U.S. Customs and Border Protection

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A "3-IN-1 CAR CLEANER"

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of a "3-in-1 Car Cleaner" consisting of a combination automobile ice scraper, squeegee, and bristle brush with a detachable handle

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 Headquarters Ruling Letter (HQ) 952654, dated January 27, 1993, concerning the tariff classification of a "3-in-1 Car Cleaner" 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

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 one ruling letter pertaining to the tariff classification of a "3-in-1 Car Cleaner". Although in this notice, CBP is specifically referring to Headquarters Ruling Letter (HQ) 952654, dated January 27, 1993 (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 HQ 952654, CBP classified "3-in-1 Car Cleaner" in heading 9603, HTSUS, specifically in subheading 9603.90.80, HTSUS, which pro-

vides for "Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees): Other: Other." CBP has reviewed HQ 952654 and has determined the ruling letter to be in error. It is now CBP's position that the "3 in 1 car cleaner" is properly classified, in heading 8708, HTSUS, specifically in subheading 8708.99.81, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ 952654 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H313099, 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

HQ 952654
January 27, 1993
CLA-2-CO:R:C:F 952654 K
CATEGORY: Classification
TARIFF No.: 9603.90.8050

DAVID A. EISEN, ESQ.
SIEGEL, MANDELL & DAVIDSON, P.C.
COUNSELORS AT LAW
515 BROADWAY, 43RD FLOOR
NEW YORK, NEW YORK 10036

RE: Classification of a Combination Automobile Ice Scraper, Squeegee, and Bristle Brush With a Detachable Handle

DEAR SIR:

The following is in response to your request of August 13, 1992, for a classification ruling of a "3-in-1 Car Cleaner". A sample was submitted.

FACTS:

The "3-in-1 Car Cleaner" consists of a plastic handle and three interchangeable components; a plastic ice scraper, a foam squeegee with rubber blade, and a bristle brush. Each component may be separately secured to the handle and may be detached by pressing the handle "clip".

ISSUE:

The issue is whether the combination article is excluded from classification under heading 8708, Harmonized Tariff Schedule of the United States (HTSUS) as parts and accessories of the motor vehicles of headings 8701 to 8705.

LAW AND ANALYSIS:

The General Rules of Interpretation (GRI), 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, taken in order.

Heading 8708, HTSUS, provides for parts and accessories of the motor vehicles of headings 8701 to 8705. However, Note 2(l), Section XVII, HTSUS, states that the "expressions 'parts' and 'parts and accessories' do not apply to the following articles, whether or not they are identifiable as for goods of this section:...brushes of a kind used as parts of vehicles (heading 9603)." The "3-in 1 Car cleaner" may be solely or principally used with a motor vehicle. However, the article can not be classifiable as a motor vehicle accessory because one of the components, the brush, is excluded by Note 2(l).

Since the article cannot be classifiable according to GRI 1, GRI 2(b) then requires that "the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." The article meets the definition of a composite article because it is partially described in two subheadings, 8708.99.50 and 9603.90.8050 and GRI 3(a) governs the classification of composite goods. GRI 3(a) provides that when classification of goods is under two or more headings (in this case, subheadings) "the heading which provides the most specific description shall be preferred to headings

providing a more general description. However, when two or more headings each refer to part only of the materials or substance contained in...composite goods...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." Accordingly, the article cannot be classifiable under GRI 3(a).

GRI 3(b) provides that "composite goods...made up of different components...which cannot be classified by reference to 3(a), shall be classified as if they consisted of the...component which gives them their essential character...." Each component, the ice scraper, the squeegee, and the brush, is equally essential in character. Accordingly, the article cannot be classifiable by GRI 3(b).

GRI 3(c) provides that "when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." The composite articles are classified as follows:

Brush----------subheading, 9603.90.8050, dutiable at 5.6 %ad valorem
Squeegee-------subheading, 9603.90.8050, dutiable at 5.6 %ad valorem
Scraper--------subheading, 8708.99.50, dutiable at 3.1 % ad valorem

Since the brush and the squeegee are classified under a subheading which occurs last in numerical order among those subheadings which equally merit consideration, the "3-in-1 Car Cleaner" is classifiable as a set under subheading 9603.90.8050, HTSUS, dutiable at 5.6 percent ad valorem.

HOLDING:

A combination ice scraper, brush, and squeegee with an interchangeable plastic handle, used as a motor vehicle accessory, is classifiable by reference to GRI 3(c), HTSUS, as a set under subheading 9603.90.8050, HTSUS, dutiable at 5.6 percent ad valorem.

Sincerely,

JOHN DURANT,
Director
Commercial Rulings Division

HQ H313099
CLA-2 OT:RR:CTF:CPMM H313099 CKG
CATEGORY: Classification
TARIFF NO: 8708.99.81.80

DAVID A. EISEN, ESQ.
SIEGEL, MANDELL & DAVIDSON, P.C.
COUNSELORS AT LAW
1515 BROADWAY, 43RD FLOOR
NEW YORK, NEW YORK 10036

RE: Revocation of HQ 952654; classification of a combination automobile ice scraper, squeegee, and bristle brush with a detachable handle

DEAR MR. EISEN:

This is in reference to Headquarters Ruling Letter (HQ) 952654, dated January 27, 1993, concerning the tariff classification of a combination automobile ice scraper, squeegee, and bristle brush with a detachable handle. In HQ 952654, CBP classified the item, referred to as the "3-in-1 Car Cleaner," in heading 9603, HTSUS, subheading 9603.90.80, HTSUS. We have reviewed HQ 952654, and have determined that the classification of the "3-in-1 Car Cleaner" in heading 9603, HTSUS, was incorrect.

FACTS:

The merchandise at issue was described in HQ 952654 as follows:

> The "3-in-1 Car Cleaner" consists of a plastic handle and three interchangeable components; a plastic ice scraper, a foam squeegee with rubber blade, and a bristle brush. Each component may be separately secured to the handle and may be detached by pressing the handle "clip".

ISSUE:

Whether the 3-in-1 Car Cleaner is classifiable as a brush or squeegee under heading 9603, HTSUS, or as parts and accessories of the motor vehicles of headings 8701 to 8705 under heading 8708, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings 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 or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

The HTSUS provisions under consideration are as follows:

9603: Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees).

8708: Parts and accessories of the motor vehicles of headings 8701 to 8705.

Note 2 to Section XVII provides, in relevant part::

> The expressions "*parts*" and "*parts and accessories*" do not apply to the following articles, whether or not they are identifiable as for the goods of this section:
>
> (l) Brushes of a kind used as parts of vehicles (heading 9603).

Note 3 to Section XVII provides, in pertinent part:

> 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.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS. While not legally binding or 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 at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Part III of the General EN's to Section XVII, HTSUS, provides, in pertinent part:

> [T]hese 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 87.08 provides as follows:

> 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).
>
> * * * *

As a preliminary matter, we wish to clarify that Note 2(l) to Section XVII, which excludes "brushes of a kind used as parts of vehicles (heading 9603)" from classification under heading 8708 as a part or accessory of motor vehicles of headings 8701 to 8705, does not apply to the 3-in-1 Car Cleaner, as we held in HQ 952654. Note 2(l) only excludes as a part or accessory of motor vehicles of headings 8701 to 8705 an item that is classified in its entirety under heading 9603. Here, only part of the 3-in-1 Car Cleaner is classified under heading 9603—the brush and the squeegee, but not the ice scraper—and so Note 2(l) does not exclude the 3-in-1 Car Cleaner from classification under heading 8708 as a part or accessory of motor vehicles of headings 8701 to 8705.

The 3-in-1 Car Cleaner is classifiable in heading 8708 as an accessory to a motor vehicle of headings 8701 to 8705. An "accessory" is not defined in the

HTSUS. The term accessory is generally understood to mean an article which is not necessary to enable the goods with which it is intended to function. Accessories are of secondary importance, but must, however, contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the particular article, widen the range of its uses, or improve its operation). HQ 958710, dated April 8, 1996; HQ 950166, dated November 8, 1991. We also employ the common and commercial meanings of the term "accessory", as the courts did in *Rollerblade v. United States*, wherein the Court of International Trade derived from various dictionaries that an accessory must relate directly to the thing accessorized. *See Rollerblade, Inc. v. United States*, 116 F.Supp. 2d 1247 (CIT 2000), aff'd, 282 F.3d 1349 (Fed. Cir. 2002) (holding that inline roller skating protective gear is not an accessory because the protective gear does not directly act on or contact the roller skates in any way, and does not affect the skates' operation); *See also* HQ 966216, dated May 27, 2003.

The 3-in-1 Car Cleaner contributes to the effectiveness and affects the operations of motor vehicles of headings 8701 to 8705 by enabling the removal of ice or snow from their windows, lights, and other parts for better visibility while driving. The item appears identifiably suitable for use solely or principally for a motor vehicle of headings 8701 to 8705. Moreover, the item is not excluded from classification as an accessory to a motor vehicle of headings 8701 to 8705, and it is not further specified elsewhere in the Nomenclature. Accordingly, the 3-in-1 Car Cleaner is classifiable under heading 8708 under GRI 1.

Conversely, the 3-in-1 Car Cleaner is not wholly described by heading 9603, as a brush or squeegee and there is no need for an essential character determination under GRI 3.

This conclusion is consistent with prior CBP rulings classifying other ice scrapers and similar articles as accessories under heading 8708, HTSUS. *See, e.g.*, HQ 081825, dated June 22, 1988; NY 860694, dated March 8, 1991; NY 896244, dated April 6, 1994; HQ 956382, dated September 28, 1994; NY A82053, dated April 15, 1996; NY G88216, dated March 12, 2001; NY R01280, dated January 19, 2005; NY N012544, dated June 27, 2007; NY N022822, dated February 12, 2008; NY N073479, dated September 22, 2009; NY N082460, dated November 20, 2009; NY N110536, dated July 12, 2010; and NY N251145, dated March 31, 2014. The instant merchandise is accordingly classified in heading 8708, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the 3-in-1 Car Cleaner is classified in heading 8708, HTSUS, specifically subheading 8708.99.81, 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 2023 column one, general rate of duty is 2.5% *ad valorem*.

EFFECT ON OTHER RULINGS:

HQ 952654, dated January 27, 1993, is hereby revoked.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF BUMPER ENERGY ABSORBERS, BUMPER EXTENSIONS, AND BUMPER REINFORCEMENTS

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

ACTION: Notice of proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of bumper energy absorbers, bumper extensions, and bumper reinforcements

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 one ruling letter concerning tariff classification of bumper energy absorbers, bumper extensions, and bumper reinforcements 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Gregory Connor, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at gregory.connor@cbp.dhs.gov.

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 bumper energy absorbers, bumper extensions, and bumper reinforcements. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N302213, dated February 14, 2019 (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 N302213, CBP classified bumper energy absorbers, bumper extensions, and bumper reinforcements in heading 8708, HTSUS, specifically in subheading 8708.29.51, 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 N302213 and has determined the ruling letter to be in error with respect to the classification of the aforementioned bumper energy absorbers, bumper extensions, and bumper reinforcements. It is now CBP's position that bumper energy absorbers, bumper extensions, and bumper reinforcements are properly classified, in heading 8708, HTSUS, specifically in subheading 8708.10.60, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Bumpers and parts thereof: Parts of bumpers."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N302213 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter H323227, 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.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N302213
February 14, 2019
CLA-2–87:OT:RR:NC:N2:206
CATEGORY: Classification
TARIFF NO.: 8302.30.3060; 8708.29.5060

PAULA MESSER
AUTONATION, INC
200 SW 1ST AVENUE, SUITE 1100
FORT LAUDERDALE, FL 33301

RE: The tariff classification of bumper components from Taiwan

DEAR MS. MESSER:

In your letter dated December 11, 2018, you requested a tariff classification ruling.

The items under consideration have been identified as Bumper Retainers, Bumper Energy Absorbers, Bumper Extensions, and Bumper Reinforcements, used in passenger vehicles.

The bumper retainers, constructed of either metal or plastic, are simple parts that are mounted on the upper or lower portion of the bumper or bumper cover. They function to hold the bumper firmly in place. They also provide support and absorb energy during impact. The retainers can also enhance the look of a vehicle giving it a customized shape and body.

The bumper energy absorbers are designed to absorb impact in case of a collision, while effectively protecting other components, thus preventing more serious injuries and physical damage to the vehicle's structure. The bumper energy absorbers, which are also called impact absorbers or bumper cores, are constructed of either foam or plastic, and must be replaced if damaged.

The bumper extensions function as a shield of protection to the bumper, which can get easily scratched or chipped when exposed to harsh road elements. They also provide a stylish accent and are placed on the driver's and passenger's sides of the vehicle's front and rear bumpers.

The bumper reinforcements are designed to reinforce the bumper assembly by fortifying and shielding the bumper from severe damage. They also keep the bumper from denting and crumpling, and are composed of either aluminum, steel, or plastic.

The applicable subheading for Bumper Retainers, if made of base metal, will be 8302.30.3060, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof: Other mountings, fittings and similar articles suitable for motor vehicles; and parts thereof: Of iron or steel, of aluminum or of zinc: Other." The general rate of duty will be 2% ad valorem.

The applicable subheading for Bumper Energy Absorbers, Bumper Extensions, and Bumper Reinforcements will be 8708.29.5060, 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: Other." The general rate of duty will be 2.5% 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.

This office is precluded from ruling on the bumper retainers made of plastic, as it involves a consideration of whether the bumper retainers made of plastic may be classifiable within tariff heading 3926, HTSUS, or heading 8708, HTSUS.

Section 177.7 of the Customs Regulations (19 C.F.R. §177.7) provides that rulings will not be issued in certain circumstances. Specifically, § 177.7(b) reads, in pertinent part:

> No ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit or any court of appeal therefrom.

As such, CBP will not rule on the bumper retainers of plastic at this time. The classification determination may be impacted by the court case currently pending in the Court of International Trade. See United States v. Jing Mei, Ct. Nos. 13–00321.

If you wish, you may resubmit your request for a prospective ruling after the appropriate court case has been resolved.

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, please contact National Import Specialist Liana Alvarez at *liana.alvarez@cbp.dhs.gov*.

Steven A. Mack

DIRECTOR

National Commodity Specialist Division

HQ H323227
OT:RR:CTF:EMAIN H323227 PF
CATEGORY: Classification
TARIFF NO.: 8708.10.60

PAULA MESSER
AUTONATION, INC
200 SW 1ST AVENUE, SUITE 1100
FORT LAUDERDALE, FL 33301

RE: Modification of NY N302213, dated February 14, 2019; Tariff classification of bumper energy absorbers, bumper extensions, and bumper reinforcements

DEAR MS. MESSER:

On February 14, 2019, U.S. Customs and Border Protection ("CBP") issued to you New York Ruling Letter ("NY") N302213. It concerned the tariff classification of bumper energy absorbers, bumper extensions, and bumper reinforcements under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have reviewed NY N302213 and determined that it is partially in error. For the reasons set forth below, we are modifying that ruling with respect to the classification of bumper energy absorbers, bumper extensions, and bumper reinforcements. The remaining analysis of N302213 remains unchanged.

