

# **CUSTOMS BULLETIN AND DECISIONS**

***Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs and Border Protection  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade***

**VOL. 54**

**September 16, 2020**

**NO. 36**

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U.S. Customs and Border Protection

General Notices

U.S. Court of Appeals for the Federal Circuit

Appeal No. 2019-2131

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Slip Op. 20-130

## **NOTICE**

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# U.S. Customs and Border Protection



## **REQUEST FOR APPLICANTS FOR APPOINTMENT TO THE COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE (COAC)**

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

**ACTION:** Committee Management; request for applicants for appointment to the COAC.

**SUMMARY:** U.S. Customs and Border Protection (CBP) is requesting that individuals who are interested in serving on the Commercial Customs Operations Advisory Committee (COAC) apply for membership. COAC provides advice and makes recommendations to the Secretaries of the Department of the Treasury (Treasury) and Department of Homeland Security (DHS) on all matters involving the commercial operations of CBP and related functions.

**DATES:** Applications for membership should be submitted to CBP at the address below on or before October 19, 2020.

**ADDRESSES:** If you wish to apply for membership, your application should be submitted by one of the following means:

- *Email:* [florence.v.constant-gibson@cbp.dhs.gov](mailto:florence.v.constant-gibson@cbp.dhs.gov).
- *Fax:* 202-325-4290.
- *Mail:* Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229.

**FOR FURTHER INFORMATION CONTACT:** Ms. Florence Constant-Gibson, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229. Email: [florence.v.constant-gibson@cbp.dhs.gov](mailto:florence.v.constant-gibson@cbp.dhs.gov); telephone 202-344-1440; facsimile 202-325-4290.

**SUPPLEMENTARY INFORMATION:** Section 109 of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114-125, 130 Stat. 122, February 24, 2016) re-established the COAC. The COAC is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. Appendix. The COAC advises the Secretaries of the Treasury and DHS on the com-

mercial operations of CBP and related Treasury and DHS functions. In accordance with Section 109 of the Trade Facilitation and Trade Enforcement Act, the COAC shall:

(1) Advise the Secretaries of the Treasury and DHS on all matters involving the commercial operations of CBP, including advising with respect to significant changes that are proposed with respect to regulations, policies, or practices of CBP;

(2) provide recommendations to the Secretaries of the Treasury and DHS on improvements to the commercial operations of CBP;

(3) collaborate in developing the agenda for COAC meetings; and

(4) perform such other functions relating to the commercial operations of CBP as prescribed by law or as the Secretaries of the Treasury and DHS jointly direct.

### **Balanced Membership Plans**

The COAC consists of 20 members who are selected from representatives of the trade or transportation community served by CBP, or others who are directly affected by CBP commercial operations and related functions. The members shall represent the interests of individuals and firms affected by the commercial operations of CBP, and be appointed without regard to political affiliation. The members will be appointed by the Secretaries of the Treasury and DHS from candidates recommended by the Commissioner of CBP. In addition, members will represent major regions of the country.

### **COAC Meetings**

The COAC meets at least once each quarter, although additional meetings may be scheduled. Generally, every other public meeting of the COAC may be held outside of Washington, DC, usually at a CBP port of entry. The members are not reimbursed for travel or per diem.

### **COAC Membership**

Membership on the COAC is personal to the appointee and a member may not send an alternate to represent him or her at a COAC meeting. Appointees will serve a one- to three-year term of office, determined at the discretion of the appointing officials. Regular attendance is essential; a member who is absent for two consecutive meetings, or does not participate in the committee's work, may be recommended for replacement on the COAC.

Members who are currently serving on the COAC are eligible to re-apply for membership provided that they are not in their second consecutive term and that they have met the attendance requirements. A new application letter is required, and may incorporate copies of previously filed application materials noted herein. Mem-

bers will not be considered Special Government Employees and will not be paid compensation by the Federal Government for their representative services with respect to the COAC.

### **Application for COAC Appointment**

Any interested person wishing to serve on the COAC must provide the following:

- Statement of interest and reasons for application;
- Complete professional resume;
- Home address and telephone number;
- Work address, telephone number, and email address;
- Statement of the industry you represent; and
- Statement agreeing to submit to pre-appointment mandatory background and tax checks.

A national security clearance is not required for the position. DHS does not discriminate on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions.

### **Signing Authority**

The Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Mark A. Morgan, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 28, 2020.

ROBERT F. ALTNEU,  
*Director,*  
*Regulations & Disclosure Law Division,*  
*Regulations & Rulings, Office of Trade,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, September 2, 2020 (85 FR 54588)]

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

OMG, INC., Plaintiff-Appellee v. UNITED STATES, Defendant-Appellant  
MID CONTINENT STEEL & WIRE, INC., Defendant-Appellee

Appeal No. 2019–2131

Appeal from the United States Court of International Trade in No. 1:17-cv-00036-GSK, Judge Gary S. Katzmann.

Decided: August 28, 2020

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

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant. Also represented by ETHAN P. DAVIS, JEANNE DAVIDSON, PATRICIA M. MCCARTHY; NIKKI KALBING, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, for defendant-appellee. Also represented by PING GONG.

