse inference**

Commerce further determined that in applying facts otherwise available based on its inability to complete verification due to missing source documents, an adverse inference was warranted because Hung Vuong “failed to cooperate to the best of its ability.” ECF 25–5, at 23; *see* 19 U.S.C. § 1677e(b)(1)(A) (permitting an adverse inference when “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information”).

Commerce reasoned that Hung Vuong, an experienced respondent, “*produces* the records sought by Commerce in the ordinary course of business, but chose to discard them so that Commerce would not be able to examine them at verification.” ECF 25–5, at 23 (emphasis added). “To allow [Hung Vuong] to determine which source documents it will allow Commerce to examine at verification is to allow [Hung Vuong] to control this proceeding.” *Id.*

Hung Vuong challenges Commerce’s decision to apply an adverse inference, arguing that “there is nothing untoward or surprising about” Hung Vuong discarding records—Hung Vuong “explained to Commerce, on multiple occasions, that it does not always keep underlying source records once the information has been transferred to more regularized monthly or computerized records.” ECF 38–1, at 29 (cleaned up). Hung Vuong further argues that Vietnamese fish producers often do not keep the sorts of records Commerce asked to review in this case. *Id.* at 30.

For purposes of whether Commerce permissibly applied an adverse inference based on Hung Vuong’s failure to maintain source documents, the question here is whether Commerce has made “an objective showing that a reasonable and responsible importer would have known that the requested [source documents were] required to be *kept and maintained* under the applicable statutes, rules, and regulations.” *Nippon Steel*, 337 F.3d at 1382 (emphasis added). Hung Vuong clearly *produced* source documents in the ordinary course of business, but would a reasonable and responsible producer have *retained* all such documents to respond to an investigation or verification by Commerce?

According to Commerce’s final decision, “[w]hile courts have held the application of AFA impermissible where companies do not *keep* records in the ordinary course of business, this is not the case here.” ECF 25–5, at 23 & n.176 (emphasis added and citing *Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000), and *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1247 (CIT 1998)). There’s a lot in that sentence, and the Court will attempt to unpack it.

First, neither cited decision even addresses, much less supports, the proposition that Commerce oddly attributes to both.<sup>30</sup> Nevertheless, the Court takes Commerce’s statement as an admission by it that a “reasonable and responsible” producer is only obligated to *retain* records that it keeps in the ordinary course. Consistent with that admission, Commerce’s standard questionnaire instructions require respondents to “[i]dentify any source documents *maintained in the normal course of business* you have relied on in preparing your response, and specify the cities where these documents are maintained.” See questionnaire cited *supra* note 28, at G-10 (emphasis added). Commerce is free to put respondents on notice that *all* (or some subset of) source documents must be retained, but Commerce

<sup>30</sup> Hung Vuong parrots verbatim Commerce’s inaccurate characterization of *De Cecco*, down to the missing pincite. See ECF 38–1, at 33.

has not done so (except as discussed below). Instead, as the questionnaire indicates, Commerce's generally applicable standard is whether source documents are "maintained in the normal course of business."

Second, the Court does not understand Commerce's unexplained, if not incoherent, assertion that "this [impermissibly applying an adverse inference for failure to retain records in the ordinary course of business] is not the case here." Hung Vuong argues that the challenged source documents were *not* kept in the normal course of business, and Commerce did apply an adverse inference. So it *is* the case here that Commerce is applying an adverse inference based on the failure to keep records in the ordinary course of business. Under Commerce's own standard questionnaire instructions, Hung Vuong had no reason to expect that it had to retain *all* original source documents.

There is more to the matter, however, than simply the standard questionnaire instructions. Commerce also sent Hung Vuong a verification outline listing the "required source documents" Commerce would seek to examine during verification. *See, e.g.*, ECF 61-1, at 854. Commerce has used this verification outline "for many, many years." ECF 25-5, at 22.

The outline stated that Commerce wished to review, *inter alia*, "[p]urchase agreements and records of payment made for material costs, charges and expenses," "raw material inventory ledger[s]," and "[m]onthly records (for [period of review] of raw material consumption at each production center," ECF 61-1, at 858-59, material that necessarily included fish feed purchase records. Similarly, section XIII of the verification outline, headed "Material Inputs," explained that Commerce would thoroughly review the costs of producing the frozen fish fillets, including how Hung Vuong purchased raw materials from suppliers and "the amounts purchased for all factors," which in context clearly referred to factors of production such as fish feed. *Id.* at 867-68.

The verification outline also listed "[p]roduction orders," which Commerce said would "serve as substantiation for reported information about individual sales as well as total sales figures for the [period of review]." *Id.* at 858. As to sales correspondence, the outline stated that Commerce would "'trace' the selected sale *from initial inquiry / order through your records to receipt of payment from the customer*," and that "*a complete set of documents should be prepared for [each selected] sale.*" *Id.* at 864 (emphasis added).

Commerce's verification outline is why Hung Vuong's status as an "experienced respondent" matters. ECF 25-5, at 18-19. An inexperienced respondent, or a respondent that had never been subject to

verification, would have received only the standard questionnaire with the general instruction about “source documents maintained in the normal course of business” and thus may not have seen a need to retain all source documents, but an experienced respondent that had previously received the verification outline would know what types of source documents Commerce would ask for at verification, such that it would be objectively unreasonable for the experienced respondent to assume that disposing of those materials was acceptable.

The Court therefore concludes, in view of this verification outline—which imposed stricter source document retention obligations than Commerce’s general instructions—that Hung Vuong, as an experienced respondent, “would have known that the requested [source documents] were required to be kept and maintained under the applicable statutes, rules, and regulations.” *Nippon Steel*, 337 F.3d at 1382. Substantial evidence therefore permitted Commerce to apply an adverse inference based on Hung Vuong’s failure to retain these source documents, regardless of its business practices.<sup>31</sup>

In addition, “a court may affirm the decision of an agency on a ground other than the ground given by the agency, so long as it is clear that the agency would have reached the same decision if it had been aware that the ground it invoked was legally unavailable, or if the decision does not depend on making a finding of fact not previously made by the agency.” *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1291 (Fed. Cir. 2020). Here, if the Court were to find that Hung Vuong was not on notice of the need to maintain source documents, the Court would find that substantial evidence permitted Commerce’s conclusion that Hung Vuong’s questionnaire answers regarding the feed consumption and production record source documents were inaccurate. *See* ECF 25–5, at 19 (Hung Vuong’s questionnaire answers inaccurately stated that feed consumption records were “kept for many years”); *id.* at 21 (“Although in its questionnaire responses HVG stated that it keeps this type of original production source documents for many years, in the end, Commerce was unable to examine any production orders at verification.”).

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<sup>31</sup> Notably, in litigation following Commerce’s 11th administrative review of the same antidumping order at issue in this case, Hung Vuong argued that it was impossible for it to comply with Commerce’s data requests because it did not track sales and factors of production based on product characteristics identified by control numbers. Commerce rejected that argument, finding Hung Vuong could still track information in the way Commerce requested even if that were not Hung Vuong’s normal business practice. The Court agreed. *See An Giang*, 287 F. Supp. 3d at 1370–71. Commerce initiated the 11th review in 2014 and issued its final decision in 2016. *Id.* at 1364, 1365. Thus, Hung Vuong was on notice well prior to the 14th administrative review that Commerce would not accept the “not our business practice” argument, especially in view of *Nippon Steel’s* admonition that “inadequate record keeping” is inexcusable.

Those findings in turn supported Commerce’s conclusion that Hung Vuong failed to cooperate to the best of its ability. *See id.* at 23 (relying on all of “the above” findings to conclude that Hung Vuong did not cooperate to the best of its ability); *see also Nippon Steel*, 337 F.3d at 1383 (“[I]naccurate reporting[] surely evinces a failure to cooperate . . .”).