FACTS:

In NY N302213, the subject bumper energy absorbers, bumper extensions, and bumper reinforcements were described as follows:

> The bumper energy absorbers are designed to absorb impact in case of a collision, while effectively protecting other components, thus preventing more serious injuries and physical damage to the vehicle's structure. The bumper energy absorbers, which are also called impact absorbers or bumper cores, are constructed of either foam or plastic, and must be replaced if damaged.
>
> The bumper extensions function as a shield of protection to the bumper, which can get easily scratched or chipped when exposed to harsh road elements. They also provide a stylish accent and are placed on the driver's and passenger's sides of the vehicle's front and rear bumpers.
>
> The bumper reinforcements are designed to reinforce the bumper assembly by fortifying and shielding the bumper from severe damage. They also keep the bumper from denting and crumpling, and are composed of either aluminum, steel, or plastic.

In NY N302213, CBP classified the bumper energy absorbers, bumper extensions, and bumper reinforcements in subheading 8708.29.51, 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."

ISSUE:

Whether the bumper energy absorbers, bumper extensions, and bumper reinforcements are classified as parts of bumpers of subheading 8708.10.60, HTSUS, or as other auto parts and accessories of subheading 8708.29.51, HTSUS.

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 ("AUSR"). The GRIs and the AUSR are part of the HTSUS and are 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 and, unless otherwise required, according to the remaining GRIs taken in order. 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 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, and any related subheading notes, and mutatis mutandis to the GRIs 1 through 5.

The HTSUS subheadings under consideration are as follows:

8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
8708.10	Bumpers and parts thereof:
8708.10.60	Parts of bumpers.
	Other parts and accessories of bodies (including cabs):
8708.29	Other:
8708.29.51	Other.

There is no dispute that the subject bumper energy absorbers, bumper extensions, and bumper reinforcements are classified in heading 8708, HTSUS. The issue is in this case is the classification of the bumper energy absorbers, bumper extensions, and bumper reinforcements at the subheading level. As a result, GRI 6 applies. Specifically, before determining whether the instant merchandise is properly classified under the provision for "*other* parts and accessories of bodies (including cabs)" (emphasis added), we must address whether the instant articles constitute "bumpers and *parts thereof*" (emphasis added) of subheading 8708.10.

In NY N302213, CBP stated that the subject energy absorbers were designed to absorb impact in case of a collision, while effectively protecting other components, thereby preventing more serious injuries and physical damage to the vehicle's structure. In addition, the subject bumper extensions functioned as a shield of protection to the bumper. Moreover, the subject bumper reinforcements were designed to reinforce the bumper assembly by fortifying and shielding the bumper from severe damage and keeping the bumper from denting and crumbling.

Based on the foregoing, we find that the energy absorbers, bumper extensions, and bumper reinforcements absorb impact and provide rigidity and protection to the bumper, which are integral to the function of motor vehicle bumpers. Therefore, they are indeed *prima facie* classifiable under subheading 8708.10.60, HTSUS, as parts of bumpers. Because subheading 8708.10.60 is superior to the provision for "other parts and accessories of bodies (including cabs)", *supra*., there is no need to address whether the instant merchandise falls under the scope of subheading 8708.29. Classification of the instant merchandise in subheading 8708.10.60 is consistent with Headquarters Ruling Letter 964662, dated March 25, 2002, where CBP classified a support assembly that was a piece of steel attached to the rear bumper of a vehicle, which had the purpose of stabilizing a vehicle's rear bumper as a part of a bumper in subheading 8708.10.60, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the bumper energy absorbers, bumper extensions, and bumper reinforcements are classified in heading 8708, HTSUS, specifically subheading 8708.10.60, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Bumpers and parts thereof: Parts of bumpers." The column one, general rate of duty is 2.5 percent *ad valorem*.

Duty rates are subject to change. The text of the most recent HTSUS and the accompany duty rates are provided at www.usitc.gov. A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

EFFECT ON OTHER RULINGS:

NY N302213, dated February 14, 2019, is hereby MODIFIED.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF TWO RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A PLASTIC PLAYMAT FROM SOUTH KOREA AND A PRINTED PLAYMAT FROM SOUTH KOREA

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

ACTION: Notice of proposed revocation of two ruling letters and proposed revocation of treatment relating to the tariff classification of a plastic playmat from South Korea and a printed playmat from South Korea.

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 concerning the tariff classification of a plastic playmat and a printed playmat 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

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 pertaining to the tariff classification of a plastic playmat from South Korea and a printed playmat from South Korea. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N091575, dated February 12, 2010 (Attachment A), and NY N213371, dated May 11, 2012 (Attachment B), 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 two rulings 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 N091575, CBP classified a plastic playmat from South Korea in heading 3924, HTSUS, specifically in subheading 3924.90.1050, HTSUSA ("Annotated"), which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:

Other: Curtains and drapes, including panels and valances; napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars and furniture slipcovers and like furnishings...Other." In NY N213371 CBP classified a printed playmat from South Korea in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." CBP has reviewed NY N091575 and NY N213371 and has determined the ruling letters to be in error. It is now CBP's position that the plastic playmat from South Korea in NY N091575 is properly classified in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." It is also now CBP's position that the printed playmat from South Korea in NY N213371 is properly classified in heading 3918, HTSUS, specifically in subheading 3918.90.1000, HTSUSA, which provides for "Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ...: Of other plastics: Floor coverings."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N091575 and NY N213371 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H328952, set forth as Attachment C 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N091575
February 12, 2010
CLA-2-39:OT:RR:NC:N4:422
CATEGORY: Classification
TARIFF NO.: 3924.90.1050

MR. SEBIN IM
IJA TRADING INC.
#304C-10090 152ND STREET
SURREY, BRITISH COLUMBIA, V3R 8X8
CANADA

RE: The tariff classification of a plastic play mat from South Korea

DEAR MR. IM:

In your letter dated January 19, 2010, you requested a tariff classification ruling.

The submitted illustration depicts an item that is identified as a Toddler Playmat. This mat has rounded corners and is made of polyvinyl chloride (PVC) foam plastic material. The size of the imported mat will range from 6' x 4' to 8' x 5'. The top surface of the mat is decorated with animation characters.

You have stated your opinion that this item is "known" to be correctly classified in subheading 3918.10.1000. However, we do not agree that this item is correctly classified in that subheading because heading 3918 only provides for floor coverings that are in rolls or in the form of tiles. You have also suggested that this item is correctly classified as a toy in chapter 95. However, we do not agree, because the mat is not principally designed for amusement. The mat is designed to provide cushioning that will protect children from hurting themselves if they fall, as well as to muffle noise and create a barrier between the child and a cold floor.

The applicable subheading for the Toddler Playmat will be 3924.90.1050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for ... other household articles...of plastics: other:...mats...and like furnishings. The rate of duty will be 3.3 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 Gary Kalus at (646) 733-3055.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

N213371

May 11, 2012
CLA-2-49:OT:RR:NC:2:234
CATEGORY: Classification
TARIFF NO.: 4911.99.800

MR. JOHN A. WHITSON
COSTCO WHOLESALE CORPORATION
999 LAKE DRIVE
ISSAQUAH, WA 98027

RE: The tariff classification of a printed play mat from South Korea

DEAR MR. WHITSON:

In your letter dated April 10, 2012, you requested a tariff classification ruling.

The ruling was requested on the Children's PVC Interactive Play Mat identified as Costco item number 925551. You submitted four photos of the item for our examination. The interactive play mat is constructed of 100% polyvinyl chloride (PVC) foam plastic material. The play mat measures approximately 82.7″ (l) x 55.1″ (w) x .51″ (d).

The interactive play mat is reversible and serves a dual purpose as an educational learning resource and a decorative floor covering. It is printed on both sides with bright colors and illustrations that depict letters, numbers and objects. One side of the mat is designed with representative pictures and words to correspond with each letter of the alphabet. The opposite side of the play mat is illustrated with a play scene that identifies various animal figures. This play mat is used as an interactive educational learning resource to engage a young child and to encourage the recognition of letters, words, and numbers. The play mat is designed for use by children ages 0 – 7 years old.

You suggest classification of the Children's PVC Interactive Play Mat (Costco item number 925551) as a toy under 9503.00.0071, HTSUS. You state that the mat is an "interactive learning item that would be played on with a child and parent to learn the letters of the alphabet and animals." However, the item is not principally designed for amusement as the decorative mat provides the utilitarian function of covering the floor. Furthermore, the item lacks any manipulative play value.

The applicable subheading for the PVC Interactive Play Mat will be 4911.99.8000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Other printed matter, including printed pictures and photographs: Other: Other: Other: Other. The rate of duty will be Free.

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 Albert Gamble at (646) 733-3037.

Sincerely,

THOMAS J. RUSSO
Director
National Commodity Specialist Division

HQ H328952
OT:RR:CTF:CPMMA H328952 MAB
CATEGORY: Classification
TARIFF NO: 3918.90.1000; 4911.99.8000

MR. SEBIN IM
IJA TRADING INC.
#304C-10090 152ND STREET
SURREY BRITISH COLUMBIA V3R 8X8
CANADA

RE: Revocation of NY N091575 and NY N213371; Classification of a plastic playmat and a printed playmat from South Korea

DEAR MR. IM:

This letter is in reference to New York Ruling Letters ("NY") N091575, dated February 12, 2010, issued to IJA Trading Inc., and NY N213371, dated May 11, 2012, issued to Costco Wholesale Corporation, by U.S. Customs and Border Protection ("CBP") concerning the classification of a plastic playmat and a printed playmat from South Korea, respectively, under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N091575, CBP classified a plastic playmat in subheading 3924.90.1050, HTSUSA ("Annotated"), which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Curtains and drapes, including panels and valances; napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars and furniture slipcovers; and like furnishings ... Other." In NY N213371, CBP classified a printed playmat in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other," respectively. After reviewing these two rulings, CBP believes that they were issued in error. For the reasons set forth below, CBP hereby revokes NY N091575 and NY N213371.

FACTS:

In NY N091575, CBP described the plastic playmat, identified as a "Toddler Playmat," as follows:

> The submitted illustration depicts an item that is identified as a Toddler Playmat. This mat has rounded corners and is made of polyvinyl chloride (PVC) foam plastic material. The size of the imported mat will range from 6' x 4' to 8' x 5'. The top surface of the mat is decorated with animation characters.

We have also reviewed the background file in NY N091575 and note there is no information as to what form the subject playmat is imported, e.g., rolls, tiles, folded, other, etc.

In NY N213371, CBP described the printed playmat, identified as a "Children's PVC Interactive Play Mat," as follows:

> The ruling was requested on the Children's PVC Interactive Play Mat identified as Costco item number 925551. You submitted four photos of the item for our examination. The interactive play mat is constructed of 100% polyvinyl chloride (PVC) foam plastic material. The play mat measures approximately 82.7" (l) x 55.1" (w) x .51" (d).

> The interactive play mat is reversible and serves a dual purpose as an educational learning resource and a decorative floor covering. It is printed on both sides with bright colors and illustrations that depict letters, numbers and objects. One side of the mat is designed with representative pictures and words to correspond with each letter of the alphabet. The opposite side of the play mat is illustrated with a play scene that identifies various animal figures. This play mat is used as an interactive educational learning resource to engage a young child and to encourage the recognition of letters, words, and numbers. The play mat is designed for use by children ages 0–7 years old.

We have also reviewed the background file in NY N213371 and note there is information indicating that the subject playmat is imported in the form of rolls.

ISSUE:

Whether the subject plastic playmat and printed playmat are classified in heading 3918, HTSUS, as "Floor coverings of plastics," in heading 3924, HTSUS, as "other household articles ... of plastics," or in heading 4911, HTSUS, as "Other printed matter, including printed pictures and photographs."

LAW AND ANALYSIS:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). 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. If 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 GRI's 2 through 6 may then be applied in order.

The 2023 HTSUS headings under consideration are as follows:

3918 Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter:

3924 Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:

4911 Other printed matter, including printed pictures and photographs:

* * *

Note 2 to Section VII, HTSUS, provides as follows:

> Except for the goods of heading 3918 or 3919, plastics, rubber, and articles thereof, printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, fall in chapter 49.

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System ("HS") at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HS and are thus useful in ascertaining the proper classification of merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Section Note 2 to the General EN to Section VII, states as follows:

Goods of heading 39.18 (floor coverings and wall or ceiling coverings of plastics) and heading 39.19 (self-adhesive plates, etc., of plastics), even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, do not fall in Chapter 49 but remain classified in the above-mentioned headings. However, all other goods of plastics or rubber of the kind described in this Section fall in Chapter 49 if the printing on them is not merely subsidiary to their primary use, and the plastics or rubber serves only as a medium for the printing.

EN 39.18 states, in relevant part, as follows:

The first part of the heading covers plastics of the types normally used as floor coverings, in rolls or in the form of tiles. It should be noted that self-adhesive floor coverings are classified in this heading.

* * *

It should be noted that this heading includes articles printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods (see Note 2 to Section VII).

Note 2 to the EN to Chapter 49, states as follows:

For the purposes of Chapter 49, the term "printed" also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopied, thermocopied or typewritten.

The General EN to Chapter 49 states, in relevant part, as follows:

With the few **exceptions** referred to below, this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations.

* * *

Goods of **heading[s] 39.18**... are also excluded from this Chapter, even if they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods.

* * *

For the purposes of this Chapter, the term "printed" includes ... reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). The term **does not** , however, **include** coloration or decorative or repetitive-design printing.

* * *

In general the goods of this Chapter are executed on paper but the goods may be on other materials provided they have the characteristics described in the first paragraph of this General Explanatory Note.

EN 49.11 states, in relevant part, as follows:

This heading covers all printed matter (including photographs and printed pictures) of this Chapter (see the General Explanatory Note above) but not more particularly covered by any of the preceding headings of the Chapter.

* * *

The following articles, in particular, are also **excluded** from this heading:
* * *

(b) Goods of **heading[s] 39.18**...