Before PROST, Chief Judge, MOORE and STOLL, Circuit Judges.

STOLL, Circuit Judge.

The Government appeals a decision of the United States Court of International Trade affirming a remand determination of the United States Department of Commerce. Commerce originally determined that imports of certain masonry anchors are within the scope of relevant antidumping and countervailing duty orders. On appeal, the Court of International Trade concluded that Commerce’s original scope ruling was contrary to law and the anchors were outside the scope of the orders, remanding to Commerce for reconsideration. On remand, Commerce determined under protest that the subject anchors are not within the scope of the relevant orders. The Court of International Trade affirmed Commerce’s remand determination. We affirm.

## BACKGROUND

Domestic industry participants believing that “a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value” may petition Commerce to impose antidumping duties on importers of foreign merchandise. 19 U.S.C. §§ 1673, 1673a(b). If Commerce determines that the subject foreign merchandise is being, or is likely to be, sold in the United States at

less than its fair value, and the International Trade Commission (ITC) determines that an industry in the United States has been materially injured or is threatened with material injury, Commerce will issue an antidumping duty order. *Id.* §§ 1673, 1673e(a). The antidumping duty order “includes a description of the subject merchandise, in such detail as [Commerce] deems necessary.” *Id.* § 1673e(a)(2).

Similarly, domestic industry participants believing that a government or public entity within a foreign country is providing a countervailable subsidy for a class or kind of merchandise that is imported, sold, or likely to be sold into the United States may petition Commerce to impose countervailing duties on such merchandise. *Id.* §§ 1671(a), 1671a(b). If Commerce determines that a countervailable subsidy is being provided to such merchandise and the ITC determines that an industry in the United States has been materially injured or is threatened with material injury, Commerce will issue a countervailing duty order. *Id.* §§ 1671(a), 1671e(a). Like an antidumping order, a countervailing duty order “includes a description of the subject merchandise, in such detail as [Commerce] deems necessary.” *Id.* § 1671e(a)(2). After an antidumping or countervailing duty order has issued, “[a]ny interested party may apply for a ruling as to whether a particular product is within the scope of an order.” 19 C.F.R. § 351.225(c)(1).

In 2014, Mid Continent Steel & Wire, Inc. filed a petition with Commerce requesting the imposition of antidumping and countervailing duties on imports of certain steel nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam. In 2015, Commerce issued antidumping and countervailing duty orders based on Mid Continent’s petition. See *Certain Steel Nails from the Socialist Republic of Vietnam: Countervailing Duty Order* (“*Countervailing Duty Order*”), 80 Fed. Reg. 41,006 (Dep’t of Commerce July 14, 2015); *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders* (“*Antidumping Duty Order*”), 80 Fed. Reg. 39,994 (Dep’t of Commerce July 13, 2015) (collectively, “the Orders”).

As relevant here, the Orders cover:

certain steel nails having a nominal shaft length not exceeding 12 inches. Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel. *Certain steel nails may be of one piece construction or constructed of two or more pieces.* Certain steel nails may be produced from any type of steel, and may have any type of

surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, including but not limited to electroplating or hot dipping one or more times), phosphate, cement, and paint. Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point.

*Countervailing Duty Order*, 80 Fed. Reg. at 41,006 (emphasis added to disputed language) (footnote omitted); see also *Antidumping Duty Order*, 80 Fed. Reg. at 39,995 (same). The Orders set out several exclusions, but they do not expressly exclude anchors.

OMG, Inc. imports zinc masonry anchors from Vietnam. OMG's anchors consist of two components: a zinc alloy body and a zinc-plated steel pin. The anchors are designed to attach termination bars to concrete or masonry walls. Installing OMG's zinc anchors requires predrilling a hole with a diameter that matches the shank diameter of the anchor and is at least half an inch deeper than the anchor embedment. J.A. 53. The anchor is then inserted into the predrilled hole and "tap[ped] lightly" with a hammer "until [the] head of [the] anchor body is set gently against the termination bar." J.A. 54. To complete installation, the hammer is used to drive the head of the steel pin flush with the head of the anchor body, thereby expanding the anchor body in the predrilled hole to fix the anchor in place. See J.A. 29, 54.

In 2016, OMG submitted a scope ruling request to Commerce asking that Commerce find its zinc anchors outside the scope of the Orders. Commerce determined that "OMG's anchors should not be considered a 'composite good,' but rather a single item." J.A. 504. Examining the Orders' scope language, Commerce found it "unambiguous as to whether zinc anchors can be classified as subject merchandise" and concluded that "the inclusion of the anchors is stated clearly." J.A. 502. Focusing on the steel pin, Commerce reasoned that "[t]he galvanized pin is a steel nail with a body or attachment. By this logic, OMG's zinc anchors are, in fact, a steel nail with two components, which matches the plain description of the scope covering



certain steel nails of two or more components plated in zinc.” *Id.* In reaching this conclusion, Commerce noted “the identical function of both steel nails and steel pins as fasteners, and [that] each is installed into position with the use of a hammer.” J.A. 503. Commerce further concluded that the factors enumerated in 19 C.F.R. § 351.225(k)(1) supported its conclusion. Accordingly, Commerce issued a final scope ruling determining that OMG’s anchors are within the scope of the Orders.