Accordingly, the Court determines that Commerce permissibly applied an adverse inference in connection with the missing feed consumption and production records documents. That inference was permissible even if Hung Vuong had not been on notice of the requirement to maintain the discarded source documents, because Hung Vuong’s questionnaire answers about its document retention policies were inaccurate.

Finally, Hung Vuong also objects that Commerce has sometimes excused prior respondents’ inadequate recordkeeping and asserts that Commerce’s allegedly disparate treatment of Hung Vuong is an arbitrary change in policy. *See* ECF 38–1, at 33–34. Specifically, Hung Vuong cites a Commerce decision from the 8th review as to a different respondent. There, Commerce did not require the respondent to “keep or maintain certain records beyond which the Department had approved in prior segments, absent explicit evidence that would call into question the company’s document retention system.” *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews*, at 45 (Mar. 13, 2013).

Commerce’s final decisions in prior reviews do not “establish a policy” as Hung Vuong contends. “Each administrative review is a separate exercise of Commerce’s authority and allows for different conclusions based on different facts in the record. Commerce’s findings with respect to [a respondent’s] reporting methodology in prior segments of this proceeding do not relieve [any respondent] of its burden to comply with Commerce’s requests in [a later] segment.” *ABB Inc. v. United States*, 437 F. Supp. 3d 1289, 1301 (CIT 2020) (cleaned up); *see also Hyundai Heavy Indus. Co. v. United States*, 332 F. Supp. 3d 1331, 1342 (CIT 2018) (finding respondent could not excuse its failure to comply with Commerce’s questionnaires by pointing to Commerce’s treatment of that respondent’s information in prior administrative reviews).



## B. Hung Vuong's Relationship with Customers<sup>32</sup>

Catfish Farmers contends that Hung Vuong may be affiliated with its U.S. customers.<sup>33</sup> Sales to an affiliated entity may not be at arm's length and thus may not reflect commercial reality.<sup>34</sup> Therefore, at oral argument counsel for Catfish Farmers explained that if Hung Vuong is affiliated with its U.S. customers, it could potentially manipulate the sales price to receive a lower dumping margin than might otherwise be the case. ECF 70, at 81:25–84:20.

Prior to verification, Commerce issued supplemental questionnaires to both Hung Vuong and its customers in “an attempt to probe [Hung Vuong's] possible affiliation with these companies, the role of ex-employees at these companies, how [Hung Vuong] does business with these companies and whether the sales are made at arm's length, and information about sales to the ultimate purchasers, among other things.” ECF 25–5, at 25.

### 1. Commerce's findings

Commerce concluded that “three important pieces of information [were] missing from the record” for purposes of assessing the relationship between Hung Vuong and its customers. ECF 25–5, at 27. First, because Hung Vuong had deleted the e-mail messages containing sales correspondence with customers, that information was not in the record. *Id.* Second, Hung Vuong's customers did not respond to Commerce's questionnaires, and that information would have shed light on the affiliation issue. *Id.* Third, Hung Vuong failed to retain production orders, which would have shown specific details for particular sales. *Id.* at 27–28.<sup>35</sup>

<sup>32</sup> This discussion corresponds to Commerce's findings in ECF 25–5, at 24–29.

<sup>33</sup> The statutory basis for this argument is 19 U.S.C. § 1677(33)(G), which provides: “The following persons shall be considered to be ‘affiliated’ or ‘affiliated persons’: . . . (G) Any person who controls any other person and such person. For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.”

<sup>34</sup> As previously discussed, antidumping duties are “equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673. The “export price” is the price the producer or exporter charges to an *unaffiliated* customer either within, or for exportation to, the United States, while the “constructed export price” is the price the *affiliated* purchaser charges within the United States to a purchaser not affiliated with the producer or exporter. *Mid Continent Steel & Wire, Inc. v. United States*, 203 F. Supp. 2d 1295, 1298–99 (CIT 2017). Commerce makes certain statutory adjustments to the price of goods to reflect various costs involved in preparing the goods for sale in the United States, and the adjustments to “constructed export price” are more extensive than the adjustments to “export price.” See 19 U.S.C. § 1677a(c) (listing adjustments to both), (d) (listing additional adjustments to “constructed export price”).

<sup>35</sup> The Court pauses here to note that aspects of Commerce's final decision are incoherent and frustrate reasoned judicial review. For instance, Commerce at times characterizes

In addition, Commerce noted Hung Vuong’s questionnaire answers stated any interaction Hung Vuong had with its “downstream purchasers” (that is, the people who buy frozen fish from Hung Vuong’s U.S. customers) was incidental, sporadic, and promotional in nature, but at verification Commerce found evidence of regular substantive visits by Hung Vuong to downstream purchasers and vice versa. *Id.* at 26.

**2. Commerce must reconsider its application of facts otherwise available with an adverse inference as to customer relationships.**

**a. Facts otherwise available**

Based on its findings described above, Commerce concluded that it did “not have the necessary information to determine the full extent of the relationship between [Hung Vuong] and its customers, including any potential affiliate relationship or any principal/agent relationship,” *id.* at 27, and could not “determine whether [it] ha[d] a correct Section C database which would include the selling expenses incurred by [Hung Vuong’s] U.S. selling agent, with which to calculate a margin for [Hung Vuong].” *Id.* at 28. The “scale of the problem” rendered Hung Vuong’s responses unusable in determining “an accurate and reliable dumping margin.” *Id.* at 28–29.

Commerce therefore applied facts otherwise available because (1) necessary information was not available on the record, *see* 19 U.S.C. § 1677e(a)(1); (2) Hung Vuong withheld information requested by Commerce, *id.* § 1677e(a)(2)(A); (3) Hung Vuong significantly impeded Commerce’s verification, *id.* § 1677e(a)(2)(C); and (4) Hung Vuong provided information that could not be verified, *id.* § 1677e(a)(2)(D). ECF 25–5, at 28. As above, any *one* of these four findings allowed Commerce to apply “facts otherwise available” under 19 U.S.C. § 1677e(a), and therefore the Court need not address every such finding so long as at least one of them is supported by substantial evidence.

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Hung Vuong’s action as “discarding” production orders, *see* ECF 25–5, at 23 (referring to Hung Vuong’s “convenient discarding of these documents”), but elsewhere Commerce characterizes Hung Vuong’s action as a “refusal to provide production orders requested at verification,” *id.* at 27, and then later distinguishes between Hung Vuong’s decisions to (1) “discard” e-mails and (2) “not provide” production orders, *id.* at 28. The Court cannot discern whether (1) this is simply sloppiness on Commerce’s part, (2) the Department believes “discard” and “refusal to provide” mean the same thing, or (3) Commerce means to say that Hung Vuong *retained* production orders but refused to provide them. In any event, the Court construes Commerce’s statements that Hung Vuong “refused to provide” production orders as meaning that Hung Vuong discarded them long before verification pursuant to its ordinary business practices.

At a minimum, substantial evidence permitted Commerce's conclusion that Hung Vuong submitted information that could not be verified due to Hung Vuong's failure to retain sales correspondence and production orders. Contrary to Hung Vuong's argument, *see* ECF 38-1, at 26, Commerce had no obligation under 19 U.S.C. § 1677m(d) to provide Hung Vuong an opportunity to cure these deficiencies. As explained above, § 1677m(d) does not apply at the verification stage, but even if it did, such an opportunity to cure would have been futile because the documents no longer existed.

On the other hand, Commerce could not lawfully rely upon the failure of Hung Vuong's customers to answer Commerce's questionnaire as a basis to apply facts otherwise available when Commerce gave no notice of the deficiency. As Hung Vuong points out in its brief, it first learned of this deficiency when Commerce issued its final decision some four months after Hung Vuong submitted its questionnaire answers. *See* ECF 38-1, at 26. The government has no response to this argument. On remand, therefore, Commerce must reconsider its decision to apply facts otherwise available as to customer relationships and determine whether it should apply partial facts available.