* * *

It has been CBP's longstanding position that floor coverings of plastic are classified either in heading 3918, HTSUS, if imported in rolls or in the form of tiles, or in heading 3924, HTSUS, if imported in any other form. *See, e.g.,* HQ H318409, dated March 9, 2023 (plastic foam playmat referred to as a "Funtime Gelli Mat™" imported in rolls with a decorative repetitive design printed on each side, measuring 78.75" x 59" x 0.39", and marketed for young children ages 0–3 years old as a protective jumbo floor mat that provides additional cushioning for playing, rolling, crawling, and tumbling, classified in subheading 3918.90.1000, HTSUSA); HQ H290312, dated November 27, 2018 (plastic foam mats imported in rolls measuring 46″ x 93″ that are placed over existing flooring for additional cushioning and support while performing tasks, exercise, or to protect existing flooring, classified in subheading 3918.90.1000, HTSUSA)[1] ; HQ H270254, dated June 9, 2016 (interlocking plastic foam tiles sized 2' x 2' x 0.47″ imported in sets of six or eight designed to form a mat and intended to cover floors used in a variety of household settings, including child play areas, classified in subheading 3918.90.1000, HTSUSA). Since it is indisputable that both the plastic playmat in NY N091575 and the printed playmat in NY N213371 are also floor coverings of plastic,[2] we will first consider classification either in heading 3918, HTSUS, or in heading 3924, HTSUS.

The subject playmats in NY N091575 and NY N213371 are most similar to the plastic foam playmat referred to as a "Funtime Gelli Mat™" in HQ H318409, which was classified in heading 3918, HTSUS, as a floor covering of plastic imported in rolls. *See supra.* Like the Funtime Gelli Mat™, both playmats are also made from plastic foam material, of similar size, used as floor coverings, with designs printed on either one or both sides[3] and marketed for children (the plastic playmat in NY N091575 is identified as a

[1] Although not stated explicitly in the ruling, we have reviewed the background file in HQ H290312 and have confirmed that the plastic foam mats were imported in rolls.

[2] In NY N091575, the ruling states that the importer requested classification of the plastic playmat either as a floor covering of plastic in subheading 3918.10.1000, HTSUSA, or as a toy in chapter 95. In NY N213371, the description of the printed playmat states that the playmat serves a dual purpose as an educational learning resource and a decorative floor covering.

[3] In HQ H318409, the Funtime Gelli Mat™ is reversible with a different decorative repetitive design printed on each side. In NY N091575, the top surface of the Toddler Playmat is printed with animation characters. In NY N213371, the Children's PVC Interactive Play Mat is printed on both sides with bright colors and illustrations that depict letters, numbers, and objects. One side is designed with representative pictures and words to correspond with each letter of the alphabet. The opposite side is illustrated with a play scene that identifies various animal figures.

"Toddler Playmat" while the printed playmat in NY N213371 is identified as a "Children's PVC Interactive Play Mat"). Although the printed playmat in NY N213371 is imported in rolls like the Funtime Gelli Mat™, the plastic playmat in NY N02575 is imported in a form other than rolls or tiles[4] . Thus, applying CBP's longstanding position that floor coverings of plastic are classified either in heading 3918, HTSUS, if imported in rolls or in the form of tiles, or in heading 3924, HTSUS, if imported in any other form, we initially find that the plastic playmat in NY N091575 is classifiable in heading 3924, HTSUS, as it is a floor covering of plastic imported in a form other than rolls or tiles, while the printed playmat in NY N213371 is classifiable in heading 3918, HTSUS, as it is a floor covering of plastic imported in rolls.

Note 2 to Section VII, HTSUS, however, requires that we also consider classification in chapter 49, HTSUS, as the plastic playmats in both NY N091575 and NY N213371 are printed with motifs, characters, or pictorial representations (*see* footnote 3, *supra).* Specifically, per Note 2 to Section VII, HTSUS, we must determine whether or not the printed motifs, characters, or pictorial representation are merely subsidiary to the primary use of the goods. Note 2 to Section VII, HTSUS, excludes goods of heading 3918 from classification in chapter 49, even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. As further explained in EN 39.18, goods of heading 39.18, including floor coverings of plastic, even if printed with motifs, characters, or pictorial representations, which are not merely subsidiary to the primary use of the goods, do not fall in Chapter 49 but remain classified in heading 3918, HTSUS. *See also* Section Note 2 to General EN to Section VII, General EN to Chapter 49, and EN 49.11(b).

Thus, we first examine the plastic Toddler Playmat in NY N091575. Since this article is a floor covering of plastic that is imported in a form other than rolls or tiles, it is excluded from classification in heading 3918, HTSUS. However, because the plastic Toddler Playmat is printed with animation characters on one side, we must also consider classification in chapter 49, HTSUS. The threshold question in our analysis then becomes whether the animation characters are not merely subsidiary to the primary use of the playmat. Or, as explained in the General EN to Chapter 49, whether the animation characters determine the playmat's "essential nature and use." As described in NY N091575, the plastic Toddler Playmat is a floor covering.[5] However, we must also consider the role of the printed animation characters and whether or not they are subsidiary to the primary use of the plastic playmat as a floor covering, *i.e*., do they form its essential nature and use. With its friendly animation characters,[6] the plastic Toddler Playmat is fab-

[4] As noted above, since NY N091575 does not definitively state what form the subject playmat is imported, e.g., rolls, tiles folded, etc., we reviewed the background file but could not find conclusive evidence on this issue. However, we note that NY N091575 rejected the importer's proposed classification in heading 3918, HTSUS, asserting "...heading 3918 only provides for floor coverings that are in rolls or in the form of tiles." Thus, we are left to assume that the subject plastic playmat from South Korea is imported in a form other than rolls or tiles.

[5] "The mat is designed to provide cushioning that will protect children from hurting themselves if they fall, as well as to muffle noise and create a barrier between the child and a cold floor."

[6] The animation characters are described by the importer as "friendly" as confirmed in the background file to NY N091575.

ricated to create an attractive atmosphere for toddlers so that they interact with the printed animation characters with delight, excitement, and pleasure, in contrast to a playmat printed with solid coloration or decorative or repetitive-designs.[7] Thus, we find that the printed animation characters, which are pleasing to a toddler's sensibilities, form the subject playmat's essential nature and use.[8] Accordingly, the animation characters are not merely subsidiary to the primary use of the playmat such that the plastic Toddler Playmat in NY N091575 is classified in heading 4911, HTSUS, as "[o]ther printed matter, including printed pictures and photographs" and not in heading 3924, HTSUS, as "other household articles ... of plastics."

We next examine the printed Children's PVC Interactive Play Mat in NY N213371, wherein the article was classified in heading 4911, HTSUS. As noted above, the printed playmat is designed for use by children ages 0–7 years old and printed on both sides with bright colors and illustrations that depict letters, numbers, and objects. One side is printed with representative pictures and words to correspond with each letter of the alphabet and the reverse side is illustrated with a play scene identifying various animal figures. We concur with the decision in NY N213371, denying classification of the printed playmat as a toy in chapter 95, HTSUS, because it lacks any manipulative play value. Also, there is no dispute with the findings in NY N213371 that the Children's PVC Interactive Play Mat's printed motifs, characters, and pictorial representations are designed to be particularly pleasing and delightful to children ages 0–7 and, in effect, form its essential nature and are not merely subsidiary to its primary use as a floor covering. However, in classifying the printed Children's PVC Interactive Play Mat in heading 4911, HTSUS, NY N213371 overlooked classification in heading 3918, HTSUS. Pursuant to Note 2 to Section VII, HTSUS, as a floor covering of plastic imported in rolls that is classifiable in heading 3918, HTSUS, the instant printed playmat is excepted from classification in chapter 49, even if printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. Thus, we find that the printed playmat in NY N213371 is classified in heading 3918, HTSUS, as a "floor covering of plastic," and not in heading 4911, HTSUS, as "[o]ther printed matter, including printed pictures and photographs.

Based on the foregoing, we therefore affirm CBP's longstanding position that floor coverings of plastic such as the plastic playmat in NY N213371, which are for use in the home such as carpets, rugs, mats, or tiles, are classified in heading 3918, HTSUS, if imported in rolls or in the form of tiles, even if they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods. Similar floor coverings in any form other than rolls or tiles are classified in heading 3924, HTSUS, unless they are printed with motifs, characters or pictorial representations, which are not merely subsidiary to the primary use of the goods, wherein they are classified in heading 4911, HTSUS. Accordingly, printed playmats such as those in NY N091575 are classified in heading 4911, HTSUS.

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[7] We note that the term "printed" in chapter 49, HTSUS, does not include "coloration or decorative or repetitive-design printing." *See* General EN to Chapter 49.

[8] As an alternative to classification in heading 3918, the importer in NY N091575 requested classification of the merchandise as a toy in chapter 95, HTSUS.

HOLDING:

By operation of GRIs 1 and 6, the subject plastic playmat from South Korea in NY N091575 is classified in heading 4911, HTSUS, specifically in subheading 4911.99.8000, HTSUSA, which provides for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." The 2023 column one, general rate of duty is *Free.* The printed plastic playmat from South Korea in NY N213371 is classified in heading 3918, HTSUS, specifically in subheading 3918.90.1000, HTSUSA, which provides for "Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ...: Of other plastics: Floor coverings." The 2023 column one, general rate of duty is 5.3% *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 online at *https://hts.usitc.gov/current*.

EFFECT ON OTHER RULINGS:

NY N091575, dated February 12, 2010, and NY N213371, dated May 11, 2012, are hereby REVOKED as set forth above.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: Mr. John A. Whitson
Costco Wholesale Corporation
999 Lake Drive
Issaquah, WA 98027

PROPOSED MODIFICATION OF ONE RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF STEEL WIRE CARTRIDGES

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

ACTION: Notice of proposed modification of one ruling letter relating to the tariff classification of steel wire cartridges.

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 steel wire cartridges 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Lily Baron, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–1807.

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 responsibil-

ity 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 steel wire cartridges. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") H300804, dated July 2, 2019 (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 ruling 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 HQ H300804, CBP classified steel wire cartridges in heading 8467, HTSUS, specifically in subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other." CBP has reviewed H300804 and has determined the ruling letter to be in error. It is now CBP's position that steel wire cartridges are properly classified, in heading 8467, HTSUS, specifically in subheading 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify H300804 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ

H330409, 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.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

HQ H300804

July 2, 2019
OT:RR:CTF:VS H300804 JK
CATEGORY: Classification

JAN DE BEER
FROST BROWN TODD LLC
250 WEST MAIN STREET, SUITE 2800
LEXINGTON, KY 40507–1749

RE: Tariff classification of steel wire cartridges; Applicability of subheading 9802.00.50

DEAR MS. BEER:

This in response to your letter, dated May 21, 2018, filed on behalf of MAX USA Corp. (MAX USA). In your letter, you requested a binding ruling pursuant to 19 C.F.R. Part 177 on the classification of imported steel tie wire cartridges and the applicability of subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS) to the subject merchandise.

FACTS:

MAX USA proposes to import two products, steel tie wire cartridges consisting of either spools of black annealed wire (TW898 USA) or spools of polyester coated wire (TW898-PC USA). The steel tie wire cartridges will be primarily for use in the MAX USA Rebar Tying Tool, a battery-powered handheld power tool. The Rebar Tying Tool is used to tie and secure concrete rebar by holding the crossed reinforcing bars and feeding, winding, cutting and tying the tie wire in one action.

You state that the raw steel material used to make the products will be sourced from the United States. In the United States, the raw steel material will be manufactured into steel wire by undergoing a drawing process to make the wire rod thinner, an annealing process to adjust the wire hardness through heat treatment, and a galvanizing or poly-coating process.

Subsequently, the steel wire will be exported to Japan where it will be cut to length and rewound from a large production spool to small plastic spools. The small plastic spools have a sprocket-like appearance and are specially molded into a unique design that allow them to properly fit inside the designated MAX USA Rebar Tying Tool. The final products will be packaged in Japan and imported to the United States.

You submitted samples of the products, a product data sheet with specifications for the steel tie wire, a video of the Rebar Tying Tool in action, and an Operating and Maintenance Manual for the three models of the MAX USA Rebar Tying Tool that use the products at issue. In reaching our decision, we have considered additional information which was submitted by you on August 21, 2018.

ISSUE:

(1) Whether the steel tie wire cartridges are classifiable under heading 7217, HTSUS, as wire of iron or nonalloy steel, or heading 8467, as parts of tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor.

(2) Whether subheading 9802.00.50, HTSUS, is applicable to the steel wire tie cartridges.

LAW AND ANALYSIS:

Tariff Classification of Steel Tie Wire Cartridges

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods is 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 may then be applied.

The HTSUS provisions under consideration are as follows:

8467 Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof:

7217 Wire of iron or nonalloy steel:

The General Notes to Section XVI provide, in pertinent part:

1. This Section does not cover:

* * *

(c) Bobbins, spools, cops, cones, cores, reels or similar supports, of any material (for example, Chapter 39, 40, 44 or 48 or Section XV);

* * *

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:

(a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17.

* * *

* * * * *

As Additional U.S. Rule of Interpretation 1(c) provides that a provision for parts shall not prevail over a specific provision for such a part, our initial analysis is whether the subject merchandise is specifically described in a provision in Chapter 72 of the tariff schedule before we examine whether classification as a "part" in Chapter 84 is proper.

Heading 7217, HTSUS, an *eo nomine* tariff provision, provides for "Wire of iron or nonalloy steel." *Eo nomine* provisions are those that describe articles by specific names and not by use. Absent limiting language or contrary legislative intent, *eo nomine* provisions cover all forms of the named article.

Nidec Corporation v. United States, 68 F.3d 1333, 1336 (Fed. Cir. 1995); *see also Lon-Ron Mft. Co. v. United States,* 334 F.3d 1304, 1309 (Fed. Cir. 2003). Further to the issue of *eo nomine* classification, it is well-established legal precedent that "[W]here an article is in character or function something other than as described by a specific statutory provision – either more limited or more diversified – and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute." *Robert Bosch Corp. v. United States,* 63 Cust. Ct. 96 (Cust. Ct. 2d Div. 1969) (citing *Cragston Corporation v. United States,* 51 CCPA 27, C.A.D. 831 (1963)); *United States v. The A.W. Fenton Company, Inc.,* 49 CCPA 45, C.A.D. 794 (1962).