OMG challenged Commerce’s final scope ruling before the Court of International Trade (CIT). The CIT agreed with Commerce that the Orders’ scope language is unambiguous and noted that the plain meaning of the language of the Orders therefore governed its determination as to whether OMG’s anchors were within the Orders’ scope. *OMG, Inc. v. United States*, 321 F. Supp. 3d 1262, 1268 (Ct. Int’l Trade 2018). Considering the plain meaning of the term “nail,” the CIT consulted several dictionary definitions, which it determined “present a ‘single clearly defined or stated meaning’: a slim, usually pointed object used as a fastener designed for impact insertion.” *Id.* at 1268–69 (citation omitted). The CIT then reasoned that OMG’s anchors are unambiguously outside the scope of the Orders because they are not nails within the plain meaning of the word. *Id.* at 1269. Specifically, OMG’s anchors are “not inserted by impact into the materials to be fastened.” *Id.* The CIT faulted Commerce for simultaneously “mak[ing] its determination based upon the steel pin” and acknowledging in its final scope ruling that OMG’s anchors are unitary articles of commerce. *Id.* The CIT noted that the parties did not dispute that “the steel pin fits within the common definition of a nail.” *Id.* But that was not the relevant question—rather, because the anchors are unitary articles, “the entire product, not just a component part, must be defined as a nail to fall within the scope of the [O]rders.” *Id.* Accordingly, the CIT “remand[ed] to Commerce for further consideration consistent with [its] opinion.” *Id.*

On remand, Commerce found “that OMG’s zinc anchors fall outside the scope of the Orders, but” issued its “remand redetermination under respectful protest.” J.A. 518. The CIT affirmed Commerce’s remand determination.

The Government appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## DISCUSSION

The Government argues that the CIT erred in concluding that OMG’s anchors are outside the scope of the Orders. According to the

Government, the plain language of the Orders covering nails “constructed of two or more pieces” unambiguously includes OMG’s anchors. We disagree.

We review decisions of the CIT de novo, applying the same standard used by the CIT in considering Commerce’s determination. *Union Steel v. United States*, 713 F.3d 1101, 1106 (Fed. Cir. 2013) (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1369 (Fed. Cir. 2011)). “When reviewing antidumping duty scope rulings, we apply the same substantial evidence standard of review as does the CIT.” *Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018) (citing *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015)). At the same time, we give “great weight” to the informed view of the CIT. *Quiedan Co. v. United States*, 927 F.3d 1328, 1330 (Fed. Cir. 2019) (quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016)).

“[T]he first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous.” *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). “If it is not ambiguous, the plain meaning of the language governs.” *Id.* But “[i]f the language is ambiguous, Commerce must next consider the regulatory history, as contained in the so-called ‘(k)(1) materials.’” *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (first citing 19 C.F.R. § 351.225(k)(1); then citing *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382–83 (Fed. Cir. 2005); and then citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 n.14 (Fed. Cir. 2002)). “If the (k)(1) materials are not dispositive, Commerce then considers the (k)(2) criteria . . .” *Id.* (first citing 19 C.F.R. § 351.225(k)(2); and then citing *Walgreen Co. of Deerfield, Ill. v. United States*, 620 F.3d 1350, 1352 (Fed. Cir. 2010)).

Thus, we first address whether the scope language “nails . . . constructed of two or more pieces” is ambiguous. Although the parties reach different conclusions regarding the ultimate issue of whether this language includes OMG’s anchors, they both contend that this language is not ambiguous. The CIT agreed, holding that “‘nail’ is an unambiguous term.” *OMG*, 321 F. Supp. 3d at 1269. “[T]he question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo.” *Meridian Prods. LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017) (citing *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172, 1183 (Ct. Int’l Trade 2004)).

Here, we agree with Commerce, the CIT, and the parties that the term “nails . . . constructed of two or more pieces” is unambiguous. We

appreciate that the language of the Orders may not unambiguously define the universe of “nails . . . constructed of two or more pieces” in every context. For instance, considering injury to domestic industry, the ITC identified several examples of nails “produced from two or more pieces.” J.A. 339. Seemingly straightforward examples include “a nail with a decorative head, such as an upholstery nail” and “a nail with a large thin attached head”—products in which two parts together form a nail. *Id.* Less clear-cut because it includes a nail and some additional item is the ITC’s example of “a nail with a rubber or neoprene washer assembled over its shaft (to seal the nail-hole in metal or fiberglass roofing, or siding).” *Id.* But we need not determine at this time whether the ITC appropriately concluded that all of these examples are, in fact, nails constructed of two or more pieces, because we consider ambiguity in the context of the merchandise at issue in this case. *See* 19 C.F.R. § 351.225(a) (“[S]cope rulings’ . . . clarify the scope of an order or suspended investigation with respect to particular products.”). Indeed, “the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties.” *ArcelorMittal*, 694 F.3d at 88. Thus, for purposes of this appeal, we consider ambiguity of the Orders’ scope language in the context of anchors.