Commerce further cited discrepancies between information in Hung Vuong's questionnaire answers about its contact with customers and their ultimate purchasers and information discovered at verification suggesting more systematic and pervasive contact. ECF 25-5, at 26-27. For example, the questionnaire response stated Hung Vuong does not discuss "price negotiation, delivery, or negotiation of other terms or conditions of U.S. sales with the ultimate U.S. purchasers," ECF 61-1, at 778-79, but e-mail correspondence found at verification indicated otherwise, ECF 25-5, at 26. The questionnaire response also stated Hung Vuong's officials did not visit customers' ultimate purchasers, aside from sometimes being introduced to them at trade fairs, ECF 61-1, at 778, but at verification Commerce learned Hung Vuong officials directly visited the ultimate purchasers, ECF 25-5, at 26 (citing ECF 61-1, at 909). The verification report noted those visits with ultimate purchasers might include discussion of "possible sales, products, [and] prices." ECF 61-1, at 909.

Hung Vuong's briefing contends there was no discrepancy because the company disclosed that its officers visited customers and customers visited Hung Vuong, *see* ECF 38-1, at 26, but the questionnaire response also said Hung Vuong did not visit the *ultimate purchasers* (i.e., the customers' customers) and the information found at verification contradicted that. ECF 25-5, at 26 (citing ECF 61-1, at 909).

In short, discrepancies in the administrative record between Hung Vuong's questionnaire answers versus the information revealed at

verification supported Commerce's decision to apply facts otherwise available due to its inability to verify information in the record and Hung Vuong's impeding of the investigation. Although Hung Vuong complains that it was not provided an opportunity to cure this deficiency pursuant to 19 U.S.C. § 1677m(d), as discussed above, the Court construes that provision as inapplicable to deficiencies discovered at verification. In any event, Commerce's obligation to provide that opportunity is subject to "the time limits established for the completion of investigations or reviews under this subtitle." 19 U.S.C. § 1677m(d). In this case, verification concluded less than one month prior to Commerce's statutory deadline.

Hung Vuong's reply brief, however, argues that Commerce should have notified Hung Vuong of the deficiencies *prior to verification* because "it had much of [Hung Vuong's] purportedly deficient information in its possession for several months (and in some cases more than a year)." ECF 58, at 9. Nothing in the record suggests Commerce was aware that Hung Vuong's questionnaire answers were inaccurate until verification, and Hung Vuong has offered no argument whatsoever to demonstrate how or why Commerce should have discovered those deficiencies sooner.

If Commerce does not know responses are unverifiable until it conducts verification—after all, what else is verification for?—then how is Commerce supposed to give notice of a deficiency it has not yet discovered? *Cf. Taian Ziyang Food Co. v. United States*, 637 F. Supp. 2d 1093, 1112 (CIT 2009) (accepting the government's argument that Commerce could not have informed a party that information was missing from the administrative record when Commerce did not yet know the information submitted was incorrect).

\* \* \*

The Court largely sustains Commerce's decision to find facts otherwise available as to Hung Vuong's customer relationships, but on remand Commerce must reconsider whether to apply partial facts available because it could not lawfully apply facts otherwise available based on the failure of Hung Vuong's customers to answer Commerce's questionnaires. In so doing, Commerce must thoroughly explain why it reaches whatever decision it makes.

#### **b. Adverse inference**

The second part of the analysis, as above, involves Commerce's decision to apply an adverse inference. Commerce found that Hung Vuong failed to cooperate to the best of its ability in responding to Commerce's requests for information because Hung Vuong discarded sales correspondence and production orders, thereby "preclud[ing]

Commerce from further probing [Hung Vuong's] relationships with its customers." ECF 25–5, at 28. Commerce concluded that Hung Vuong's failure to cooperate resulted in Commerce being unable to determine whether the administrative record provided adequate information about Hung Vuong's selling expenses from which Commerce could calculate a dumping margin for Hung Vuong. *Id.* at 28–29.

Again, the standard is that enunciated in 19 U.S.C. § 1677e(b)(1) as further clarified by *Nippon Steel*—whether the respondent (here, Hung Vuong) failed to cooperate to the best of its ability—and, again, the analysis has no *mens rea* component. The same problem with the data supporting Hung Vuong's factors of production arises as to the records Commerce sought to review regarding Hung Vuong's relationship with its customers. Hung Vuong discarded production orders and e-mail correspondence with its customers and, apparently (based on records found at verification), those customers' ultimate purchasers. As the *Nippon Steel* court noted, the "best of its ability" standard does not permit "inadequate record keeping." 337 F.3d at 1382. Hung Vuong does not dispute that it routinely deletes production orders and e-mail correspondence—rather, Hung Vuong almost defiantly admits that it does so and then disparages Commerce for requesting material Hung Vuong considers "not relevant." ECF 58, at 17.

Moreover, while Hung Vuong contends that discarding production orders and deleting e-mail is a "typical business practice," *id.*, Hung Vuong fails to address how such discarding of source documents Commerce deems relevant can possibly comply with the *Nippon Steel* standard when Commerce's verification outline requires such data. Therefore, the Court concludes that substantial evidence in the administrative record permitted Commerce to apply an adverse inference as to Hung Vuong's relationship with its customers based on its failure to retain production orders and e-mail correspondence with its customers.

Similarly, the Court concludes that substantial evidence supported Commerce's determination to apply an adverse inference based on Hung Vuong's submission of inaccurate questionnaire answers regarding its relationship with downstream customers. These inaccurate responses amounted to a failure to cooperate for purposes of 19 U.S.C. § 1677e(b)(1). However, because the Court is remanding for Commerce to reconsider whether to use total or partial facts available for the reasons noted above, the Court is also required to remand the decision to apply an adverse inference—regardless of whether substantial evidence in the administrative record permitted that decision—because 19 U.S.C. § 1677e(b)(1)(A) allows Commerce to

apply an adverse inference only for purposes of “selecting from among the facts otherwise available.” Thus, if Commerce decides to use partial facts available on remand, Commerce could only apply (at most) a partial adverse inference. On remand, therefore, after reconsidering whether to apply partial facts available on the customer relationships issue, Commerce must also reconsider whether to apply an adverse inference—in whole or in part—on the issue and must thoroughly explain why it reaches whatever decision it makes.

### C. Control Number Reporting<sup>36</sup>

#### 1. Commerce’s findings

As discussed above, *see supra* Statutory and Regulatory Background Part C.2., Commerce requires respondents to use a reporting mechanism referred to as “control numbers.” In this case, Commerce found that Hung Vuong failed to comply with the control number methodology:

At verification, we observed that [Hung Vuong’s] invoices, rather than reflecting the actual [control numbers] produced, instead represent an average of several [control numbers]. More specifically, an examination of the Daily Production Report indicates that for each sale, production occurs over several days, and at the end of an order, [Hung Vuong] sums up the unsoaked and soaked fillet weights to calculate an average NETWGTV for that particular sale. The value reflected in the invoice is therefore an average of all the productions [sic] runs for that sale.

ECF 25–5, at 30.

The Court understands “NETWGTV” as having something to do with the amount of water weight the fish fillets gain when they are soaked in preservatives. Commerce emphasized that producers must accurately report this weight gain “in the [control number] in the field ‘NETWGTV,’” *id.*, but found that Hung Vuong only reported average numbers, “rather than the precise amount of water weight gained by fillets during each production run.” *Id.* Commerce also found that Hung Vuong had records that would have allowed it to comply with Commerce’s required methodology. *Id.* at 31.<sup>37</sup>

<sup>36</sup> This discussion corresponds to Commerce’s findings in ECF 25–5, at 29–32.