At the outset, we note that the subject tie wire cartridges, referenced as TW898 USA and TW898-PC USA, consist of long lengths of steel wire wrapped around black polypropylene cores. These cores, also referred to as reels, spools or cartridges, do not resemble the typical packaging associated with wire products. Rather, these cores have been specially molded into a unique design that limits their use with certain rebar tying tools. We also note that the Operating and Maintenance Manual for the MAX USA Rebar Tying Tool provides specifications for the tie wire, indicating the specific MAX USA tie wire cartridges that can be used with each model of the rebar tying tool. The manual also indicates that failure to use the specified tie wire cartridges may cause a breakdown of the equipment. It is reasonable to conclude that these cartridges are not generic products and unlikely to be used unless in conjunction with the appropriate MAX USA Rebar Tying Tool. For these reasons, we find that the distinctive features of TW898 USA and TW898-PC USA serve to change the identity of the articles and render them significantly differentiated in function from the exemplars listed in heading 7217, HTSUS. Therefore, we find that the subject steel tie wire cartridges are not *prima facie* classifiable in heading 7217, HTSUS. *See CamelBak Prods., LLC v. United States,* 649 F.3d 1361 (Fed. Cir. 2011), in which the court examined whether certain specifications may be considered "merely an improvement" or whether they serve to change the identity of the article described by the statute. *See also* Headquarters Ruling Letter (HQ) 251008 dated June 14, 2018, in which CBP found that media roll assemblies of pressure-sensitive tape and labels imported on reels designed solely for use with specific printers were not *prima facie* classifiable under the *eo nomine* tariff provisions.

We now consider classification of the subject articles within Section XVI, HTSUS, specifically in heading 8467, HTSUS, which provides for, in pertinent part, parts of hand tools with a self-contained electric motor. As an initial matter, we find that the MAX Rebar Tying Tool, as a handheld tool incorporating a self-contained electric motor, is itself classifiable under subheading 8467.29.0090, HTSUS, *i.e.*, "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other: Other." We also note that classification of the subject articles in Section XVI is not precluded by Note 1(c) in that they are not classifiable as "[b]obbins, spools, cops, cones, cores, reels or similar supports, of any material (for example, Chapter 39, 40, 44 or 48 or Section XV)." The subject articles are not mere cores, spools or reels used to support wire; rather, the engineered features of the tie wire cartridges allow them to engage mechanically with certain designated rebar tying tools.

The term "part" is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct but reconcilable tests for determining whether a particular item qualifies as a "part" for tariff classification purposes. *See Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997). Under the test initially promulgated in *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933), an imported item qualifies as a part only if can be described as an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 779. Pursuant to the test set forth in *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), a good is a "part" if it is "dedicated solely for use" with a particular article and, "when applied to that use...meets the *Willoughby* test." *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int'l Trade 1999) (holding that a purported part must satisfy both the *Willoughby* and *Pompeo* tests).

In *Mita Copystar America v. United States*, 160 F.3d 710 (Fed. Cir. 1998), the court classified toner cartridges that were shaped to fit into specific electrostatic photocopiers as parts of such machines. The court based its decision on Note 2(b), Chapter 90, HTSUS, which provides for the classification of parts and accessories of articles of Chapter 90 and is substantively similar to Note 2, Section XVI, HTSUS, quoted above, in part. In determining that the cartridges were parts of photocopiers, the court noted that the toner cartridges were sold with toner inside, remained with the toner through its use by the photocopier, served as the standard device for providing toner to the photocopier, and were not designed for reuse. *Id.* at 712–713. *See also* HQ 251008 dated June 14, 2018 (classifying media rolls imported on plastic reels with code apertures as parts of printers by operation of Note 2(b) to Section XVI).

In this case, the subject steel tie wire cartridges meet the definition of "parts" as defined by the courts because they are integral to, and dedicated solely for use with, the MAX USA Rebar Tying Tool. Similar to the merchandise at issue in *Mita Copystar*, the subject cartridges are sold with tie wire inside, remain with the tie wire through its use by the rebar tying tool, are the standard device for providing tie wire to the rebar tying tool, and are not designed for reuse. Furthermore, they are designed exclusively for use with the MAX USA Rebar Tying Tool and are sold for use only with such tools, which could not function without these cartridges. As a result, we find that the subject articles are specially designed as a part of certain rebar tying tools as to warrant classification with such machines.

We further note that the subject merchandise at issue is distinguishable from the monofilament at issue in New York Ruling Letter (NY) K81013 dated December 30, 2003. In that ruling, cut-to-length monofilament was considered to be a part of the hand held trimmer while the same monofilament imported in material lengths, either on ordinary packing spools or in a "donut" form, was classified as monofilament. While the subject cartridges contain steel tie wire wound on spools in material lengths, the similarities to the monofilament at issue in K81013 end there. In K81013, the material lengths of monofilament were placed either on non-descript generic spools or on no spools at all. In comparison, the tie wire in this case cannot be bought separately for use with the MAX USA Rebar Tying Tool without it being contained in the cartridge. Furthermore, as discussed above, the cartridge

itself is not a generic spool used to support wire but specifically designed for exclusive use with the MAX USA Rebar Tying Tool.

Accordingly, because the subject articles do not fall under the scope of a single heading of Section XVI as goods unto themselves, per Note 2(a) to Section XVI, *supra*, we find that they are properly classified under heading 8467, HTSUS, as parts of hand tools by operation of Note 2(b) to Section XVI. Specifically, we find that the subject steel tie wire cartridges are classifiable under subheading 8467.29.0090, HTSUS, which provides for other parts of hand tools with a self-contained electric motor. Because the section note provides that goods classifiable as parts of such tools are to be classified as such, CBP need not perform a relative specificity analysis under GRI 3(a).

Applicability of Subheading 9802.00.50

Subheading 9802.00.50, HTSUS, provides a partial duty exemption for articles that are returned after having been exported to be advanced in value or improved in condition by means of repairs or alterations, provided that the documentary requirements of 19 CFR 10.8 are met. For qualifying articles, duty is assessed only on the cost or value of the foreign processing.

In circumstances where the operations abroad destroy the identity of the exported article or create a new or commercially different article, entitlement to subheading 9802.00.50, HTSUS, is precluded. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956), *aff'd* C.D. 1752, 36 Cust. Ct. 46 (1956); *Guardian Industries Corporation v. United States*, 3 CIT 9 (1982). Additionally, entitlement to this tariff treatment is not available where the exported articles are incomplete for their intended purposes prior to their foreign processing and the foreign processing is a necessary step in the preparation or manufacture of the finished articles. *Dolliff & Company, Inc. v. United States*, 455 F. Supp. 618 (CIT 1978), *aff'd*, 599 F.2d 1015 (Fed. Cir. 1979).

In this case, steel wire is exported from the United States to Japan where it is cut and rewound onto smaller plastic spools to create the subject steel tie wire cartridges. CBP has found that cutting and winding of wire, yarn or thread onto spools or similar supporting material qualifies as an alteration under subheading 9802.00.50, HTSUS. *See* HQ H212675 dated June 4, 2012 (sewing thread rewound onto smaller spools and packaged); HQ 555708 dated September 21, 1990 (thread and yarn rewound onto small plastic spools and packaged into a blister pack); HQ 555411 dated August 11, 1989 (primary wire cut and placed on spools or wound into coils); HQ 555296 dated June 16, 1989 (bulk twine cut and rewound onto smaller cardboard tubes). Here the steel tie wire is cut to length, wound and placed into a cartridge that is specially designed for exclusive use with certain rebar tying tools. The steel wire is treated prior to exportation with its inherent properties for its intended purpose. Accordingly, the processing that occurs in Japan may be considered an alteration, and therefore we find that subheading 9802.00.50, HTSUS, is applicable to the subject articles.

HOLDING:

By application of GRI 1, the steel tie wire cartridges at issue (referenced as TW898 USA and TW898-PC) are classified in subheading 8467.29.0090, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other: Other." The 2019 applicable column one general rate of duty is free.

Based on the evidence presented, the processing that occurs in Japan may be considered an alteration. Therefore, the subject articles are eligible for subheading 9802.00.50, HTSUS, treatment.

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*.

Please note that 19 CFR § 177.9(b)(1) provides that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a CBP field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based."

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

Sincerely,

MONIKA R. BRENNER,
Chief
Valuation and Special Programs Branch

ATTACHMENT B

HQ H330409
OT:RR:CTF:EMAIN H330409 LCB
CATEGORY: Classification
TARIFF NO.: 8467.99.01

JAN DE BEER
FROST BROWN TODD LLC
250 WEST MAIN STREET
SUITE 2800
LEXINGTON, KENTUCKY 40507–1749

RE: Modification of HQ H300804; tariff classification of steel tie wire cartridges

DEAR MR. BEER:

This ruling pertains to Headquarters Ruling Letter ("HQ") H300804 (July 2, 2019), which concerned the classification of imported steel tie wire cartridges and the applicability of subheading 9802.00.50, Harmonized Tariff Schedule of the United States ("HTSUS") to the subject merchandise. In HQ H300804, U.S. Customs and Border Protection ("CBP") classified steel wire cartridges in subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: With self-contained electric motor: Other." We have since reviewed HQ H300804 and determined that the portion of the ruling pertaining to the classification of the steel tie wire cartridges under heading 8467, HTSUS, is in error. Accordingly, CBP is modifying HQ H300804 pursuant to the analysis set forth below.

FACTS:

The products at issue are steel tie wire cartridges consisting of either spools of black annealed wire (referenced as TW898 USA), or spools of polyester coated wire (referenced as TW898-PC USA) wrapped around black polypropylene cores. The cartridges do not resemble the typical packaging associated with wire products. Rather, they have a sprocket-like appearance and are specially molded into a unique design that allows them to properly fit inside the designated MAX USA Rebar Tying Tool (models RB518, RB398, and RB218) (hereinafter the "Rebar Tying Tool"). The Rebar Tying Tool is a battery-powered handheld power tool that incorporates a self-contained direct current ("DC") motor. It is used to tie and secure concrete rebar by holding the crossed reinforcing bars and feeding, winding, cutting, and tying the steel tie wire in one action.

ISSUE:

Whether the steel wire cartridges are classified under heading 7217, HTSUS, as wire of iron or nonalloy steel, or heading 8467, HTSUS, as parts of tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor.

LAW AND ANALYSIS:

Classification under the HTSUS is determined 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 based on 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.

GRI 6 provides as follows:

> 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.

In addition to the GRIs, in interpreting the HTSUS, the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Initially, we note that this ruling does not address the applicability of subheading 9802.00.50, and that the classification of the subject steel tie wire cartridges in heading 8467, HTSUS, is not in dispute. As such, applying GRI 6, *supra*, the HTSUS provisions under consideration in this ruling are as follows:

8467		Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof:
		* * *
		With self-contained electric motor:
8467.29.00		Other...
		* * *
		Other:
8467.99.01		Other...

Note 2 to Section XVI, which governs the classification of parts within Section XVI, provides, in pertinent part:

> Subject to Note 1 to this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:
>
> (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However,

> parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17....

The Rebar Tying Tool (for which the instant steel tie wire cartridges are designed and used), is a handheld tool incorporating a self-contained electric motor. As such, it would be classified under subheading 8467.29.00, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor: Other: Other." However, the instant steel wire cartridges are not themselves tools of heading 8467, HTSUS, but are rather moving parts incorporated into the Rebar Tying Tool.

The term "part" is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct though not inconsistent tests for determining whether a particular item qualifies as a "part" for tariff classification purposes.[1] The test articulated in *United States v. Willoughby Camera Stores, Inc.*[2] requires a determination of whether the imported item is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article."[3] Under the test articulated in *United States v. Pompeo*,[4] a good is a "part" if it is "dedicated solely for use" with a particular article and, "when applied to that use ... meets the *Willoughby* test."[5]

In *Mita Copystar America v. United States*,[6] the court classified toner cartridges that were shaped to fit into specific electrostatic photocopiers as parts of such machines. The court based its decision on Note 2(b), Chapter 90, HTSUS, which provides for the classification of parts and accessories of articles of Chapter 90 and is substantively similar to Note 2, Section XVI, HTSUS, quoted above. In determining that the cartridges were parts of photocopiers, the court noted that the toner cartridges were sold with toner inside, remained with the toner throughout its use by the photocopier, served as the standard device for providing toner to the photocopier, and were not designed for reuse.[7] Similarly, in New York Ruling Letter (NY) N308917 (January 24, 2020), CBP found that various parts of the Metabo Angle Grinder are classified in heading 8467, HTSUS, noting that the parts are "specifically and solely designed for use with" that machine.

In the present case, the subject steel tie wire cartridges meet the definition of "parts" as defined by the courts and applied by previous CBP rulings because they are integral to, and dedicated solely for use with, the Rebar Tying Tool. Similar to the articles at issue in *Mita Copystar*, the subject cartridges are sold with steel tie wire inside, remain with the steel tie wire throughout its use by the rebar tying tool, are the standard device for

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[1] *See Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F. 3d 774 (Fed. Cir. 1997).

[2] 21 C.C.P.A. 322, 324 (1933).

[3] *Bauerhin*, 110 F.3d at 778 (quoting *Willoughby*, 21 C.C.P.A. 322 at 324).

[4] 43 C.C.P.A. 9, 14 (1955).

[5] *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int'l Trade 1999) (holding that a purported part must satisfy both the Willoughby and Pompeo tests).

[6] 160 F.3d 710 (Fed. Cir. 1998).

[7] *Id.* at 712–713. *See also* HQ 251008 (June 14, 2018) (classifying media rolls imported on plastic reels with code apertures as part or printers by operation of Note 2(b) to Section XVI).

providing steel tie wire to the rebar tying tool, and are not designed for reuse. Furthermore, and similarly to the articles at issue in N308917, the steel tie wire cartridges are designed exclusively for use with the Rebar Tying Tool and are sold for use only with such tools, which could not function without these cartridges. As a result, we find that the subject articles are specially designed as part of certain rebar tying tools as to warrant classification with such machines.

We further note that the articles at issue are distinguishable from the monofilament at issue in New York Ruling Letter (NY) K81013 (December 30, 2003). In that ruling, cut-to-length monofilament imported in material lengths, either on ordinary packing spools or in a "donut" form, was classified as monofilament. While the subject cartridges contain steel tie wire wound on spools in material lengths, the similarities to the monofilament at issue in K81013 end there. In K81013, the material lengths of monofilament were placed either on non-descript generic spools or on no spools at all. In comparison, the steel tie wire in this case cannot be bought separately for use with the Rebar Tying Tool without it being contained in the cartridge. Furthermore, as discussed above, the cartridge itself is not a generic spool used to support wire but has a sprocket-like appearance and is specifically designed for exclusive use with the Rebar Tying Tool. Accordingly, because the subject articles do not fall under the scope of a single heading of Section XVI as goods unto themselves, per Note 2(a) to Section XVI, we find that they are properly classified under heading 8467, HTSUS, as parts of hand tools by operation of Note 2(b) to Section XVI.

Specifically, we find that the steel tie wire cartridges are classified in 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other."

HOLDING:

By application of GRIs 1 (Note 2(b) to Section XVI) and 6, the steel tie wire cartridges at issue (referenced as TW 898 USA and TW898-PC) are classified in subheading 8467.99.01, HTSUS, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Parts: Other." The column one general rate of duty is free.

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 at www.usitc.gov.

EFFECT ON OTHER RULINGS:

HQ H300804 is hereby MODIFIED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PROCESSED BREWER'S SAVED GRAINS

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of processed Brewer's Saved Grains.