We agree with the CIT, OMG, and the Government that the scope language “nails . . . constructed of two or more pieces” is unambiguous in this context. The language requires one or more pieces that form a nail. No party appears to dispute that for purposes of the Orders, “nails” are fasteners designed for impact insertion. *See* Appellant’s Br. 19–22 (taking issue with every aspect of the CIT’s definition for “nail” other than its use as a fastener and its design for “impact insertion”); Appellee’s Br. 34 (defining “nail” as “a slender piece of metal with a point at one end that is driven into construction materials by impact” (citations omitted)). This understanding is sufficient to allow us to address the next step in the analysis: whether OMG’s anchors meet the unambiguous scope language “nails . . . constructed of two or more pieces.”

“The question of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence.” *Meridian Prods.*, 851 F.3d at 1382 (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002)). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* at 1381 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001)). We agree with the CIT that substantial evidence does not support Commerce’s original conclusion that OMG’s anchors are nails constructed

of two or more pieces. On the other hand, substantial evidence supports Commerce's conclusion on remand that OMG's anchors fall outside the scope of the Orders.

Though OMG's anchors are constructed of two or more pieces, they are not nails. As an initial matter, we agree with both Commerce and the CIT that OMG's anchors should be treated as unitary items. J.A. 504 ("OMG's anchors should not be considered a 'composite good,' but rather a single item."); *OMG*, 321 F. Supp. 3d at 1269 ("OMG's zinc anchor is a unitary article of commerce."). Considering OMG's anchors as unitary items, no reasonable person could conclude that OMG's anchors are nails because unlike nails, OMG's anchors are not designed for impact insertion. Rather, OMG's anchors require a pre-drilled hole at least half an inch deeper than the anchor embedment with a diameter matching the shank diameter of the anchor. To fasten "termination bars to concrete or masonry walls, [OMG's] [z]inc [a]nchors are inserted into predrilled holes," and "then installed with a hammer, which is used to drive the steel pin, thereby expanding the zinc body in the predrilled hole." J.A. 29. Expansion of the zinc body against the interior of the pre-drilled hole fixes the anchor in place, thereby fastening the termination bar to the wall. Though nails and OMG's anchors are both installed with the use of a hammer, unlike nails, OMG's anchors are not driven by impact through the materials to be fastened.

We further conclude that Commerce's original decision that OMG's anchors are unambiguously within the scope of the Orders is contrary to law and not supported by substantial evidence because Commerce failed to consider the relevant question. Commerce based its conclusion that OMG's anchors are "nails . . . constructed of two or more pieces" on the steel pin component of OMG's anchors when it should instead have considered OMG's anchors as unitary articles of commerce. *See, e.g.*, J.A. 502 ("The galvanized pin is a steel nail with a body or attachment. By this logic, OMG's zinc anchors are, in fact, a steel nail with two components."). Commerce's focus on the steel pin runs contrary to both its determination that OMG's anchors should be considered "a single item" and the Orders' plain scope language. J.A. 504. Indeed, the Orders cover "nails . . . constructed of two or more pieces," not fasteners of two or more pieces, one of which is a nail. *Countervailing Duty Order*, 80 Fed. Reg. at 41,006; *Antidumping Duty Order*, 80 Fed. Reg. at 39,995.

During oral argument, the Government also asserted that the Orders' scope unambiguously includes OMG's anchors because the tariff classification subheading covering OMG's anchors, Harmonized Tariff Schedule of the United States (HTSUS) Subheading 7907.00.60.00,

is specifically included in the language of the Orders. *See* Oral Arg. at 3:44–5:03, <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=19-2131.mp3>. The Orders state: “Certain steel nails subject to this order also may be classified under HTSUS subheadings 7907.00.60.00, 8206.00.00.00 or other HTSUS subheadings.” *Countervailing Duty Order*, 80 Fed. Reg. at 41,007; *Antidumping Duty Order*, 80 Fed. Reg. at 39,995. But contrary to the Government’s argument, the Orders’ inclusion of “[c]ertain steel nails . . . classified under HTSUS subheading[] 7907.00.60.00” does not sweep in all products classified under subheading 7907.00.60.00, which broadly covers “Other articles of zinc: Other.” The plain language of the Orders limits covered products classified under subheading 7907.00.60.00 to “certain steel nails.” Indeed, it is easy to imagine zinc products that are not steel nails (such as a zinc key ring) that may nonetheless fall within subheading 7907.00.60.00. Classification of OMG’s anchors under subheading 7907.00.60.00 does not make OMG’s anchors nails any more than classification under subheading 7907.00.60.00 would make a key ring a nail. Accordingly, classification of OMG’s anchors under subheading 7907.00.60.00 does not support the conclusion that OMG’s anchors are unambiguously within the scope of the Orders.