<sup>37</sup> The Court further notes that at oral argument, Hung Vuong’s counsel said it would have been easy for the company to report data in the way Commerce required because it would have essentially just required hitting “a few buttons” on the company’s computer system. ECF 70, at 40:3–42:4. If indeed it would have been “easy” for the company to comply, then the Court cannot understand why Hung Vuong didn’t just follow Commerce’s instructions in the first place.

Commerce’s review of Hung Vuong’s invoices at verification indicated that “an examination of the daily production shows that rounding each day’s production to the nearest decimal results in the same NETWGTU for each line item as well as the report’s total, and therefore, for the entire sale.” *Id.* at 30. Commerce noted that in this circumstance, reporting one control number for the whole invoice was accurate, but Commerce then explained that this method would not always work: “However, for other sales, for example the first surprise sales trace, an examination of the daily production report shows that rounding the daily production to the nearest decimal results in five different NETWGTUs, and therefore, five [control numbers] should have been reported, but [Hung Vuong] only reported one [control number] for the sale.” *Id.*

Hung Vuong’s response was essentially to argue that Commerce’s requirements were too difficult, but Commerce found that Hung Vuong’s records would have allowed for reporting in the required manner. *Id.* at 30–31. “Put another way, [Hung Vuong] has not reported [control number–]specific sales data as required by Commerce’s repeated warnings in this case, and Commerce’s instructions.” *Id.* at 31. Commerce explained that this matters because “allocation methodologies that average [control number] characteristics may result in a reporting methodology that is not accurate because there is less variation in the calculation of [normal value], even though there are clear differences in the physical characteristics of the [control numbers] and in the actual amount of inputs used.” *Id.*

**2. The administrative record permitted Commerce to apply facts otherwise available with an adverse inference as to control number reporting.**

**a. Facts otherwise available**

Based on the foregoing, Commerce invoked 19 U.S.C. § 1677e(a)(2)(B), (C), and (D) and stated that “because [Hung Vuong] did not report accurate [control numbers] when it had the ability to do so, we find that [Hung Vuong] failed to provide sales and [factors-of-production] data in the form or manner requested by Commerce and significantly impeded this proceeding.” ECF 25–5, at 32. Commerce found that the absence of properly-reported data meant that “we do not have correct Section C and Section D databases with which to calculate an accurate margin for [Hung Vuong]. Commerce therefore cannot use [Hung Vuong’s] Section C and Section D questionnaire responses to determine an accurate and reliable dumping margin.” *Id.* As before, any one of the three statutory grounds—§

1677e(a)(2)(B), (C), or (D)—is enough to require Commerce to use facts otherwise available.

***i. (a)(2)(B)—failure to provide information in the form and manner requested.***

The Court concludes that substantial evidence permitted Commerce’s decision to resort to facts otherwise available pursuant to § 1677e(a)(2)(B) because it is essentially undisputed that Hung Vuong failed to report its control numbers in the manner Commerce required and because neither of the two exceptions under § 1677m apply here.<sup>38</sup>

Commerce explained that Hung Vuong “reported the weighted average of the production runs for an invoice, rather than the precise amount of water weight gained by fillets during each production run.” ECF 25–5, at 30. Hung Vuong objects to this finding and argues that the company reported data “based on actual water weight gain attributed to each specific production run using its actual production records . . . .” ECF 38–1, at 36. Hung Vuong spends roughly three pages of its brief asserting, in various ways, that it used “actual water weight gain” in its reporting. *See id.* at 36–38.

However, it appears to the Court that Hung Vuong and Commerce are talking past each other. Commerce’s findings do not appear to the Court to contend that Hung Vuong did not use “actual water weight gain.” Rather, it appears to the Court that Commerce’s complaint is that Hung Vuong took the “actual water weight gain” for multiple fish fillets and then averaged all the data to report a single control number, instead of reporting figures for each specific control number that should have applied to the finished fish fillets: “More specifically, an examination of the Daily Production Report indicates that for each sale, production occurs over several days, and at the end of an order, [Hung Vuong] sums up the unsoaked and soaked fillet weights to calculate an average NETWGTU for that particular sale. *The value reflected in the invoice is therefore an average of all the productions [sic] runs for that sale.*” ECF 25–5, at 30 (emphasis added). Commerce’s complaint is that Hung Vuong should have reported separate data for each production run, rather than averaging the data. Notably, Hung Vuong admits to doing this and says it “does not dispute that it used an ‘averaging’ methodology to report its net weights.” ECF 38–1, at 39.

<sup>38</sup> Section 1677e(a)(2)(B) requires Commerce to use facts otherwise available when an interested party “fails to provide such information [requested by Commerce] by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of [19 U.S.C. § 1677m].” 19 U.S.C. § 1677e(a)(2)(B).



The requirement that Hung Vuong comply with the “control number” reporting methodology is not new and should not have been a surprise to Hung Vuong. As noted above, *see supra* note 31, the *An Giang* Court previously found that Commerce emphasized the control number requirements at least as early as the 8th administrative review, such that by the time of the 11th review, Hung Vuong was “notified of Commerce’s preference for [control number–]specific reporting and had enough time to come into compliance.” *An Giang Fisheries Import & Export Joint Stock Co. v. United States*, 287 F. Supp. 3d 1361, 1369–70 & n.13 (CIT 2018); *see also id.* at 1370 (“Given the advance notice afforded to respondents, the court cannot find that Commerce’s request for [control number–]specific reporting, here, was unreasonable . . .”).

The *An Giang* Court also found that while Hung Vuong did not track sales and factors of production based on the product characteristics identified by the control numbers, Commerce was justified in expecting Hung Vuong to track information in the way Commerce required, regardless of what sort of records Hung Vuong kept in the “normal course of business.” *Id.* at 1370–71 (cleaned up). The government notes that in the course of this 14th administrative review, Commerce again placed great emphasis on the importance of its required “control number” reporting methodology. ECF 49, at 26–28, 37–38.

Hung Vuong, however, contends that Commerce could not permissibly invoke § 1677e(a)(2)(B) because “Commerce must still accept and consider the information if it nevertheless satisfies the statutory conditions of 19 U.S.C. § 1677m(e).” ECF 38–1, at 23.<sup>39</sup> Section 1677m(e) provides that Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by” Commerce *if* the information satisfies *all five* of the following requirements: (1) “the information is submitted by the deadline established for its submission”; (2) “the information can be verified”; (3) “the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination”; (4) “the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements

<sup>39</sup> Hung Vuong repeatedly mischaracterizes § 1677m(e) as qualifying the *entirety* of § 1677e(a). *See, e.g.*, ECF 38–1, at 20 (“Importantly, the statute also instructs that the Department ‘shall not decline to consider information that is submitted by an interested party and is necessary to the determination’ if” the conditions listed in § 1677m(e) apply). Section 1677e(a), however, refers to § 1677m(e) in one location only—subparagraph (B) of paragraph (2). Section 1677m(e) does not apply to the other five circumstances listed in § 1677e(a) requiring Commerce to use “facts otherwise available.”

established by [Commerce] with respect to the information”; and (5) “the information can be used without undue difficulties.” 19 U.S.C. § 1677m(e)(1)–(5). If the respondent fails to satisfy *any* of these five requirements, Commerce need not consider the deficient submission. See *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016) (noting that “all five requirements in that subsection” must be satisfied).<sup>40</sup>

Remarkably, however, Hung Vuong argues that *Commerce* must satisfy “the five enumerated requirements of 19 U.S.C. § 1677m(e) to enable it to decline an interested party’s information for its final determination.” ECF 38–1, at 20. Hung Vuong has it exactly backwards.