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 one ruling letter concerning tariff classification of processed Brewer's Saved Grains 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Marie Durané, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0984.

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 one ruling letter pertaining to the tariff classification of processed Brewer's Saved Grains. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N307210, dated October 9, 2020 (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 N307210, CBP classified processed Brewer's Saved Grains in heading 1102, HTSUS, specifically in subheading 1102.20.00, HTSUS, which provides for "Cereal flours other than of wheat or meslin: Corn (maize) flour," and subheading 1102.90.60, HTSUS, which provides for "Cereal flours other than of wheat or meslin: Other: Other: Other." CBP has reviewed NY N307210 and has determined the ruling letter to be in error. It is now CBP's position that processed Brewer's Saved Grains are properly classified in heading 2106, HTSUS, specifically in subheading 2106.90.99, HTSUS, which provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N307210 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H322361, 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N307210
October 9, 2020
CLA-2–23:OT:RR:NC:N2:231
CATEGORY: Classification
TARIFF NO.: 1102.20.0000; 1102.90.6000

MR. SCOTT HOFFMAN
TRANS AMERICAN CHB INC.
4902 NORTH AMERICA DRIVE
BUFFALO, NY 14224

RE: The tariff classification of Brewing Spent Grains from Belgium

DEAR MR. HOFFMAN:

In your letter dated October 30, 2019, you requested a tariff classification ruling on behalf of Anheuser-Busch LLC (St. Louis, MO). The samples and documentation received with your request was forwarded to our lab for review. That review is now complete. We apologize for the delay in the issuance of this ruling.

The subject merchandise are BarleyVita Fibra and BarleyVita Pro. You have stated that both products are derived from brewing spent grains, barley and corn, respectively. The products, which are in powder form, are produced from drying and milling brewing or distilling dregs

and waste. The products are separated into finer and coarser particles. BarleyVita Pro represents the former, and BarleyVita Fibra characterizes the latter. Both products will be sold for use as fiber and/or protein ingredients in baked goods and other food applications.

Based on the laboratory review, the samples fail to meet the Chapter 11, Note 2(A) starch/ash content requirements for classification within that chapter of the Harmonized Tariff Schedule of the United States (HTSUS). However, the samples meet the Note 2(B) sieve-test requirement for flours of heading 1102.

The applicable subheading for the BarleyVita Fibra will be 1102.20.0000, HTSUS, which provides for: "Cereal flours other than of wheat or meslin: Corn (maize) flour." The rate of duty will be 0.3 cents per kilogram.

The applicable subheading for the BarleyVita Pro will be 1102.90.6000, HTSUS, which provides for: "Cereal flours other than of wheat or meslin: Other: Other: Other." The rate of duty will be 9 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 World Wide Web at https://hts.usitc.gov/current.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling the FDA at 301–575–0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html. This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR Part 177).

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 Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H322361
OT:RR:CTF:FTM H322361 MJD
CATEGORY: Classification
TARIFF NO.: 2106.90.99

MR. RICHARD MOJICA
MILLER & CHEVALIER CHARTERED
900 16TH STREET NW
WASHINGTON, DC 20006

Re: Reconsideration of NY N307210; Classification of Processed Brewer's Saved Grains

DEAR MR. MOJICA:

This is in reference to your correspondence, dated December 14, 2021, requesting reconsideration of New York Ruling Letter ("NY") N307210, dated October 9, 2020, on behalf of your client, EverGrain Ingredients LLC (hereinafter "EverGrain") of two types of products made from processed Brewer's Saved Grains ("BSG") under the Harmonized Tariff Schedule of the United States ("HTSUS"). After reviewing NY N307210, we have found that ruling to be in error. For the reasons set forth below, we are revoking NY N307210.

You have asked that certain information submitted in connection with this request be treated as confidential, pursuant to 19 C.F.R. § 177.2(b)(7). Your request for confidentiality is approved. Specifically, the images and exhibits included in your submission will not be released to the public.

FACTS:

In NY N307210, the products were described as follows:

> The subject merchandise are BarleyVita Fibra and BarleyVita Pro. You have stated that both products are derived from brewing spent grains, barley and corn, respectively. The products, which are in powder form, are produced from drying and milling brewing or distilling dregs and waste. The products are separated into finer and coarser particles. BarleyVita Pro represents the former, and BarleyVita Fibra characterizes the latter. Both products will be sold for use as fiber and/or protein ingredients in baked goods and other food applications.

NY N307210 also details U.S. Customs and Border Protection ("CBP") New York laboratory findings on samples of the products via laboratory report # NY20191820, dated October 1, 2020, which provides as follows:

> Based on the laboratory review, the samples fail to meet the Chapter 11, Note 2(A) starch/ash content requirements for classification within that chapter of the Harmonized Tariff Schedule of the United States (HTSUS). However, the samples meet the Note 2(B) sieve-test requirement for flours of heading 1102.

In your request for reconsideration, you explain that at the time the ruling request for NY N307210 was made, the products were named "BarleyVita Pro" and "BarleyVita Fibra," and now they are named "EverVita Prima" and "EverVita Fibra," respectively, (or "the EverVita products"). The EverVita products are made from BSG, specifically the BSG of barley and corn. BSG are the by-product of the beer brewing process. To create the EverVita Prima and EverVita Fibra, the BSG are dried using a ring drying technology during which hot air gets passed through the BSG and removes moisture so that the moisture content is less than 10 percent. Then the BSG are milled using a pin

mill technology which helps to make a non-homogenous particle size distribution. Lastly the BSG are fractionated using air classification which separates the milled product into two fractions, one with smaller and lighter particles ("EverVita Prima") and one with larger and heavier particles ("EverVita Fibra"). Afterwards the two products are packed into 20kg bags and palatalized.

The EverVita Prima consist of more than 33 percent protein and more than 35 percent natural dietary fiber. It can be used as a fiber/protein additive and used in baking and other food applications. The EverVita Fibra contain as least 55 percent natural dietary fiber and 15 percent protein. It is used a fiber/protein additive in snacks and other food applications. Neither the EverVita Prima nor the EverVita Fibra can be consumed as is and must be added to other ingredients and cooked to be edible.

In NY N307210, CBP classified the EverVita products under heading 1102, HTSUS. Specifically, the BarleyVita Fibra (now "EverVita Fibra") was classified in subheading 1102.20.0000, HTSUS Annotated ("HTSUSA"), which provides for "Cereal flours other than of wheat or meslin: Corn (maize) flour," and the BarleyVita Pro (now the "EverVita Prima") was classified in subheading 1102.90.6000, HTSUSA, which provides for "Cereal flours other than of wheat or meslin: Other: Other: Other."

According to your submission, you argue that the EverVita products are classified in subheading 2303.30.0000, HTSUSA, which provides for "Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets: Brewing or distilling dregs and waste."

ISSUE:

What is the tariff classification of the EverVita Prima and the EverVita Fibra?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI's). 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 may then be applied.

The 2023 HTSUS provisions under consideration are as follows:

1102 Cereal flours other than of wheat or meslin:
* * *

2106 Food preparations not elsewhere specified or included:
* * *

2302 Bran, sharps (middlings) and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants:
* * *

2303 Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets:
* * *

Note 2 to Chapter 11, HTSUS, provides in pertinent part:

(A) Products from the milling of the cereals listed in the table below fall within this chapter if they have, by weight on the dry product:

(a) A starch content (determined by the modified Ewers polarimetric method) exceeding that indicated in column (2); and

(b) An ash content (after deduction of any added minerals) not exceeding that indicated in column (3).

Otherwise, they fall in heading 2302. However, germ of cereals, whole, rolled, flaked or ground is always classified in heading 1104.

(B) Products falling within this chapter under the above provisions shall be classified in heading 1101 or 1102 if the percentage passing through a woven metal wire cloth sieve with the aperture indicated in column (4) or (5) is not less, by weight, than that shown against the cereal concerned.

Otherwise, they fall in heading 1103 or 1104.

Cereal	Starch content	Ash content	Rate of passage through a sieve with an aperture of -	
(1)	(microns) (2)	(microns) (3)	315 micrometers (4)	500 micrometers (5)
	Percent	Percent	Percent	Percent
Wheat and rye	45	2.5	80	-
Barley	45	3	80	-
Oats	45	5	80	-
Corn (maize) and grain sorghum	45	2	-	90
Rice	45	1.6	80	-
Buckwheat	45	4	80	-

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, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The ENs to heading 2106, HTSUS, provides in pertinent part as follows:

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

(A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.

(B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

* * *

The ENs to heading 2302, HTSUS, provides in pertinent part as follows:

This heading covers:

(A) **Bran, sharps and other residues from the milling of cereal grains**. This category essentially comprises by-products from the milling of wheat, rye, barley, oats, maize (corn), rice, grain sorghum or buckwheat, which do not comply with the requirements of Note 2 (A) to Chapter 11 as regards starch content and ash content.

...

(B) **Residues from the sifting or other working of cereal grains.** Sifting residues, obtained during pre-milling operations, consist essentially of:

...

(C) **Residues and waste of a similar kind resulting from the grinding or other working of leguminous plants.**

The ENs to heading 2303, HTSUS, provides in pertinent part as follows:

. . .

(E) **Brewing or distilling dregs and waste** comprise in particular:

(1) Dregs of cereals (barley, rye, etc.), obtained in the manufacture of beer and consisting of the exhausted grains remaining after the wort has been drawn off.

...

* * *

In NY N307210, CBP classified the EverVita products in heading 1102, HTSUS, which provides for "Cereal flours other than of wheat or meslin." CBP stated that based on the results in the CBP laboratory report, tested samples of the EverVita products "faile[d] to meet the Chapter 11, Note 2(A) starch/ash content requirements for classification within that chapter of the Harmonized Tariff Schedule of the United States (HTSUS)." However, CBP opined that while the samples did not meet the specifications for Note 2(A) to Chapter 11, HTSUS, they did meet the "Note 2(B) sieve-test requirement for flours of heading 1102." Note 2(B) to Chapter 11, HTSUS, provides that "**Products falling within this chapter under the above provisions shall be classified in heading 1101 or 1102** if the percentage passing through a woven metal wire cloth sieve with the aperture indicated in column (4) or (5) is not less, by weight, than that shown against the cereal concerned." (Emphasis added). Thus, to meet the requirements of Note 2(B) to Chapter 11, HTSUS, a product must first meet the requirements of Note 2(A) to Chapter 11, HTSUS. As a result, because the EverVita products failed to meet the starch and ash requirements of Note 2(A) to Chapter 11, HTSUS, resorting to Note 2(B) to Chapter 11, HTSUS, is incorrect. Therefore, we find that the EverVita products are not classified in Chapter 11, HTSUS, because they are excluded from classification therein because of Note 2(A) to Chapter 11, HTSUS.

Note 2(A) to Chapter 11, HTSUS, however, directs classification to heading 2302, HTSUS, when products from the milling of cereals fail to meet the starch and ash requirement of Note 2(A) to Chapter 11, HTSUS. Specifically, Note 2(A) to Chapter 11, HTSUS, provides, in pertinent part, that "Products

from the milling of the cereals listed in the table below fall within this chapter if they have [a specific starch and ash content] ... Otherwise, they fall in heading 2302." Heading 2302, HTSUS, provides for "Bran, sharps (middlings) and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants." The ENs to heading 2302, HTSUS, provide that the heading covers primarily three types of products, "bran, sharps and other residues from the milling of cereal grains," "residue from the sifting or other working of cereal grains," and "residues and waste of a similar kind resulting from the grinding or other working of leguminous plants." None of these categories, however, describe the EverVita products at issue here. Therefore, we find that the EverVita products are also not classified in heading 2302, HTSUS.

Next, we turn to heading 2303, HTSUS, which provides for "Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets." The ENs to heading 2303, HTSUS, provide that the "Brewing or distilling dregs and waste" comprise of "Dregs of cereals (barley, rye, etc.), obtained in the manufacture of beer and consisting of the exhausted grains remaining after the wort has been drawn off." *See* EN 23.03(E). In the instant case, the BSG produced as a result of the beer making process are precisely described by heading 2303, HTSUS, and the ENs to heading 2303, HTSUS, as they are the left-over remnants from the beer brewing process. However, while the BSG is properly described by heading 2303, HTSUS, the EverVita products are not. The EverVita products are processed BSG and while you explain that the products are minimally processed, we find that the processing of the BSG, i.e. the drying, milling, and fractionation, further advances the BSG to a different product. Thus, we find that the EverVita products are also not classified in heading 2303, HTSUS.

You argue that the EverVita products are classified in heading 2303, HTSUS and that minimally processing the BSG through drying, milling, and the fractionation that sorts the BSG by particle size does not advance the EverVita products into a different product. You cite to NY L81574, dated February 2, 2005, where CBP determined that Fibrex®, a dietary fiber derived from sugar beets, was classified in heading 2303, HTSUS. Fibrex® is produced by drying sugar beet pulp under pressure with overheated steam, and milling the dried pulp to different particle sizes. The Fibrex® is "sold as a fiber additive for use in bakery products, in other food applications and as a vegetable fiber in health food products." However, in that case the product was dried with overheated steam, and milled to different particle sizes, whereas the EverVita products are not only dried and milled, but also fractionated to achieve different particle size. This fractionation process for the EverVita products yields products are further advanced into a different product unlike the Fibrex® in NY L81574.

You also cite to Headquarters Ruling Letter ("HQ") H311471, dated March 11, 2021, where CBP found that a pea protein product that "results as a side stream product from the production of pea starch," and is further processed by separating the starch from the product which results in a fruit water that is "coagulated, separated, and dried," was classified as a "vegetable waste" or "vegetable product in heading 2308, HTSUS. However, in that ruling, CBP specifically mentioned that the pea protein was not a product of heading 2303, HTSUS, because it was not a "residue within the meaning of heading 2303, HTSUS," and that the product was "further advanced into a different

product by coagulation and drying." Similarly, we find that the EverVita products are advanced from BSG into a different product by the drying, milling, and fractionation process, and as a result are not classified in heading 2303, HTSUS.

Likewise, in HQ H039339, dated November 18, 2009, which you cite to, CBP found that two oat bran products, OatWell 14 and OatWell 22, were classified in heading 2306, HTSUS, as "oilcake and other solid residues." In reaching that decision, CBP first excluded the products from heading 2302, HTSUS, which provides for "Bran, sharps (middlings) and other residues . . ." CBP stated that heading 2302, HTSUS, does not cover the "by-products that result from the milling process and that have undergone 'further processing." Similarly, we find that heading 2303, HTSUS, does not provide for the by-products of heading 2303, HTSUS, that have undergone further processing, including a drying, milling, and fractionation process such as the process used to produce the EverVita products.