Though it is not dispositive in view of our analysis above, we are compelled to address the Government’s argument that the CIT’s reliance on dictionary definitions to determine the plain meaning of the word “nail” was improper and impermissibly changed the scope of the Orders. As a threshold matter, the CIT may consult dictionary definitions to assist in determining the plain meaning of a term in an antidumping or countervailing duty order. *See Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990) (explaining that “the scope of a final order” may be “clarified,” but not “changed in a way contrary to its terms”); *NEC Corp. v. Dep’t of Commerce*, 74 F. Supp. 2d 1302, 1307 (Ct. Int’l Trade 1999) (“In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information including testimony of record.” (citation omitted)); *see also Meridian Prods.*, 851 F.3d at 1381 n.7 (adopting dictionary definition of “unambiguous” as the standard for determining whether the scope terms of an antidumping or countervailing duty order are unambiguous); *cf. Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (explaining, in the tariff classification context, that “[t]ariff terms are construed in accordance with their common and popular meaning, and in construing such terms the court may rely upon its own understanding, dictionaries and other reliable sources.” (citing *Marubeni*

*Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)); *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (“A court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine the common meaning of a tariff term.” (citations omitted)). Indeed, the Government conceded as much at oral argument. See Oral Arg. at 41:47–42:44.

Moreover, we do not agree that the CIT in this case used dictionary definitions inconsistently with the Orders’ scope language. Though some of the dictionary definitions the CIT considered are, indeed, narrower than the Orders’ scope language, the CIT did not rest its conclusion on these differences. As the Government notes, the scope language is broader than the definitions the CIT considered in that the scope language includes nails with blunt or no points, nails of any shaft diameter, and nails constructed of two or more pieces. But the CIT did not conclude that OMG’s anchors are not nails because they are blunt, have a particular shaft diameter, or include two or more pieces. Rather, consistent with our analysis above, the CIT held that OMG’s anchors are not nails because the dictionary definitions “define a nail as a fastener inserted by impact into the materials to be fastened,” and “[t]he “merchandise at issue is not inserted by impact into the materials to be fastened.” *OMG*, 321 F. Supp. 3d at 1269. Accordingly, the CIT did not err in relying on dictionary definitions.

Having concluded that OMG’s anchors are unambiguously outside the scope of the Orders, that Commerce’s remand decision is supported by substantial evidence, and that Commerce’s original decision to the contrary is not supported by substantial evidence, we need not address the Government’s argument that the (k)(1) sources support Commerce’s determination. See *Meridian Prods.*, 890 F.3d at 1277 (“If the scope is unambiguous, it governs.” (quoting *Meridian Prods.*, 851 F.3d at 1381)).

## CONCLUSION

We have considered the parties’ remaining arguments and do not find them persuasive. For the foregoing reasons, we affirm the decision of the CIT.

**AFFIRMED**

# U.S. Court of International Trade

Slip Op. 20–130

CYBER POWER SYSTEMS (USA) INC., Plaintiff, v. UNITED STATES,  
Defendant.

Before: Leo M. Gordon, Judge  
Court No. 20–00124

[Plaintiff's motion for preliminary injunction denied.]

Dated: September 2, 2020

*John M. Peterson, Patrick Brady Klein, and Richard F. O'Neill*, Neville Peterson, LLP of New York, NY for Plaintiff Cyber Power Systems (USA) Inc.

*Beverly A. Farrell and Brandon A. Kennedy*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY for Defendant United States. With them on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-In-Charge. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection of New York, NY.

## OPINION and ORDER

### Gordon, Judge:

In this action Plaintiff Cyber Power (USA) Inc. challenges the denial by U.S. Customs and Border Protection (“Customs” or “CBP”) of Plaintiff’s protest of Customs’ deemed exclusion of Plaintiff’s subject merchandise (five models of uninterruptible power supplies and one model of surge voltage protectors) for country of merchandise is substantially transformed in the Philippines and requests an order directing Customs to enter Plaintiff’s merchandise as marked “made in Philippines.” Before the court is Plaintiff’s request for a preliminary injunction that seeks the ultimate relief in the action. For the reasons set forth below, the court denies Plaintiff’s motion.

### Background

Before the subject entry was detained and deemed excluded, Cyber Power made a verbal prior disclosure to Customs in the summer of 2019, arising from a consumer affairs journalist who identified an over-label on packaging of imported Cyber Power surge was “made in Philippines” but, when the reporter removed the label, the printing on the packaging stated “made in China.”

In September 2019, Customs sent an initial Request for Information to Cyber Power seeking general information and certain produc-

tion records. Customs followed up with another request in October 2019 again seeking production records. Cyber Power provided Customs with its Final Prior Disclosure in November 2019, in which Cyber Power explained that the disclosure related to the country of origin designation of certain imported merchandise “spanning from November 2018 to the present [November 27, 2019].” Among other things, Cyber Power stated that it believed the use of over-labels on pre-printed packaging was reasonable and compliant with 19 U.S.C. § 1304 and that the goods met the substantial transformation test. Cyber Power further explained that it had conducted an internal review of its certificate of origin declaration and marking practices.