*Commerce* is not required to “meet” five requirements in order to “decline” information. Rather, as explained above, the statute says Commerce “shall not decline to consider” an interested party’s submission of information “necessary to the determination” that does not meet all of Commerce’s requirements if the *information submitted* satisfies five conditions that are linked together with the conjunction “and.” In other words, it is the *respondent* (in this case, Hung Vuong) that must “meet the five enumerated [conditions]” before Commerce is required to consider that respondent’s deficient submissions. See *Papierfabrik*, 843 F.3d at 1382–83. But Hung Vuong makes no effort to show how its information satisfied *all five* statutory conditions.

Here, Commerce found that Hung Vuong’s submitted information failed to satisfy a number of § 1677m(e)’s five conditions. First, Commerce found that Hung Vuong’s failure to retain source documentation (as discussed above, see Analysis Part II.A.) meant that Hung Vuong’s control number reporting could not be verified, which is the condition set forth in § 1677m(e)(2). The Court concludes that substantial evidence permitted that finding for the same reasons stated above.

Second, Commerce found that Hung Vuong’s databases could not be deemed reliable for use in calculating an accurate dumping margin for Hung Vuong because of the lack of properly-reported control number sales and factor-of-production data, which is the condition set forth in § 1677m(e)(3). See ECF 25–5, at 32. Commerce emphasized that “allocation methodologies that average [control number] characteristics may result in a reporting methodology that is not accurate

<sup>40</sup> The statute does not define the words “best of its ability” as used in § 1677m(e)(4). The Federal Circuit has explained that those words have the same meaning, and are subject to the same analysis, as the words “best of its ability” in 19 U.S.C. § 1677e(b)(1), the provision governing when Commerce may apply an adverse inference. *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007). The Court addresses “best of its ability” more fully in Statutory and Regulatory Background Part B.4.b., *supra*.

because there is less variation in the calculation of [normal value], even though there are clear differences in the physical characteristics of the [control numbers] and in the actual amount of inputs used.” *Id.* at 31.

Hung Vuong does not really dispute this point in its briefing, arguing only that it was “eminently reasonable” to report averaged data because “[t]here are only minor variations in the individual soaking percentages of the separate production runs used to fill a specific invoice from day to day.” *Id.* at 40. Commerce’s point, however, was that the unaccounted-for variations were the reason why the databases were unreliable. For example, as to one sales trace, Commerce’s review at verification revealed that Hung Vuong should have reported five control numbers, but instead Hung Vuong only reported one. ECF 25–5, at 30. The Court understands this to mean that Hung Vuong’s factors of production data therefore could not properly be tied to the finished products, and the Court concludes that substantial evidence permitted Commerce to find the databases unreliable.

Third, Commerce expressly found that Hung Vuong failed to act to the best of its ability in meeting Commerce’s control number reporting requirements, *see* ECF 25–5, at 30–31, which is the condition set forth in § 1677m(e)(4). The Court deems Commerce’s finding in this regard supported by substantial evidence in view of (1) the *An Giang* decision in 2018 that found that Hung Vuong could have complied with the control number requirements, *see supra* note 31, and (2) counsel’s statement at oral argument that it would have been “easy” for Hung Vuong to comply with Commerce’s requirements, *see supra* note 37. Again, the Court concludes that if it would have been “easy” to comply, then noncompliance may reasonably be considered substantial evidence permitting a finding that Hung Vuong did not act to the best of its ability in attempting to comply with instructions.

As a result of the foregoing three findings, § 1677m(e) did not require Commerce to excuse Hung Vuong’s failure to comply with Commerce’s control number reporting requirements, and Commerce therefore permissibly invoked § 1677e(a)(2)(B) to apply facts otherwise available.

Commerce’s invocation of § 1677e(a)(2)(B) is also subject to § 1677m(c)(1), which permits a party to ask Commerce to modify its reporting requirements.<sup>41</sup> Nothing in the administrative record

<sup>41</sup> While 19 U.S.C. § 1677m(c)(1) requires Commerce to consider modifying its requirements to avoid placing an unreasonable burden upon a respondent, that requirement “only applies where a party notifies Commerce ‘that such party is unable to submit the information requested in the required form and manner, together with a full explanation and suggested alternative forms . . . .’” *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360–61 (Fed. Cir.2018) (quoting § 1677m(c)(1)).

shows that Hung Vuong ever made such a request, nor does anything in the record show that Hung Vuong suggested an alternative form for submitting the information prior to verification.

At oral argument, Hung Vuong’s counsel confirmed that the company reported information in a different format from what Commerce required but did not seek approval first—instead, it used a different format, disclosed what it did, and explained its methodology. ECF 70, at 37:14–38:2 (Court’s question) and 39:6–40:2 (counsel’s answer).

Apparently on the theory that it is better to beg forgiveness than to ask permission, Hung Vuong tried to shortcut the process. Rather than explain the difficulty and suggest an alternate form of production, Hung Vuong unilaterally produced records in a different format without first obtaining Commerce’s approval.

Hung Vuong now asks the Court to deem that alternative format acceptable. That decision is not the Court’s to make. Hung Vuong should have made that request of Commerce before unilaterally proceeding with its own alternative methodology. *Cf. Diamond Sawblades Mfrs.’ Coalition v. United States*, Slip Op. 18–146, at 10, 2018 WL 5281941, at \*4 (CIT Oct. 23, 2018) (noting that respondent’s provision of substitute data “would not have been necessary had it maintained full and complete records . . . in the first place”) (cleaned up).

***ii. (a)(2)(D)—information could not be verified***

As an alternative ground for resorting to facts otherwise available, Commerce cited 19 U.S.C. § 1677e(a)(2)(D), which applies when a party provides information that cannot be verified. As discussed above, the Court has already found that substantial evidence in the administrative record permitted Commerce’s finding that Hung Vuong’s control number reporting was not verifiable in the context of § 1677m(e)(2), and that analysis applies with equal force here.

Overall, Hung Vuong’s arguments here are strikingly similar to those it unsuccessfully made in *An Giang*. Notably, Hung Vuong does not even dispute that it did not follow the control number methodology Commerce requires, instead arguing that its alternative methodology “was eminently reasonable as it reported accurate [factors of production] with no distortion as accurately as possible using existing records.” ECF 38–1, at 39. But Commerce previously found, and the *An Giang* Court affirmed, that it was irrelevant how Hung Vuong maintained its records because Hung Vuong could have tracked information in the way Commerce required.<sup>42</sup>

<sup>42</sup> This is all the more so if, as Hung Vuong’s counsel stated at oral argument, it would have been “easy” for Hung Vuong to comply. *See supra* note 37.

There is no reason for the Court to find otherwise now. Hung Vuong has had even more time to revise its practices to come into compliance—if, after all, Hung Vuong had ample notice prior to the 11th administrative review, then it had even more notice prior to this 14th review. The government’s brief states the issue correctly and succinctly: “. . . [A]lthough this methodology may be ‘eminently reasonable’ according to [Hung Vuong], it was *not* how Commerce directed [Hung Vuong] to report its [control numbers] . . .” ECF 49, at 37 (emphasis in original).

Hung Vuong argues on reply that “Commerce’s decision in the eleventh review is not relevant inasmuch as [Hung Vuong] devised a completely new and more precise methodology in the current review.” ECF 58, at 19. The Court disagrees. The decision in the 11th review remains relevant because it put Hung Vuong on notice that Commerce, and this Court, would continue to require Hung Vuong to adhere to Commerce’s instructions or suffer the consequences of failing to do so. Hung Vuong essentially admits it opted not to follow Commerce’s instructions and instead “devised” its own reporting methodology. Whether Hung Vuong believes that methodology is “more precise” is immaterial, as Hung Vuong has admitted it did not report information in the required form. *Cf.* 19 U.S.C. § 1677e(a)(2)(B) (referring to a respondent’s failure to provide information “in the form and manner requested”).