Instead, we find that that the EverVita products are properly classified in heading 2106, HTSUS, which provides for "Food preparations not elsewhere specified or included." Classification in heading 2106, HTSUS, depends on the product being a food preparation and a failure to find any prior tariff provision which meets the characteristics and use of the product. EN 21.06 provides two definitions for the phrase "food preparation". *See* EN (A) and EN (B) to 21.06. One of the definitions for the phrase "food preparation" is "Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption." *See* EN (B) 21.06. The EverVita products at issue are not classified under any other tariff provision and are made wholly of foodstuffs used in the making of food preparations like baked goods and other food applications for human consumption. Therefore, we find that the EverVita products at issue are food preparations within the meaning of EN 21.06, and are properly classified in heading 2106, HTSUS.

Accordingly, we find that the EverVita Prima and EverVita Fibra are classified in heading 2106, HTSUS, specifically, these products are classified in subheading 2106.90.9998, HTSUSA, which provides "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other."

HOLDING:

In accordance with GRI 1, the EverVita Prima and EverVita Fibra are classified in heading 2106, HTSUS, specifically, they are classified in subheading 2106.90.9998, HTSUSA, which provides "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other." The column one general rate of duty is 6.4%.

Duty rates are provided for convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided online at *http://www.usitc.gov/tata/hts/*.

EFFECT ON OTHER RULINGS:

NY N307210, dated October 9, 2020, 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,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A DECORATIVE WOOD BOX FROM CHINA

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

ACTION: Notice of proposed revocation of one ruling letter relating to the tariff classification of a decorative wood box from China.

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 one ruling letter concerning tariff classification of a decorative wood box from China 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also accepting 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Mr. Nicholas A. Horne, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

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 one ruling letter pertaining to the tariff classification of decorative wood boxes from China. Although in this notice CBP is specifically referring to New York Ruling Letter (NY) N274180, dated April 21, 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 N274180, CBP classified decorative wood boxes from China in heading 4420, HTSUS, specifically in subheading 4420.90.45, HTSUS, which provides for "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood; wooden articles of furniture not falling within chapter 94: Other: Jewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics." CBP has reviewed NY N274180 and has determined the ruling letter to be in error. It is now CBP's position that decorative wood boxes from China are properly classified in subheading 4420.90.80, HTSUS, which provides for "Wood marquetry and inlaid wood; caskets and cases for

jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood; wooden articles of furniture not falling within chapter 94: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N274180 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (HQ) H315828, 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

N274180
April 21, 2016
CLA-2–44:OT:RR:NC:N4:234
CATEGORY: Classification
TARIFF NO.: 4420.90.4500

DAVID PRATA
TRADE COMPLIANCE ANALYST
OHL INTERNATIONAL AT CVS HEALTH
MAIL CODE 5055
1 CVS DRIVE
WOONSOCKET, RI 02895

RE: The tariff classification of a decorative wood box from China.

DEAR MR. PRATA:

In your letter dated March 10, 2016, on behalf of CVS Health, you requested a tariff classification ruling. As requested, the sample submitted will be returned to you.

SKU number 511220 is the {7" wood box}. The item is a small decorative wooden box with slats in the shape of an open produce crate. The box measures approximately 4 inches by 6 inches by 7 inches. The box is available in two styles. The first style features a front and back panel painted with pumpkins and the second style features a front and back panel painted with apples. The two styles of decorative boxes are not used for general packing and transport of goods, but rather can be used for storage of household personal effects, and food items such as apples and other fruits, spices, etc.

Besides the decorative design on the front and back panels of the two styles of boxes, the sample has is a hangtag with the front-side of the hangtag reading "CREATIVE DESIGN LTD" with the logo "CD," all in capital letters, and the backside of the hangtag reading SKU number 511220. Company provided information and examination of the sample with the pumpkin design does not indicate that the merchandise concerned is principally used for kitchenware purposes, and as such the merchandise concerned is not classifiable in subheading 4419.00.8000 of the Harmonized Tariff Schedule of the United States (HTSUS).

When terms are not defined in the HTSUS or the Explanatory Notes (ENs) to the HTSUS, they are construed in accordance with their common and commercial meaning – *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

We find that the Online Oxford English Dictionary (OED) defines "Case" at n.[2], 1. a., as a box, bag, or other receptacle, designed to contain an item or items for safe keeping, transporting, or display. The subheading of 4420.90, HTSUS, differentiates for specific types of boxes and chests and cases, as well as similar type boxes, and moreover, the plain language of the subheading allows for the inclusion to other types of "cases and chests." The enumerated list of goods at subheading 4420.90, HTSUS, suggests that all boxes, cases and chest have a lid for closure, while a comma calling for other types of "cases and chests" appears to expend the list of "cases and chest" to those not having lids.

It is our opinion that the 7" Wood Box, not having a lid, not only falls within the OED definition for "case," but also falls to the class or kind of goods enumerated in the heading of 4420 and its subheading of 4420.90, HTSUS., specifically for other types of "cases and chests." As such, the merchandise concerned is classifiable in subheading 4420.90.4500 of the HTSUS.

The applicable subheading for SKU number 511220, the 7" Wood Box will be 4420.90.4500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood; wooden articles of furniture not falling within chapter 94: Other: Jewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics." The rate of duty will be 4.3% 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 Neil H. Levy at neil.h.levy@cbp.dhs.gov.

Sincerely,

DEBORAH MARINUCCI
Acting Director
National Commodity Specialist Division

HQ H315828
OT:RR:CTF:CPMMA H315828 NAH
CATEGORY: Classification
TARIFF NO: 4420.90.80

MR. DAVID PRATA
TRADE COMPLIANCE ANALYST
OHL INTERNATIONAL AT CVS HEALTH
MAIL CODE 5055
1 CVS DRIVE
WOONSOCKET, RI 02895

RE: Revocation of NY N274180; Classification of a decorative wood box from China

DEAR MR. PRATA:

This letter is in reference to New York Ruling Letter (NY) N274180, issued to you on April 21, 2016, concerning the tariff classification of a decorative wood box from China. In NY N274180, U.S. Customs and Broder Protection (CBP) classified the subject merchandise in subheading 4420.90.4500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), as "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94: Other: Jewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics." We have reviewed NY N274180 and determined that the ruling is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N274180.

FACTS:

The subject merchandise was described in NY N274180 as follows:

> SKU number 511220 is the {7" wood box}. The item is a small decorative wooden box with slats in the shape of an open produce crate. The box measures approximately 4 inches by 6 inches by 7 inches. The box is available in two styles. The first style features a front and back panel painted with pumpkins and the second style features a front and back panel painted with apples. The two styles of decorative boxes are not used for general packing and transport of goods, but rather can be used for storage of household personal effects, and food items such as apples and other fruits, spices, etc.

ISSUE:

Whether a decorative wood box from China is classified under subheading 4420.90.45, HTSUS, as "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics," or under subheading 4420.90.80, HTSUS, as "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Other."

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 based on 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.

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.

The 2023 HTSUS provisions under consideration are as follows:

4420	Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94:
4420.90	Other:
	Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases and similar boxes, cases and chests, all the foregoing of wood:
	Other:
4420.90.45	Not lined with textile fabrics...
4420.90.80	Other...

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).

EN 44.20 states, in pertinent part, as follows:

> The articles of this heading may be made of ordinary wood or of particle board or similar board, fibreboard, laminated wood or densified wood (see Note 3 to this Chapter).
>
> It also covers a wide variety of articles of wood (including those of wood marquetry or inlaid wood), generally of careful manufacture and good finish, such as: small articles of cabinetwork (for example, caskets and jewel cases); small furnishing goods; decorative articles. Such articles are classified in this heading, even if fitted with mirrors, provided they remain essentially articles of the kind described in the heading. Similarly, the heading includes articles wholly or partly lined with natural or composition leather, paperboard, plastics, textile fabrics, etc., provided they are articles essentially of wood.
>
> The heading includes:
>
> (1) Boxes of lacquered wood (of the Chinese or Japanese type); cases and boxes of wood, for knives, cutlery, scientific apparatus, etc.; snuff-boxes

and other small boxes to be carried in the pocket, in the handbag or on the person; stationery cases, etc.; needlework boxes; tobacco jars and sweetmeat boxes. However, the heading excludes ordinary kitchen spice boxes, etc. (heading 44.19).

(2) Articles of wooden furniture, other than those of Chapter 94 (see the General Explanatory Note to that Chapter. This heading therefore covers such goods as coat or hat racks, clothes brush hangers, letter trays for office use, ashtrays, pen-trays and ink stands.

* * * * *

Subheading 4420.90, HTSUS, provides for "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94: Other." There is no dispute at the six-digit level that the decorative wood boxes are classified therein. As such, the classification is governed by GRIs 1 and 6. Instead, the issue at hand is whether the decorative wood boxes are classified in subheading 4420.90.45, HTSUS, as "[j]ewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood," or in subheading 4420.90.80, HTSUS, as "[o]ther" than "[j]ewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood." Nothing about the decorative wood box in NY N274180 makes it specifically a jewelry box, silverware chest, cigar or cigarette box, microscope case, tool or utensil case, or similar box of subheading 4420.90.45, HTSUS, or other similar boxes enumerated in the ENs. The subject decorative wood box is a generic, unlidded box used for storage of household personal effects, food items, spices, etc. Moreover, in Headquarters Ruling Letter (HQ) H304788, dated August 23, 2020, CBP noted that based on prior CBP practice, merchandise classifiable in subheading 4420.90.45, HTSUS, generally contains a lid,[1] whereas merchandise classifiable in subheading 4420.90.80, HTSUS, generally does not have a lid.[2] Accordingly, the subject decorative wood boxes, which are unlidded and designed for general storage of household effects, are properly classified as other than "jewelry boxes, silverware chests, . . ." in subheading 4420.90.80, HTSUS.

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[1] *See, e.g.*, NY D87547, dated February 9, 1999 (classifying various wood boxes with decorated exteriors and hinged lids in subheading 4420.90.45, HTSUS); NY L80813, dated December 23, 2004 (classifying a lidded wood box suitable for small personal items in subheading 4420.90.45, HTSUS); NY R01546, dated March 3, 2005 (classifying a decorative plywood box with a hinged lid and metal clasp in subheading 4420.90.45, HTSUS); NY R01495, dated March 3, 2005 (classifying three boxes with decorated exteriors, hinged lids, and metal clasp closures in subheading 4420.90.45, HTSUS); and NY N032230, dated July 18, 2008 (classifying a mini table trunk with a lid and an iron clasp closure in subheading 4420.90.45, HTSUS).

[2] *S ee, e.g.,*NY N206996, dated March 30, 2012 (classifying open-top trays in subheading 4420.90.80, HTSUS); NY N224320, dated July 31, 2012 (classifying various open-topped bins and containers in subheading 4420.90.80, HTSUS); NY N276688, dated July 15, 2016 (classifying organizer trays in subheading 4420.90.80, HTSUS); NY N206996, dated March 30, 2012 (classifying an open-top tray with three compartments in subheading 4420.90.80, HTSUS); HQ H287056, dated February 25, 2020 (classifying various MDF, unlidded valet trays in subheading 4420.90.80, HTSUS); and HQ H304788, dated August 23, 2020 (classifying unlidded valet trays and unlidded, deep open boxes in subheading 4420.90.80, HTSUS).

HOLDING:

By application of GRIs 1 and 6, the decorative wood box from China is classified in heading 4420, HTSUS, and specifically in subheading 4420.90.80, HTSUS, which provides for "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Other." The 2023 column one, general rate of duty is 3.2 percent *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 4420.90.80, HTSUS, unless specifically excluded, are subject to an additional 25 percent *ad valorem* rate of duty. At the time of importation, such products must be reported under the relevant Chapter 99 subheading, *i.e.,* 9903.88.03, in addition to subheading 4420.90.80, HTSUS, listed above.

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 at https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY N274180, dated April 21, 2016, is hereby revoked.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF TWO RULING LETTERS, PROPOSED MODIFICATION OF TWO RULINGS LETTERS, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF VARIOUS PLAYING CARDS

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

ACTION: Notice of proposed revocation of two ruling letters, proposed modification of two ruling letters, and proposed revocation of treatment relating to the tariff classification of various playing cards.

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 to modify two rulings letters concerning the tariff classification of various playing cards 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov.

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 to modify two ruling letters pertaining to the tariff classification of various playing cards. Although in this notice CBP is specifically referring to New York Ruling Letter ("NY") N319955, dated June 22, 2021 (Attachment A); Headquarters Ruling Letter ("HQ") 088829, dated May 20, 1991 (Attachment B); NY N319421, dated May 26, 2021 (Attachment C); and NY L88167, dated October 25, 2005 (Attachment D), 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 four 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 N319955, HQ 088829, NY N319421 and NY L88167, CBP classified various playing cards in heading 9504, HTSUS, specifically in subheading 9504.90.90, HTSUS, which provides for "Video game

consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: Other: Other: Other." CBP has reviewed NY N319955, HQ 088829, NY N319421, and NY L88167 and has determined those ruling letters to be in error. It is now CBP's position that various playing cards are properly classified in heading 9504, HTSUS, specifically in subheading 9504.40.00, HTSUS, which provides for "Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: Playing cards."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N319955 and HQ 088829, to modify NY N319421 and NY L88167, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H331822, set forth as Attachment E 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N319955

June 22, 2021
CLA-2–95:OT:RR:NC:N4:424
CATEGORY: Classification
TARIFF NO.: 9504.90.9080; 9903.88.15

MS. JOANN MOSQUEDA
JA-RU, INC.
12901 FLAGLER CENTER BOULEVARD
JACKSONVILLE, FL 32258

RE: The tariff classification of the "Kids Cards" card games from China

DEAR MS. MOSQUEDA:

In your letter dated June 10, 2021, you requested a tariff classification ruling. A photograph and a description of the "Kids Cards" card games were received with your inquiry.

The "Kids Cards", cards games, item number 3602, consists of four games, Old Maid, Go Fish, Crazy Eights and Hearts. These are classic card games designed for children. Each of these games is a contest between two or more players involving skill or chance.

The applicable subheading for the "Kids Cards" will be 9504.90.9080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Video game consoles and machines, articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof: Other: Other: Other: Other. The rate of duty will be Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9504.90.9080, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 9504.90.9080, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective dates, you may refer to the relevant parts of the USTR and CBP websites, which are available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions and https://www.cbp.gov/trade/remedies/301-certain-products-china respectively.

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.

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 Roseanne Murphy at roseanne.j.murphy@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ 088829
May 20, 1991
CLA-2 CO:R:C:F 088829 STB
CATEGORY: Classification
TARIFF NO.: 9504.90.9080

MR. WILLIAM GIBSON, JR.
INTERPRETIVE MARKETING PRODUCTS
P.O. BOX 21697
BILLINGS, MONTANA 59104

RE: Request for Reconsideration of New York Ruling Letter 858772 concerning the tariff classification of various game cards from Taiwan.