In January 2020, Customs determined that the country of origin of certain Cyber Power uninterruptible power supplies and surge voltage protectors was China, not the Philippines. In February 2020, Customs sent a Notice of Action to Cyber Power on CBP Form 29 informing it of a rate advance. Plaintiff, through counsel, responded to the rate advance, disclosing, among other things, that the production country for the batteries and the circuit boards for the goods had changed. This contradicted the information in Cyber Power’s November 2019 Final Prior Disclosure. In March 2020, Cyber Power advised its Customs broker that it intended to make only pen and ink changes to its Philippine invoices and that it would continue marking all items as “made in Philippines.”

On April 10, 2020, Customs detained the subject entry for inspection. Customs sent Cyber Power and its Customs broker a notice of detention accompanied by a notice to mark and/or redeliver. *See* Compl., ECF No. 13–1, Exs. A-1 and A-2. The notice to mark states:

Cyber Power, council [sic] for Cyber Power, John Peterson, and broker C.H. Robinson were all advised by Import Specialist Horacek, in writing, back in February 2020 that Cyber Power is required to claim country of origin China on all Uninterruptible power supplies (UPS) and surge protectors and no exemption was given for marking purposes. All UPS and surge protectors must be entered as Chinese goods and marked made in China.

*See* Compl., Ex. A-2 at 4.

Plaintiff refused to change the marking on the goods and their packages, and on May 3, 2020, the subject merchandise was deemed excluded by operation of 19 U.S.C. § 1499(c)(5). On May 21, 2020, Plaintiff filed Protest No. 3501–20–101425 challenging Customs’ deemed exclusion. Plaintiff asserted that the imported products were manufactured in Cyber Power Systems Inc.’s plant in the Philippines through processes involving the assembly of hundreds of discrete



components that originated primarily in China, but also in other countries. Plaintiff argued that the processes performed in the Philippines resulted in the “substantial transformation” of such components into new and different articles of Philippine origin, having a name, character, or use different than those constituent components. According to Plaintiff, the imported products were of Philippine origin, and the products and their packages were properly marked pursuant to 19 U.S.C. § 1304(a).

In connection with the protest, Cyber Power did not provide information and documents specific to the five models of uninterruptible power supplies and one model of surge voltage protectors at issue, but instead explained that “Manufacturing operations for representative units are described. Bills of materials and manufacturing processes for each model are available to Customs on request.” Declaration of Linda Horacek at ¶ 5, Attach. to ECF No. 27 (“Horacek Decl.”); *see also* ECF No. 20–1 at 5. Customs requested all the records relating to the subject merchandise. Horacek Decl. at ¶ 6. In reviewing Cyber Power’s protest, Customs discovered discrepancies in the information provided. For example, Cyber Power states that of the 188 discrete components needed to make CP600LCDa, “approximately 118 of those components, consisting of various electronic microcomponents are combined in Taiwan to manufacture the main printed circuit board assembly for the power supply.” *Id.* at ¶ 9. However, the process flow chart submitted contradicted this claim and alleged that circuit boards were being soldered in the Philippines. *Id.* Although Cyber Power claimed the main board of model CBN50048A-1 was soldered in the Philippines, a document (Exhibit H to the Horacek Decl.) showed that all main board assemblies were soldered in China. *Id.* at ¶ 13.

In response to a question from Customs about when Philippine-soldered components were first used on models OR500LCDRM1U and SX650U, Cyber Power admitted that information in the protest needed to be corrected to reflect that the boards were of Chinese origin. *Id.* at ¶ 12. Ultimately, Customs learned that only model CP600LCDa was claimed to possess a main board of Philippine origin. *Id.* at ¶ 14. However, work orders for circuit boards that were alleged to be contained in this model were completed either one day before, the day of, or two days after the model had been packed for export. *Id.* at ¶ 15.

After reviewing Plaintiff’s submissions in support of the protest, Customs denied the protest on June 19, 2020, concluding that: “Insufficient documentation was provided by the protestant in order to change the country of origin from China to the Philippines for mark-

ing and classification purposes. All information, both verbal and written, was considered by this office. The country of origin marking for this shipment should remain ‘made in China’.” See ECF No. 20–1 at 2.

This action, and Cyber Power’s motion for a preliminary injunction followed. After considering the parties’ respective proposed scheduling orders for expedited litigation, the court entered a Scheduling Order on July 14, 2020.

### **Discussion**

In an action under 28 U.S.C. § 1581(a), Plaintiff bears the burden of proof on contested factual issues that arise from the protest decision. 28 U.S.C. § 2639(a)(1) (2000); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997); *Chrysler Corp. v. United States*, 33 CIT 90, 97, 601 F. Supp. 2d 1347, 1353–54 (2009), *aff’d*, 592 F.3d 1330 (Fed. Cir. 2010). Plaintiff therefore carries the burden to prove by a preponderance of the evidence that its subject merchandise is substantially transformed in the Philippines and not made in China.