Moreover, as discussed above, the obligation was on Hung Vuong to seek permission *in advance* for using its own non-compliant methodology, but Hung Vuong did not do so. Hence, while Hung Vuong’s reply brief objects that the government “fails to address or analyze [Hung Vuong’s] information and data showing that its methodology was reasonable and not distortive,” ECF 58, at 20–21, the government had no obligation to conduct such an analysis, nor was Commerce obligated to explain why Hung Vuong’s unilateral decision not to follow instructions was unreasonable. Thus, the Court need not dive into the weeds of Commerce’s control number methodology and its overall meaning in the antidumping duty context. What matters is that Commerce found that Hung Vuong did not act to the best of its ability to provide the information in the form Commerce required. That is enough to sustain Commerce’s decision to apply facts otherwise available.

***iii. (a)(2)(C)—significantly impeding the proceeding***

Finally, even if the Court were to conclude that substantial evidence did not permit Commerce’s decision under either 19 U.S.C. § 1677e(a)(2)(B) or (D), the Court would alternatively sustain Com-

merce’s invocation of § 1677e(a)(2)(C) finding that Hung Vuong had “significantly impeded” this proceeding for all of the same reasons cited above in view of Hung Vuong’s admission that it did not follow instructions in reporting its data even though it would have been “easy” to have done so.<sup>43</sup>

Therefore, the Court concludes that substantial evidence in the administrative record permitted Commerce to resort to facts otherwise available on the “control numbers” issue.

### **b. Adverse inference**

After determining that it was necessary to resort to facts otherwise available, Commerce determined that it was appropriate to apply an adverse inference pursuant to 19 U.S.C. § 1677e(b)(1) “because [Hung Vuong] has failed to cooperate to the best of its ability.” ECF 25–5, at 32. Commerce found that “[Hung Vuong] had the records available to it to report accurate [control numbers] in its U.S. sales and [factors-of-production] databases.” *Id.* Commerce noted that because the Court had previously “sustained Commerce’s decision to require [Hung Vuong] to maintain records on a [control number–]specific basis,” Hung Vuong was an experienced respondent and “should have taken reasonable steps to keep and maintain full and complete records documenting the information that an experienced respondent should anticipate being called upon to produce.” *Id.* Commerce concluded that Hung Vuong’s failure to cooperate resulted in the company’s databases being unusable for purposes of calculating an accurate dumping margin. *Id.*

As is thoroughly discussed above, Hung Vuong does not dispute that it did not report control numbers in the manner required by Commerce. If, as counsel said at oral argument, it would have been “easy” for Hung Vuong to comply with Commerce’s instructions, *see supra* note 37, then there was no excuse for failure to comply. Hung Vuong has effectively admitted that it failed to cooperate to the best of its ability. Therefore, substantial evidence permitted Commerce to conclude that Hung Vuong failed to cooperate such that an adverse inference was appropriate.

<sup>43</sup> Hung Vuong also repeats its argument that Commerce violated 19 U.S.C. § 1677m(d) by not “promptly” notifying Hung Vuong of deficient responses and providing an opportunity to cure. *See* ECF 38–1, at 41.

The Court’s analysis of that argument in the context of the “customers” issue also applies here. *See supra* Analysis Part II.B.2.a. The administrative record shows that Commerce discovered the extent of the problems only at verification, and Hung Vuong makes no attempt to demonstrate how Commerce could or should have determined at an earlier date that Hung Vuong’s submissions were deficient and thereby triggered the “notice-and-opportunity-to-cure” provision. Because the Court concludes that § 1677m(d) is inapplicable at the verification stage, Hung Vuong’s argument fails again here.

## D. Factors of Production<sup>44</sup>

### 1. Commerce's findings

The parties dispute the accuracy of Hung Vuong's reported factors of production in two specific ways. First, Commerce found that Hung Vuong does not track the number of hours its employees work, but rather just tracks their attendance, and that the employees work as many (or as few) hours as are necessary to process all the fish fillets, without regard to the number of hours in a working day. ECF 25–5, at 34.

Second, Commerce found that Hung Vuong's factors of production were inaccurate due to an issue with the weight of fish byproducts. In reporting its factors of production, Hung Vuong divided the amount of whole live fish produced or fish byproducts (depending on the particular factor of production at issue) by the amount of fish fillets produced, "resulting in a ratio of whole live fish needed to produce one kg of fillet." *Id.* at 33. Commerce determined there was a problem: "At verification . . . Commerce discovered that the [period-of-review] weight total of unsoaked fillets, plus the total weight of the by-products[,] was many millions of kgs higher than the total weight of the whole live fish consumed by [Hung Vuong] during the [period of review]. Put another way, the output was much higher than the input, which is a mathematical impossibility." *Id.*

Commerce noted that Hung Vuong was unable to explain the discrepancy. "This calls into question the accuracy of all [Hung Vuong's factors of production], and not just its whole live fish and by-products [factors of production], because it is the weight of the fillets that is the denominator for all of [Hung Vuong's factors of production]." *Id.*

### 2. **The administrative record did not permit Commerce to apply facts otherwise available with an adverse inference as to the fish byproducts portion of Hung Vuong's factors of production data.**

#### a. **Facts otherwise available**

In view of its findings regarding Hung Vuong's factors of production, Commerce invoked 19 U.S.C. § 1677e(a)(1) and (a)(2)(A), (C), and (D) to apply facts otherwise available as to both labor and fish byproducts. The Court addresses each in turn.

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<sup>44</sup> This discussion corresponds to Commerce's findings in ECF 25–5, at 32–35.

*i. Labor costs*

Commerce questioned Hung Vuong's labor factor of production, noting that Hung Vuong assumes an eight-hour workday but does not actually track the number of hours its personnel work. Commerce sought to probe the accuracy of the eight-hour day estimate but was unable to do so, and Commerce further noted that at verification the plaintiffs stated that workers are paid based on their production and work as many hours as are needed to process all the fish fillets. *See* ECF 25–5, at 34.

In response, Hung Vuong contends Commerce should have applied a presumption of an eight-hour workday, citing a Federal Register notice:

The Department [i.e., Commerce] selects from the following categories in the following hierarchy: (1) per hour; (2) per day; (3) per week; or (4) per month. Where data is not available on a per-hour basis, the Department converts that data to an hourly basis *based on the premise that there are 8 working hours per day*, 5.5 working days a week, and 24 working days per month.

*Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 n.4 (Dep't Commerce June 21, 2011) (emphasis added), *cited in* ECF 38–1, at 44.

At oral argument, the Court asked the government's counsel why Commerce did not apply this presumption in this case. Counsel explained that verification revealed that Hung Vuong's workers have no fixed schedule—one day, they might work 13 hours, whereas another day, they might work two hours, and it all depends on the size of the pile of fish in front of a given worker on a given day, such that the concept of a standard eight-hour workday is simply not how Hung Vuong operates. ECF 70, at 78:22–81:10.

Hung Vuong's pre-verification submissions stated the company assumes an eight-hour workday, but Commerce's final decision notes that

[a]t verification [Commerce] attempted to determine whether this was an accurate estimate, but rather than stating that the regular work day at [Hung Vuong] was eight hours, we found that Hung Vuong does not track workers at all, just attendance. [Hung Vuong] stated that workers are paid based on their production, and assumes workers work an eight hour day, but also admitted that workers work until there are no more fillets to process.



ECF 25–5, at 34. The verification report also noted that “pay is based on results, not hours,” that “[c]ompany officials stated that whenever raw material deliveries are finished for the day, and there is nothing left to process, that is when the day would end,” and that workers’ timesheets included a code reflecting double shifts. ECF 61–1, at 927. Based on all the foregoing, Commerce found that “we cannot assume that an eight hour work day is a reasonable estimate of the number of hours worked.” ECF 25–5, at 34.