DEAR MR. GIBSON:

This letter is in response to your request for a reconsideration of New York Ruling Letter (NYRL) 858772, dated January 4, 1991, regarding the classification of several packages of game cards under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The cards are from Taiwan. Several samples were mailed to, and received by, Headquarters, U.S. Customs.

FACTS:

The samples submitted to Headquarters consist of three packages of plastic coated paper cards. Each package contains two sets of 53 cards plus one instruction card. The cards contain photographs on one side and trivia type questions on the other side: a brief statement of information concerning the picture also appears on the question side. The instruction cards state that these cards are to be used to play a trivia type game with the objective being to collect points by either correctly answering any one of the questions found on the back of each card or identifying the photograph on the front. The samples submitted were "Baseball Wit", "Yellowstone Teton Wit", and "Northwest National Park and Forest Wit" game cards.

ISSUE:

Whether the subject cards should be classified under subheading 9504.90.9080, HTSUSA, the provision for other articles for arcade, table or parlor games, or under subheading 9504.40.0000, HTSUSA, the provision for playing cards?

LAW AND ANALYSIS:

The General Rules of Interpretation (GRI's) set forth the legal framework in which merchandise is to be classified under the HTSUSA. 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. In this instance, the merchandise can be classified by reference to GRI 1.

Customs position over a long period of time has been that cards such as these are classifiable as other articles for arcade, table or parlor games, and not as playing cards. We have generally limited the playing card subheading to those decks or packs containing four suits of 13 cards each, plus certain extras. This subheading includes ordinary playing cards that are used in playing games of skill or chance such as "poker", "bridge", "pinochle", "ca-

nasta", and the like, and cards that may be used in lieu of ordinary playing cards. These cards are identified by pictures of characters such as the King, Queen, and Jack; numbers to indicate the numerical value; and pips to indicate the suits such as hearts, diamonds, clubs, and spades; or such indicia as makes them readily acceptable for use in lieu of regular playing cards.

The established Customs position is supported by the common meaning of the term "playing cards." The Webster's New World Dictionary, Third College Edition, (1988), p.1036, defines "playing cards" as "cards used in playing various games, arranged in decks of four suits (spades, hearts, diamonds, and clubs): a standard deck has 52 cards." The courts have ruled that tariff terms are to be construed in accordance with their common and commercial meanings, which are presumed to be the same. United States v. C.J. Tower & Sons, 48 CCPA 87, C.A.D. 770 (1961).

You have stated that your cards were initially classified as playing cards following the removal of Taiwan from the list of countries receiving preferential treatment, but that the last two shipments of cards have been classified as articles for arcade, table or parlor games. As noted above, Customs position concerning playing cards is a long established position; any of your cards that were classified as playing cards were improperly classified.

HOLDING:

The cards at issue are properly classifiable under subheading 9504.90.9080, HTSUSA, the provision for articles for arcade, table or parlor games, other, other, other, other. The applicable duty rate is 4.64% ad valorem. NYRL 858772 is hereby affirmed.

Sincerely,

JOHN DURANT,
Director
Commercial Rulings Division

N319421
May 26, 2021
CLA-2–95:OT:RR:NC:N4:424
CATEGORY: Classification
TARIFF NO.: 9503.00.0073; 9504.90.9080;
9903.88.15

MR. JOSEPH J. KENNY
GEODIS USA INC.
ONE CVS DR.
WOONSOCKET, RI 02895

RE: The tariff classification of the "Wacky Packages" and a miniature Uno game from China

DEAR MR. KENNY:

In your letter, dated May 13, 2021, you requested a tariff classification ruling on behalf of your client, CVS Pharmacy, Inc. The ruling was requested for item 569869 "Wacky Packages" and item 482511, a miniature Uno card game. Photos and product information were submitted for our review.

The first product under consideration, "Wacky Packages" item number 569869, is a package of 5 miniature plastic toy representations of common food or household items such as cereal, dog food, toothpaste, soap, cookies etc. The product is sold in a variety of combinations and can be collected to form a complete set. Included in each retail box is one sticker, lithographically printed on paper and less than .51mm in thickness. The "Wacky Packages" item is principally designed for the amusement of children 8 years of age and older.

Legal Note 4 to Chapter 95 states that heading 9503 applies to "articles of this heading combined with one or more items, which cannot be considered as sets under the terms of General Interpretative Rule 3(b), and which, if presented separately, would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys." In addition, when applying Note 4, the toy and non-toy item(s) must complement one another to the extent that together they can be used for "amusement, diversion or play" in order to possess "the essential character of toys". This item meets the aforementioned terms of Note 4 to Chapter 95. The overall combination possesses the essential character of toys of heading 9503. The child will use the sticker in conjunction with the "Wacky Packages". The sticker adds to the amusement of the toys with which they are packaged.

The second product under consideration, item number 482511, is a miniature Uno game, whereby players using colored cards that have various assigned points, compete to be the first to total 500 points. The game contains a standard set of 108 Uno playing cards, measuring approximately 2 inches by 1 inch. The miniature Uno game is principally designed for the amusement of children 6 years of age and older.

The applicable subheading for the "Wacky Packages" will be 9503.00.0073, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Tricycles, scooters, pedal cars and similar wheeled toys...dolls, other toys...puzzles of all kinds; parts and accessories thereof... 'Children's products' as defined in 15 U.S.C. § 2052: Other: Labeled or determined by importer as intended for use by persons: 3 to 12 years of age." The rate of duty will be Free.

The applicable subheading for the miniature Uno game will be 9504.90.9080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Video game consoles and machines, articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof: Other: Other: Other: Other. The rate of duty will be Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9504.90.9080, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 9504.90.9080, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions and https://www.cbp.gov/trade/remedies/301-certain-products-china respectively.

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.

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 Roseanne Murphy at roseanne.j.murphy@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

NY L88167
October 25, 2005
CLA-2–95:RR:NC:SP:225 L88167
CATEGORY: Classification
TARIFF NO.: 9503.70.0000; 9504.90.6000;
9504.90.9080

MS. LORIANNE ALDINGER
RITE AID CORPORATION
P.O. BOX 3165
HARRISBURG, PA 17105

RE: The tariff classification of a "Games Car Go Fun" assortment from China.

DEAR MS. ALDINGER:

In your letter dated October 11, 2005, you requested a tariff classification ruling.

You submitted a "Games Car Go Fun" assortment identified as assortment number 920201, which is being returned upon your request. The assortment consists of seven toys or games designed for entertainment while riding in a car. Each toy or game is packaged in a thermos-like plastic container that measures approximately 8" in height and 3–1/2" in diameter and houses its own environment applicable to that toy or game. Each container's top screws-off and a hinged side opens-up allowing access to the toy or game and its applicable printed instruction sheet.

Poly Pocket is a toy set that contains a plastic 4" doll, her clothes, a pair of sneakers and a wall mirror. The interior of the container serves as a doll-house. The Construction Playset is a toy set that contains a 2–1/2" dump truck, plastic construction workers, cargo, and a loading dock. The Fire Playset is a toy set that contains a 3" fire truck and fire station. Hot Wheels Automix Mini Mountain Car contains two 1–1/2" cars, a racetrack and racing flags.

Othello, Uno and Fun Fairytopia are considered games as they involve competition. Othello is a board game where the playing pieces are built into the board, which consists of two different colored tiles. Players try to outflank each other by flipping the board tiles to their color, and the player with the majority of tiles in their color wins. Uno is a card game whereby players using colored cards that have various assigned points compete to be the first to total 500 points. Fun Fairytopia is a game that features plastic water flowers, a seahorse and a fish. When the container is filled with water, a seashell-shaped button on the outside of the container is pushed which shoots the seahorse and fish upward in the water where they are attempted to be caught in the open flowers.

The applicable subheading for the "Games Car Go Fun" (Poly Pocket, Construction Playset, Fire Playset, and Hot Wheels Automix Mini Mountain Car) from assortment number 920201 will be 9503.70.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other toys, put up in sets or outfits, and parts and accessories thereof." The rate of duty will be Free.

The applicable subheading for the "Games Car Go Fun" (Othello) from assortment number 920201 will be 9504.90.6000, HTS, which provides for Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games...parts and accessories thereof: other: chess, checkers, parchisi, backgammon, darts and other games

played on boards of a special design, all the foregoing games and parts thereof (including their boards); mah-jong and dominoes; any of the foregoing games in combination with each other, or with other games, packaged together as a unit in immediate containers of a type used in retail sales; poker chips and dice." The rate of duty will be Free.

The applicable subheading for the "Games Car Go Fun" (Uno and Fun Fairytopia) from assortment number 920201 will be 9504.90.9080, HTS, which provides for "Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof: Other: Other...Other." The rate of duty will be Free.

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 Alice Wong at 646–733–3026.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

HQ H331822
OT:RR:CTF:CPMMA H331822 RRB
CATEGORY: Classification
TARIFF NO.: 9504.40.00

MS. JOANN MOSQUEDA
JA-RU, INC.
12901 FLAGLER CENTER BOULEVARD
JACKSONVILLE, FL 32258

RE: Revocation of NY N319955 and HQ 088829; Modification of NY N319421 and NY L88167; Tariff classification of various playing cards

DEAR MS. MOSQUEDA:

This is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York Ruling Letter ("NY") N319955, dated June 22, 2021, regarding the classification of various playing cards consisting of four cards games, Old Maid, Go Fish, Crazy Eights and Hearts. In NY N319955, CBP classified various playing cards in subheading 9504.90.9080, HTSUSA ("Annotated"), as "Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: Other: Other: Other." We have reviewed NY N319955 and have determined that the classification of various playing cards in subheading 9504.90.9080, HTSUSA, was incorrect.

We have also reviewed Headquarters Ruling Letter ("HQ") 088829, dated May 20, 1991; NY N319421, dated May 26, 2021; and NY L88167, dated October 25, 2005, concerning the tariff classification of similar playing cards in subheading 9504.90.9080, HTSUSA, and have determined that the aforementioned rulings were incorrect. For the reasons set forth below, we revoke two ruling letters and modify two ruling letters.

FACTS:

In NY N319955, we described the merchandise as follows:

> The "Kids Cards", cards games, item number 3602, consists of four games, Old Maid, Go Fish, Crazy Eights and Hearts. These are classic card games designed for children. Each of these games is a contest between two or more players involving skill or chance.

In HQ 088829, we described the merchandise as follows:

> The samples submitted to Headquarters consist of three packages of plastic coated paper cards. Each package contains two sets of 53 cards plus one instruction card. The cards contain photographs on one side and trivia type questions on the other side: a brief statement of information concerning the picture also appears on the question side. The instruction cards state that these cards are to be used to play a trivia type game with the objective being to collect points by either correctly answering any one of the questions found on the back of each card or identifying the photograph on the front. The samples submitted were "Baseball Wit", "Yellowstone Teton Wit", and "Northwest National Park and Forest Wit" game cards.

In NY N319421, we described the merchandise as follows:

The second product under consideration, item number 482511, is a miniature Uno game, whereby players using colored cards that have various assigned points, compete to be the first to total 500 points. The game contains a standard set of 108 Uno playing cards, measuring approximately 2 inches by 1 inch. The miniature Uno game is principally designed for the amusement of children 6 years of age and older.

In NY L88167, we described the merchandise as follows:

Uno is a card game whereby players using colored cards that have various assigned points compete to be the first to total 500 points.

ISSUE:

Whether various playing cards are classified in subheading 9504.40.00, HTSUS, as "Video game consoles and machines, table or parlor games...: Playing cards," or in subheading 9504.90.90, HTSUS, "Video game consoles and machines, table or parlor games...: Other: Other: Other."

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings 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 2023 HTSUS provisions under consideration are as follows:

9504	Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment:	
9504.40.00	Playing Cards	
9504.90	Other:	
	Other:	
9504.90.90	Other	

* * * *

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 ENs 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 consult, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 95.04 states, in pertinent part, as follows:

This heading includes:

...

(11) Card games of all kinds (bridge, tarot, "lexicon", etc.).

* * * *

The merchandise at issue in NY N319955, HQ 088829, NY N319421, and NY L88167 each consists of a type of game played with cards that was classified in subheading 9504.90.90, HTSUS. For example, the products at issue in NY L88167 and NY N319421 are regular and miniature Uno card games, whereby players using colored cards with various assigned points compete to be the first to total 500 points. The merchandise described in HQ 088829 includes three packages of plastic-coated paper cards, with each package containing two sets of 53 cards plus one instruction card, and with photographs on one side and trivia questions on the other. These cards are used to play a trivia type game with the objective being to collect points by correctly answering questions on the back of the card or identifying the photos on the front. Similarly, the merchandise in NY N319955 consists of four card games designed for children—Old Maid, Go Fish, Crazy Eights and Hearts—each of which is a contest between two or more players involving skill or chance.

Heading 9504 provides for, among other things, table or parlor games; other games operated by coins, banknotes, bank cards, token or by any other means of payment; playing cards; video game consoles and machines; and other games. There is no dispute at the heading level that the subject merchandise is classified in heading 9504, HTSUS. Because the instant classification analysis occurs beyond the four-digit heading level, GRI 6 is implicated. GRI 6 states:

> For legal purposes, the classification of goods in the subheading 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, chapter, and subchapter notes also apply, unless the context otherwise requires.

Here, the dispute arises at the six-digit level, whereby the various subheadings of heading 9504, HTSUS, differentiate between different types of games, including playing cards (subheading 9504.40.00, HTSUS) and other games not described in any of the preceding six-digit headings (subheading 9504.90.90, HTSUS).

The term "playing cards" is not defined in the tariff schedule. Although the ENs 95.04, HTSUS, do not mention the term "playing cards," the ENs state that the heading includes "[c]ard games of all kinds (bridge, tarot, 'lexicon', etc.)." In HQ 953626, dated September 9, 1993, CBP examined the requestor's assertion that the reference to "card games" in the ENs is a reference to "playing cards" of subheading 9504.40.40, HTSUS. There, CBP concluded that in light of the Harmonized System Committee's (HSC) stated intent behind the subheading provision for "playing cards" to cover card games of all kinds—not just those played with a standard deck of four suits (hearts, diamonds, clubs and spades) of 13 cards each (two through ten, jack queen, king, and ace)—the Tarot, Snap, Old Maid and the French Auto Race card games at issue in that rulings were properly classified in subheading 9504.40.00, HTSUS, as playing cards. Accordingly, beyond classification of standard deck playing cards in subheading 9504.40.00, HTSUS[1] , it has been CBP's practice to classify all types of playing cards in subheading 9504.40.00,

[1] *See*, *e.g.*, NY L86880, dated September 1, 2005; NY L82706, dated March 2, 2005; NY N319956, dated June 22, 2021; and NY N277251, dated July 28, 2016.