Section 304(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a), requires that all merchandise imported into the United States be marked permanently, legibly, indelibly, and in a conspicuous place, to indicate the English name of the product’s country of origin. 19 C.F.R. § 134.1(b) defines the term “country of origin” as “the country of manufacture, production, or growth of any article of foreign origin entering the United States.” Section 134.1(b) explains that “[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the ‘country of origin’ within the meaning of this part.” Where goods are not properly marked to show their country of origin, they are considered “restricted” merchandise, which Customs may exclude from entry into the United States. See 19 U.S.C. § 1304(j); see also 19 C.F.R. § 134.3(a).

A substantial transformation occurs “when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process.” *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267, C.A.D. 98 (1940); *Anheuser Busch Brewing Ass’n v. United States*, 207 U.S. 556, 562 (1908); *Belcrest Linens v. United States*, 741 F.2d 1368, 1372 (Fed. Cir. 1984); *Superior Wire v. United States*, 867 F.2d 1409, 1414 (Fed. Cir. 1989).

### **Preliminary Injunction**

“A plaintiff seeking a preliminary injunction must establish [(1)] that he is likely to succeed on the merits, [(2)] that he is likely to

suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

### Public Interest

The court begins with consideration of the public interest because the requested preliminary injunction seeks Plaintiff’s permanent, ultimate relief, rather than temporary or preliminary relief. Pl.’s Proposed Order accompanying App. for Prelim. Inj., ECF No. 21 (Attach. 1) (requesting that Customs “release the goods which are the subject of this action to Plaintiff . . . without first requiring Plaintiff to change country of origin marking on the merchandise or its packaging.”). There is nothing preliminary or temporary about releasing Plaintiff’s merchandise for entry as marked. It is the permanent relief Plaintiff seeks. Plaintiff’s merchandise is presently excluded from entry, which is the status quo. Once the court releases the goods into the flow of commerce marked “made in Philippines” as Plaintiff requests, the court upsets the status quo, and the court cannot mitigate the harm to the public if, after a trial on the merits, the court concludes the merchandise should be marked “made in China.”

The marking statute, 19 U.S.C. § 1304(a), allows the purchasing public to buy or not, “if such marking should influence their will.” *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940). And while any corollary governmental interests in marking-related duties, 19 U.S.C. § 1304(i), and any Section 301 duties on Chinese goods, may be potentially safeguarded by a bond, there is simply no way to compensate the ultimate purchaser—no bond to indemnify the interests affected—if the court improvidently grants the preliminary injunction releasing the goods as marked. These eggs cannot be unscrambled. “A preliminary injunction should be denied if it will adversely affect the public or other interested parties for which, even temporarily, an injunction bond cannot compensate.” *Associated Dry Goods Corp. v. United States*, 1 CIT 306, 310, 515 F. Supp. 775, 779 (1981). “The court should withhold such relief until a final determination of the controversy, even though the delay may be burdensome to the plaintiff.” *Id.*; see also *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 471, 664 F. Supp. 535, 536 (1987) (preliminary injunction denied in “substantial transformation” case on ground that injunction granted *ultimate* relief sought; court consolidated preliminary injunction motion with trial on merits and ordered expedited review, ultimately issuing judgment for plaintiff). The public interest therefore

discourages issuance of a preliminary injunction in this case. The best course is instead to proceed expeditiously on the merits toward a final judgment.

### **Likelihood of Success**

As noted above, Plaintiff bears the burden to establish by a preponderance of the evidence that the subject merchandise is substantially transformed in the Philippines. Plaintiff's likelihood of success therefore depends on its development of the factual record before the court. In seeking a preliminary injunction, though, Plaintiff argues that the court should weaken its rules of evidence and procedure—basically, consider otherwise inadmissible evidence. *See* Pl.'s Mot. for Hr'g on App. for Prelim. Inj. at 5–6, ECF No. 29. This elevates its attempt to obtain its ultimate relief in the form of a preliminary injunction to a bold, if not questionable, litigation stance. Whatever its characterization, it is not a persuasive posture for Plaintiff's likelihood of success. It implies that Plaintiff is not yet prepared to make the evidentiary proffer required at trial. That posture, coupled with Defendant's point that Plaintiff submitted inconsistent/incorrect information about its manufacturing processes to Customs (explained above), means that Plaintiff simply asks too much of the court to conclude that Plaintiff has a likelihood of success. All the court can conclude at this stage of the litigation is that Plaintiff appears to still be formulating the theory of its case and trying to figure out what admissible evidence it can marshal in support of its claims.

In addition to Plaintiff's factual hurdles, Plaintiff acknowledges that the substantial transformation analysis the court applies (to finished articles comprised of components) may prove dispositive. Pl.'s Mot. for Hr'g on App. for Prelim. Inj. at nn. 4 & 5. With 80 years of application in various contexts (country of origin marking, government procurement, voluntary restraint agreements, Generalized System of Preferences eligibility, drawback eligibility), the substantial transformation test should, one would anticipate, be fairly straightforward to apply. It is not.