In sum, Commerce’s point is that the administrative record did not allow Commerce to verify the accuracy of Hung Vuong’s reported labor factor of production. *See id.* at 35 (“[W]e cannot verify that its basis for reporting labor hours is accurate.”). The Court concludes that substantial evidence permitted Commerce to reach that conclusion and to invoke 19 U.S.C. § 1677e(a)(2)(D) to apply facts otherwise available.<sup>45</sup>

## *ii. Fish byproducts*

The government and the intervenors both note that at verification, Commerce discovered a discrepancy between the input—whole live fish—and the output—fish fillets and byproducts—in which the output weighed several million kilograms more than the input.<sup>46</sup> Commerce noted that this is “a mathematical impossibility” and stated that when the personnel conducting verification asked Hung Vuong to explain the discrepancy, Hung Vuong could not do so and simply said the “math was not exact” and the numbers were correct. ECF 25–5, at 33. Commerce found this discrepancy rendered all of Hung Vuong’s factors of production unreliable. *Id.*

Hung Vuong argues that the discrepancy between the input and output weights occurs because the production process involves throwing fish byproducts on the floor, where they are exposed to some unknown amount of water that accumulates with the byproducts when they are cleaned up off the floor. ECF 38–1, at 42–43. Commerce’s final decision contended that Hung Vuong’s post-verification briefing “attempts to explain away this discrepancy as water weight gain by the by-products,” and Commerce questioned this argument because Hung Vuong “has never claimed that it soaks its by-products to add to their weight, and there is no compelling evidence on the

<sup>45</sup> As discussed above in connection with the customers issue, *see supra* Analysis Part II.B.2.a., the Court concludes that 19 U.S.C. § 1677m(d) does not apply in the verification context, but even if it did apply, Commerce’s statutory deadline for completing its work would have made it impracticable for Commerce to provide Hung Vuong the opportunity to remedy the deficiency.

<sup>46</sup> In the interest of comparing this figure to more familiar measurements, the Court observes that a kilogram is equivalent to 2.20462 U.S. pounds.

record to support such a conclusion.” ECF 25–5, at 33. Commerce suggested that “there may be little need for [Hung Vuong] to soak its fillets because they too might naturally absorb water like its by-products.” *Id.*

At oral argument, the Court asked whether the administrative record *prior to* the post-verification briefing demonstrated that Hung Vuong’s explanation was not simply a *post hoc* rationalization as suggested by Commerce. ECF 70, at 43:24–45:25. In response, Hung Vuong submitted two excerpts from the administrative record.

The first is an excerpt from Hung Vuong’s response to Commerce’s Supplemental Section D questionnaire, in which Hung Vuong explained as follows:

It is common industry practice and well understood within the industry that byproducts must be collected and disposed of immediately (to prevent spoilage, etc.). Thus, the byproducts are collected as they accumulate, and this also includes some amount of water that commingles with the byproducts (as part of the overall manufacturing process). The byproducts and commingled water are collected together into buckets (*this includes water that collects on the floor along with the by-products, etc.*). This additional water weight is then included as part of the by-product weight that is sold to those consuming the by-products. As such, the by-product weight actually includes both the by-products and the weight of water collected with the by-products.

ECF 69–1, at 8–9 (emphasis added).

The second record excerpt Hung Vuong submitted consists of a two-page excerpt from its response to Catfish Farmers’ pre-preliminary comments before Commerce issued its preliminary determination. Hung Vuong reiterated the points made in its questionnaire response and then referred Commerce to the company’s questionnaire answers, which Hung Vuong said compared the input and output figures without the added byproduct water weight. ECF 69–2, at 8 (citing Exhibit SDQ-41(a) of Hung Vuong’s supplemental Section D response).

Commerce explained that at verification, the on-site personnel could not explain the discrepancy and simply said the “math was not exact.” ECF 25–5, at 33. The Court recognizes the validity of Commerce’s concern that if the “math was not exact,” it calls into question the accuracy of Hung Vuong’s reported data. Nevertheless, and critically for present purposes, Commerce’s final decision nowhere addressed Hung Vuong’s explanation of why the byproducts gained water weight nor the data Hung Vuong submitted in its questionnaire

answers that the company characterizes as comparing input and output figures without the added byproduct water weight.

In determining whether the administrative record contains substantial evidence permitting Commerce's final decision, the Court must consider evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence. *Nippon Steel*, 337 F.3d at 1379. Because Commerce's final decision did not address Hung Vuong's explanation for the byproducts' weight gain, the Court concludes that Commerce's finding on that issue is not supported by substantial evidence and is therefore not permissible. *See, e.g., SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 846 (Fed. Cir. 2020) (discussing procedural history of case in which CIT remanded twice, first for further explanation of Commerce's findings and again when Commerce pointed to certain record evidence but did not address the respondent's counterarguments); *see also SeAH Steel VINA Corp. v. United States*, 269 F. Supp. 3d 1335, 1365 (CIT 2017) (remanding to Commerce for second time, noting that Commerce failed to address respondent's counterarguments beyond a single sentence saying there was no evidence on the record supporting respondent's position, and finding that "[u]ntil Commerce explains why, despite SSV's challenges, its decision is correct, the court cannot find that Commerce's decision was consistent with the law and supported by substantial evidence").

Moreover, because Commerce cited this issue as the basis for discrediting *all* of Hung Vuong's factors of production, ECF 25-5, at 35 (finding all Hung Vuong's factors of production unreliable "because the foundation of its reporting is based on a mathematical impossibility"), the Court cannot sustain Commerce's final decision despite finding the remainder of Commerce's analysis to be supported by substantial evidence and therefore permissible. At oral argument, counsel for Catfish Farmers explained that if a respondent (here, Hung Vuong) cannot support its reported factors of production, Commerce cannot confirm that the factors are not understated. This matters because understated factors of production would result in a product having a lower normal value and, by extension, lower dumping margins. Catfish Farmers argued that—as Commerce found following verification—the issues with Hung Vuong's factors of production warranted rejecting all of Hung Vuong's data because the factors of production are at the heart of Commerce's dumping determination. ECF 70, at 85:5-86:18.

Even accepting all these arguments, however, the problem is that Commerce rejected *all* the factors of production based on its finding that Hung Vuong could not explain the byproducts' weight gain, but

there is nothing in the administrative record showing that Commerce considered (much less addressed) Hung Vuong’s previously-offered explanation for that issue. Because Commerce viewed this issue as essential to its analysis, the Court cannot sustain Commerce’s decision to apply total facts otherwise available as to Hung Vuong’s factors of production.

Commerce failed to address Hung Vuong’s submission explaining the reason for the water weight gain, which might have demonstrated that the figures were not “mathematically impossible.” If, in turn, the administrative record contradicted the “mathematically impossible” conclusion, that would call into question Commerce’s assumption that the “foundation” of Hung Vuong’s factors of production reporting was invalid. Commerce must therefore thoroughly address that issue and reconsider its final decision in view of that issue, including, but not limited to, whether to disallow the byproduct offset as Hung Vuong suggests, *see* ECF 58, at 22, and whether to apply partial facts available instead of total facts available as to the factors of production issue. The Court will therefore remand this matter to Commerce for that purpose.

#### **b. Adverse facts available**

Invoking 19 U.S.C. § 1677(b) to apply an adverse inference as to the factors of production issue, Commerce found that Hung Vuong had failed to cooperate to the best of its ability “because the foundation of its reporting is based on a mathematical impossibility.” ECF 25–5, at 35. Thus, on remand, in addition to reconsidering Hung Vuong’s original submission on the byproduct issue, Commerce is to consider the extent to which its conclusion as to that submission affects its decision on the adverse inference as to the factors of production, including whether a partial or total adverse inference is justified, and is to thoroughly explain the reason for its decision on that issue in the remand determination.