Take, for example, *Energizer Battery Inc. v. United States*, 40 CIT \_\_\_, 190 F. Supp, 3d 1308 (2016), a government procurement case. In *Energizer Battery*, 50 components were imported and assembled into a flashlight in the state of Vermont. The court granted summary judgment for the Government that the flashlight was not substantially transformed in Vermont, an outcome that seems somewhat counterintuitive because on a practical level a finished flashlight does have a different name, character, and use than a pile of 50 unassembled constituent components. Following a component-by-

component name, character, and use analysis developed in prior court decisions, the *Energizer Battery* court concluded that the flashlight components (the lens, etc.) all retained their specific names, character, and use when assembled in the finished flashlight. *Energizer Battery*, 40 CIT at \_\_\_, 190 F. Supp. 3d at 1321 (“whether there has been a substantial transformation depends on whether there has been a change in the name or use of the components”).

The court in *Energizer Battery* also relied upon those same prior decisions that held the assembly of components for a pre-determined use could not constitute a change in use for the finished article in the country of assembly. 40 CIT at \_\_\_, 190 F. Supp. 3d at 1319; see *Nat'l Hand Tool Corp. v. United States*, 16 CIT 308, 311–312 (1992) (post-importation processing primarily consisted of assembly process, having one pre-determined end-use at time of importation); see also *Ran–Paige Co., Inc. v. United States*, 35 Fed. Cl. 117, 121–122 (1996) (post-importation processing consisted primarily of attaching handles to pans with predetermined use at time of importation); *Uniroyal, Inc. v. United States*, 3 CIT 220, 226, 542 F. Supp. 1026, 1031 (1982) (imported shoe upper underwent no physical change and was attached to outsole for predetermined use).

The above component-by-component approach to the substantial transformation test would seem to make it practically insurmountable for subsequent-country, pre-determined assembly to ever constitute further work/substantial transformation of an article. And this does not bode well for Plaintiff's likelihood of success. Under these precedents, however, it appears Plaintiff may still be able to prevail despite failing the component-by-component name, character, and use test if it can establish that the Philippine processing is “sufficiently complex” to justify a substantial transformation in the finished articles. *Energizer Battery*, 40 CIT at \_\_\_ – \_\_\_, 190 F. Supp. 3d at 1319–20. Exactly what constitutes “sufficiently complex” is a bit of a mystery though.

Plaintiff hangs its hopes on a recent Federal Circuit decision that appears to eschew the component-by-component substantial transformation analysis. See Pl's Mem. in Supp. of Prelim. Inj. at 13, ECF No. 21–2 (citing *Acetris Health, LLC v. United States*, 949 F.3d 719, 731 (Fed. Cir. 2020) (“it is clear . . . that the ‘product’ is the final product that is procured—here, the pill itself—rather than the ingredients of the pill.”)). This Court would add that the Court of International Trade in *Uniden America Corp. v. United States*, 24 CIT 1191, 1195–98, 120 F. Supp.2d 1091, 1095–1099 (2000) expressly rejected a component-by-component analysis in reviewing whether articles were substantially transformed.

Perhaps the only way to make sense of these seemingly disparate substantial transformation cases is to concentrate on the courts' analysis of the underlying statutory and regulatory purposes, and the courts' conclusions about whether those purposes were served by a finding of substantial transformation. *Compare Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 471, 664 F. Supp. 535, 536 (1987) (DiCarlo J.) (finding substantial transformation in subsequent country, New Zealand, in context of voluntary restraint agreement with originating country, Japan) *with Nat'l Hand Tool Corp. v. United States*, 16 CIT 308, 311–312 (1992) (DiCarlo C.J.) (finding no substantial transformation for assembly operations in United States for product and components originating in Taiwan).

The court cannot yet say whether Plaintiff will succeed or not. The court will have to see how the record develops and evaluate the parties' arguments about the statutory and regulatory purposes of the marking statute and Section 301 duties, and whether Plaintiff's Philippine activities advance those purposes or not.

### **Balance of Equities**

Plaintiff submitted incorrect and misleading information to Customs that undermines its equitable stance. Plaintiff's pursuit of its ultimate relief in the form of a preliminary injunction rather than proceeding expeditiously on the merits slows the litigation down, and adds unnecessary cost, expense, and delay. The equities therefore do not favor Plaintiff.

### **Irreparable Injury**

Cyber Power alleges harm that is both reparable and subsumed in the expected costs of voluntarily engaging in the importation of foreign merchandise. *See* Def's. Resp. to Pl.'s Mot. for Prelim. Inj. at 16–20, ECF No. 27. The court notes that by requesting a preliminary injunction that seeks its ultimate relief, Plaintiff has added unnecessary expenditure of time and energy for all parties and the court. The best course for Plaintiff to obtain its desired relief is to proceed expeditiously to a trial on the merits.

### **Conclusion**

For the reasons set forth above, a preliminary injunction granting Plaintiff its ultimate relief is not appropriate in this action. Accordingly, it is

**ORDERED** that Plaintiff's application for a preliminary injunction is denied; and it is further

**ORDERED** that Plaintiff's request for a hearing on its motion for a preliminary injunction is denied as moot.

Dated: September 2, 2020  
New York, New York

*/s/ Leo M. Gordon*  
JUDGE LEO M. GORDON





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