#### **E. The Court Is Required to Remand Commerce’s Decision to Apply “Total AFA.”<sup>47</sup>**

After addressing the four specific issues discussed above, Commerce applied what it called “Total AFA.” As discussed above, *see supra* Statutory and Regulatory Background Part B.4., “AFA” is jargon for Commerce using “an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). The Court’s analysis up to this point has discussed whether the administrative record permitted Commerce’s

<sup>47</sup> This discussion corresponds to Commerce’s findings in ECF 25–5, at 35–36.

resort to “facts otherwise available” and “adverse inferences” as to four particular issues. The analysis of Commerce’s “Total AFA” discussion, in contrast, focuses on the case as a whole—whether substantial evidence in the administrative record permitted Commerce to apply “Total AFA.”

Commerce cited the “many deficiencies listed above” as the basis for applying some level of facts otherwise available with an adverse inference. ECF 25–5, at 35. Commerce stated that its findings demonstrated that Hung Vuong “failed to cooperate to the best of its ability by not providing complete and accurate responses to Commerce’s requests for information in the form and manner request [sic], significantly impeded the proceeding, and provided information which could not be verified. In addition, certain necessary information is missing from the record.” *Id.* Commerce therefore tied the deficiencies it identified in Hung Vuong’s questionnaire answers—which were the basis for using “facts otherwise available”—to Hung Vuong’s failure to cooperate “by not acting to the best of its ability to comply with a request for information from” Commerce, which is the statutory prerequisite for application of an adverse inference. 19 U.S.C. § 1677e(b)(1).

Commerce then considered whether it should apply “partial” or “total” facts otherwise available with an adverse inference. Commerce found that Hung Vuong’s failure to cooperate rendered the company’s questionnaire answers completely unreliable and unusable such that “we cannot accurately calculate a dumping margin for [Hung Vuong] pursuant to section 773(a) of the Act [i.e., 19 U.S.C. § 1677b(a)].” ECF 25–5, at 35. Commerce further found that “[t]he use of partial AFA is not appropriate because the missing information, *i.e.*, data needed to calculate [Hung Vuong’s] dumping margin, is core to our analysis and it would be unduly difficult to apply partial AFA by selecting from the facts available to remedy each of the deficiencies that impact each sale.” *Id.* at 36.

“Depending on the severity of a party’s failure to respond to a request for information and failure to cooperate to the best of its ability, Commerce may select either partial or total AFA.” *Fresh Garlic Producers Ass’n v. United States*, 121 F. Supp. 3d 1313, 1324 (CIT 2015). The Federal Circuit has suggested that “partial” application may be appropriate where deficiencies are limited to particular portions of the administrative record such that Commerce can use other portions of the respondent’s submissions. *See Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307–08 (Fed. Cir. 2014). This rule exists because Commerce is to use “facts otherwise available” to fill in

actual gaps in the administrative record, *Bebitz Flanges Works Private Ltd. v. United States*, 433 F. Supp. 3d 1309, 1317 (CIT 2020), and the statute allows Commerce to employ an adverse inference only in the process of “selecting from among the facts otherwise available,” 19 U.S.C. § 1677e(b)(1)(A).

But the “use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty.” *Mukand*, 767 F.3d at 1308. Instead, a “total” application “is used by Commerce in situations where none of the reported data is reliable or usable. . . . Commerce can ignore all data submitted where the bulk of it is determined to be flawed and unreliable.” *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

Here, Commerce did make a finding that the problems it had with the administrative record were “core” to the Department’s analysis and that it would be “unduly difficult” to do anything other than to apply total facts otherwise available with an adverse inference. However, for the reasons discussed above, it is unclear from the existing record whether there was substantial evidence permitting Commerce to resort to facts otherwise available—and, by extension, an adverse inference—on (1) the customer relationship issue due to its failure to give Hung Vuong notice of the customers’ failure to answer Commerce’s questionnaires and (2) the factors of production issue due to Commerce’s failure to address Hung Vuong’s original submission on the water weight gain of the fish byproducts.

The Court is therefore required to vacate Commerce’s application of “total AFA” in view of those two issues. On remand, Commerce must reconsider whether (1) its failure to give Hung Vuong notice of its customers’ failure to answer Commerce’s questionnaires and (2) its reassessment of the byproducts issue would allow for application of “partial AFA” and must thoroughly explain its rationale for whatever conclusion it reaches.

#### **F. The Rate Commerce Applied Must Be Reconsidered on Remand.**<sup>48</sup>

After finding it appropriate to apply facts otherwise available with an adverse inference, Commerce looked to the prior administrative reviews of the antidumping order at issue in this case and selected the highest rate applied to any respondent, \$3.87 per kilogram. ECF 25–5, at 37. Hung Vuong objects to the assigned rate as “arbitrarily punitive,” ECF 38–1, at 47, and contends that Commerce needed to

<sup>48</sup> This discussion corresponds to Commerce’s findings in ECF 25–5, at 36–37.

explain why it did not choose some other lower rate. Hung Vuong does appear to concede, however, that the purpose of applying an adverse inference is to ensure that a party does not benefit from its own lack of cooperation. *Id.* at 48.

The Court need not address either Hung Vuong's objections to the rate or the government's arguments in support of it. Because the Court must remand this matter to Commerce for further consideration of the customer relationships issue as discussed *supra* in Analysis Part II.B.2.a.–b. and Hung Vuong's byproduct data as discussed *supra* in Analysis Part II.D.2.a.ii., the Court cannot sustain Commerce's application of the \$3.87/kg rate in this case. On this record, the Court is unable to determine whether Commerce permissibly applied a total adverse inference. Accordingly, Commerce is to reconsider the rate on remand in conjunction with its reconsideration of the customer questionnaire and byproduct issues and the total adverse inference.

\* \* \*

### Order

For all the foregoing reasons, the Court remands this matter to Commerce for further proceedings consistent with this opinion. Accordingly, upon consideration of all papers and proceedings in this action, it is hereby

**ORDERED** that Plaintiff's motion for judgment on the agency record (ECF 38) is **GRANTED IN PART AND DENIED IN PART**, and it is further

**ORDERED** that this case is **REMANDED** to the Department of Commerce with instructions that the Department reconsider (1) its findings on Hung Vuong's relationship with its customers in view of Commerce's failure to comply with its obligations under 19 U.S.C. § 1677m(d) to notify Hung Vuong of deficiencies in the customers' questionnaire answers and to provide an opportunity to remedy them, (2) its findings on the Hung Vuong Group's byproduct data and the effect those findings have on Commerce's overall decision, and (3) the antidumping rate applied to the Hung Vuong Group in view of the reconsideration of the two foregoing issues, and it is further

**ORDERED** that this case will proceed with the following schedule:

1. Commerce must file its remand determination on or before 120 days after the date of entry of this opinion and order;
2. Commerce must file the administrative record on or before 14 days after the date on which it files the remand determination;
3. The parties' post-remand comments must be set in either 13- or 14-point type, except that 12-point type may be used for footnotes;

4. Plaintiffs' comments in opposition to the remand determination must be filed on or before 30 days after Commerce files the administrative record;

5. Defendant's comments in support of the remand determination must be filed on or before 30 days after Plaintiffs file their comments in opposition;

6. Intervenors' comments in support of the remand determination must be filed on or before 15 days after Defendant files its comments in support and may contain no more than half the word count applicable to Defendant's comments pursuant to the Court's Standard Chambers Procedures;

7. The joint appendix must be filed on or before 14 days after the date on which the last comments in support of the determination are filed, and the Court will issue an order giving the parties further direction on how to format the joint appendix and how to cite the administrative record in their post-remand comments; and

8. Motions for further oral argument, if any, must be filed on or before the due date for the joint appendix.

Dated: December 3, 2020

New York, New York

*/s/ M. Miller Baker*

JUDGE





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