HTSUS. *See*, *e.g.*, NY N326534, dated June 14, 2022 (classifying a card game called "Tapeworm," consisting of 84 cards printed with images of four different cartoon worms and action icons which dictate the game play, and with various actions and scenarios for boosting a player's chances or sabotaging an opponent's hand, in subheading 9504.40.00, HTSUS, as "playing cards"); NY N221070, dated June 22, 2012 (classifying a "Blurble Card Game," consisting of 300 pictured paper cards, where the object of the game is to say a word with the same letter as the depicted image on the card before one's opponent, in subheading 9504.40.00, HTSUS, as "playing cards"); NY N305974, dated September 24, 2019 (classifying two sports trivia card games testing the user's sports knowledge of a particular city's team, in subheading 9504.40.00, HTSUS, as "playing cards"); NY N008041, dated March 23, 2007 (classifying a collectable card strategy game called "Magic: The Gathering," consisting of a 60 trading card theme deck, in subheading 95004.40.00, HTSUS, as "playing cards"); NY N304635, dated June 27, 2019 (classifying a card game set to play a game called "Argute," consisting of 73 poker-sized playing cards for play between 2 and 7 people, in subheading 9504.40.00, HTSUS, as "playing cards"); and NY N322120, dated October 25, 2021 (a country of origin ruling confirming classification of "Magic: The Gathering," a collectable card strategy game involving two or more players, in subheading 9504.40.00, HTSUS, as "playing cards").

Like the card games described above, which were classified as "playing cards" of subheading 9504.40.00, HTSUS, the card games at issue in NY N319955, HQ 088829, NY N319421, and NY L88167 are also played with card decks different from the standard card deck containing four suits (hearts, diamonds, clubs, and spades) of 13 cards each (two through ten, jack, queen, king, and ace). Thus, we conclude that the playing cards in NY N319955, HQ 088829, NY N319421, and NY L88167 were wrongly classified in subheading 9504.90.90, HTSUS. Because the regular Uno card game, miniature Uno card game, trivia card games, and card decks for playing Old Maid, Go Fish, Crazy Eights and Hearts in NY L88167, NY N319421, HQ 088829, and NY N319955, respectively, are "playing cards," the merchandise in those rulings are properly classified in subheading 9504.40.40, HTSUS, as "Video game consoles and machines, table or parlor games...: Playing cards."

HOLDING:

By application of GRIs 1 and 6, the subject playing cards are classified in heading 9504, HTSUS, specifically under subheading 9504.40.00, HTSUS, which provides for: "Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment.: Playing Cards." The 2023 column one general rate of duty for subheading 9504.40.00, HTSUS, is free.

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 https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY N319955, dated June 22, 2021, and HQ 088829, dated May 20, 1991, are hereby REVOKED.

NY N319421, dated May 26, 2021, and NY L88167, dated October 25, 2005, are hereby MODIFIED with respect to the classification of the miniature and regular Uno playing cards discussed in those rulings.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Cc: Mr. William Gibson, Jr.
Interpretive Marketing Products
P.O. Box 21697
Billings, Montana 59104

Mr. Joseph J. Kenny
Geodis USA Inc.
One CVS Dr.
Woonsocket, RI 02895

Ms. Lorianne Aldinger
Rite Aid Corporation
P.O. Box 3165
Harrisburg, PA 17105

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION AND COUNTRY OF ORIGIN OF PET BOWL MAT

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification and country of origin of a pet bowl mat.

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 and country of origin of a pet bowl mat 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 October 13, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: John Rhea, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

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 and country of origin of a pet bowl mat. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N307920, dated December 18, 2019 (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 N307920, CBP classified a pet bowl mat in heading 5705, HTSUS, specifically in subheading 5705.00.20, HTSUS, which provides for "Other carpets and textile floor coverings, whether or not made up: Other." CBP also found the country of origin of this pet mat to be Vietnam. CBP has reviewed NY N307920 and has determined the ruling letter to be in error. It is now CBP's position that pet bowl mat is 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." CBP also now finds that the country of origin of the pet mat is China.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N307920 and to revoke or modify any other ruling not specifically

identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H325602, 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.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N307920
December 18, 2019
CLA-2-OT:RR:NC:N3:349
CATEGORY: Classification
TARIFF NO.: 5703.30.80.30; 5705.00.2030;
6307.10.2030; 9903.88.03; 9903.88.15

MS. CATHY LOPEZ
C.H. ROBINSON INTERNATIONAL
1452 HUGHES ROAD, SUITE 350
GRAPEVINE, TX 76051

RE: Classification and country of origin determination for a microfiber towel, a pet bowl mat, and a door mat; 19 CFR 102.21(c)(2); tariff shift; 19 CFR 102.21(c)(4); most important assembly

DEAR MS. LOPEZ:

This is in reply to your letter dated November 14, 2019, requesting a country of origin determination for a microfiber towel, a pet bowl mat and a door mat which will be imported into the United States. The request was sent on behalf of your client, Schroeder & Tremayne, Inc. Samples were submitted with your letter. The samples will be retained by this office for training purposes.

FACTS:

The microfiber towel, item 853400, is a general purpose cleaning towel made of 85 percent polyester and 15 percent polyamide pile fabric. The towel measures 12 X 16 inches and is finished along the four edges with an overlock stitch. The towel is retail packed and imported in a 24-pack of assorted colors: green, blue and yellow. The packaging identifies the contents as all-purpose auto cloths suitable for removing wax and polish, cleaning windows and dusting interior surfaces.

The manufacturing operations for the microfiber towel are as follows:

China
- Yarn formed.
- Fabric is knitted and dyed.
- Fabric is exported to Vietnam.

Vietnam
- Fabric is cut to size.
- An overlocking stitch is sewn around the edges.
- Labels and tags are sewn.
- Towel is washed and packaged.
- Towel is exported to the United States.

The pet bowl mat, item 535900, is a knitted floor covering consisting of three layers laminated together: a printed, knit pile face fabric of 100 percent polyester followed by a layer of foam and a 100 percent polyester knit backing fabric with polyvinyl chloride dots applied 3/8" apart from one another on one side to create a non-skid backing for the mat. The mat measures 10 X 20 inches and is finished along the four edges with an overlock stitch. The mat is folded and a cardboard sleeve is placed over the mat.

The manufacturing operations for the Pet Bowl Mat are as follows:

China
- Yarn is formed for the face and backing fabrics.
- Face and backing fabrics are knitted.
- Face fabric is dyed and printed.
- Backing fabric is dyed.
- PVC anti-slip dots are applied to one side of the backing fabric.
- Fabrics are exported to Vietnam.

Vietnam
- Fabrics are cut to size.
- Foam is formed.
- Face fabric, foam and backing fabric are laminated together.
- The mat is finished with an overlock stitch around the edges.
- Rug is folded and packaged under a printed cardboard sleeve and exported to the United States.

The chenille door mat (no item number provided) is a tufted mat. The pile surface is made from twisted, uncut loops of polyester chenille yarns that are tufted into a pre-existing polyester woven base fabric. The tufts are approximately 1/2 inch in length from the surface. A clear thermoplastic elastomer is lightly applied to the back of the mat to create a non-skid surface. The edges of the mat are capped with a narrow strip of woven binding fabric. The finished mat measures 18 x 25 inches. In your letter, you state the mat will be sold as a door mat to wipe feet when entering the home.

The manufacturing operations for the chenille door mat are as follows:

China
- Yarn is formed.
- Polyester fabric is tufted with polyester chenille yarns.
- Tufted fabric is exported to Vietnam.

Vietnam
- Tufted fabric is cut to size.
- Styrene-ethylene-butylene-styrene (SEBS) thermoplastic elastomer (TPE) is applied to back.
- Edges are capped with a polyester narrow woven fabric.
- Mat is folded and packaged under a printed cardboard sleeve and exported to the United States.

ISSUE:

What are the classification and country of origin of the subject merchandise?

CLASSIFICATION:

The applicable subheading for the microfiber towel will be 6307.10.2030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other made up articles, including dress patterns: Floorcloths, dishcloths, dusters and similar cleaning cloths: Other: Other." The general rate of duty will be 5.3 percent ad valorem.

The applicable subheading for the pet bowl mat will be 5705.00.2030, HTSUS, which provides for "Other carpets and other textile floor coverings, whether or not made up: Other: Of man-made fibers." The general rate of duty will be 3.3 percent ad valorem.

The applicable subheading for the chenille door mat will be 5703.30.8030, HTSUS, which provides for "Carpets and other textile floor coverings, tufted, whether or not made up: Of other man-made textile materials: Other: Measuring not more than 5.25 m2 in area." The general rate of duty will be 6 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 https://hts.usitc.gov/current.

COUNTRY OF ORIGIN - LAW AND ANALYSIS:

Section 334 of the Uruguay Round Agreements Act (codified at 19 U.S.C. 3592), enacted on December 8, 1994, provided rules of origin for textiles and apparel entered, or withdrawn from warehouse for consumption, on and after July 1, 1996. Section 102.21, Customs Regulations (19 C.F.R. 102.21), published September 5, 1995 in the Federal Register, implements Section 334 (60 FR 46188). Section 334 of the URAA was amended by section 405 of the Trade and Development Act of 2000, enacted on May 18, 2000, and accordingly, section 102.21 was amended (68 Fed. Reg. 8711). Thus, the country of origin of a textile or apparel product shall be determined by the sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states, "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:" Paragraph (e) in pertinent part states,

> The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

HTSUS	Tariff shift and/or other requirements
5701 – 5705	A change to heading 5701 through 5705 from any other chapter.
6307.10	The country of origin of a good classifiable under subheading 6307.10 is the country, territory or insular possession in which the fabric comprising the good was formed by the fabric-making process.

As the microfiber towels are constructed from fabric formed in a single country, that is, China, as per the terms of the tariff shift requirement, country of origin is conferred in China.

The pet bowl mat is formed from knit fabrics from China which undergo the tariff shift in Vietnam along with the added foam padding, as such, per the terms of the tariff shift requirement, the country of origin of this mat is Vietnam.

With respect to the chenille door mat, which also includes fabric formed in China sent to Vietnam for cutting and making up into the mat, consideration must be made as to the classification of the tufted fabric.

Heading 5802, HTSUS, provides for, "Terry toweling and similar woven terry fabrics, other than narrow fabrics of heading 5806; tufted textile fabrics, **other than products of heading 5703**." [Emphasis added.]

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), although not legally binding, constitute the official interpretation of the Harmonized System at the international level.

The EN to heading 5802, HTSUS, read as follows:

> Products of this heading are distinguished from the tufted carpets and floor coverings of heading 5703 by, for example, their lack of stiffness, thickness and strength which renders them unsuitable for use as floor coverings.

The EN to heading 5703, HTSUS, describe the same distinction between the two headings, and read as follows:

> Products of this heading are distinguished from the tufted fabrics of heading 5802 by, for example, their stiffness, thickness and strength, which render them suitable for use as floor coverings.

Further, the General Explanatory Notes to Chapter 57 state, in pertinent part,

> This Chapter covers carpets and other textile floor coverings in which textile materials serve as the exposed surface of the article when in use. In includes articles having the characteristics of textile floor coverings (e.g., thickness, stiffness, and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other furnishing purposes).
>
> The above products are classified in this Chapter whether made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.), in the form of carpet squares, bedside rugs, hearth rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up.

The tufted chenille fabric has the thickness and strength to render it suitable for use as a floor covering of heading 5703 without any added materials. Therefore, the chenille tufted fabric is classified under heading 5703, HTSUS, rather than heading 5802, HTSUS, at the time of export to Vietnam.

As all of the foreign materials incorporated in chenille door mat did not undergo an applicable change in tariff classification in a single country, territory, or insular possession, Section 102.21(c)(2) is inapplicable.

Section 102.21(c)(3) states,

> Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section:
>
> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
>
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was

wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject merchandise is neither knit to shape nor wholly assembled in a single country, Section 102.21 (c)(3) is inapplicable.

Section 102.21 (c)(4) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory or insular possession in which the most important assembly or manufacturing process occurred."

In the case of the subject chenille door mats, the tufting of the base fabric constitutes the most important assembly process. Accordingly, the country of origin of the door mat is China.

SECTION 301 TRADE REMEDIES:

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 5703.30.8030, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 5703.30.8030, HTSUS, listed above.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 6307.10.2030, HTSUS, unless specifically excluded, are subject to an additional 15 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 6307.10.2030, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at *https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions* and *https://www.cbp.gov/trade/remedies/301-certain-products-china*, respectively.

HOLDING:

The country of origin of the microfiber towel and chenille door mat is China. The country of origin of the pet bowl mat is Vietnam.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in section 19 CFR 177.9(b)(1). This section states that a ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). Should it be subsequently determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 CFR 177.2.

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 Kim Wachtel at kimberly.a.wachtel@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H325602
OT:RR:CTF:FTM H325602 JER
CATEGORY: Classification
TARIFF NO.: 6307.90.98

MR. ROBERT SHAPIRO
THOMPSON COBURN, LLP
1909 K STREET, NW, SUITE 600
WASHINGTON, DC 20006

RE: Proposed Modification of NY N307920; tariff classification and country of origin of Pet Bowl Mat

DEAR MR. SHAPIRO:

This is with respect to your request for reconsideration, dated April 12, 2021, filed by Thompson Coburn LLP, on behalf of Schroeder & Tremayne, Inc., concerning U.S. Customs and Border Protection's ("CBP") decision in New York Ruling ("NY") N307920, dated December 18, 2019. The decision in NY N307920 concerned the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), and country of origin of a microfiber towel (Item No. 853400), a pet bowl mat (Item No. 535900), and a door mat. Your request for reconsideration pertains only to the tariff classification of the pet bowl mat, which was classified under heading 5705, HTSUS, and specifically in subheading 5705.00.20, HTSUS, which provides for "Other carpets and other textile floor coverings, whether or not made up: Other." Based on this classification, the country of origin of the pet bowl mat in NY N307920 was determined to be Vietnam. Upon further review, we have reviewed NY N307920 and determined it to be in error with respect to the tariff classification and country of origin of the pet bowl mat, Item No. 535900. For the reasons set forth below, NY N307920 is herein modified with respect to the tariff classification and country of origin of the pet bowl mat.

FACTS:

In NY N307920, the pet bowl mat was described, in relevant part, as follows:

> The pet bowl mat, Item No. 535900, is a knitted floor covering consisting of three layers laminated together: a printed, knit pile face fabric of 100 percent polyester followed by a layer of foam and a 100 percent polyester knit backing fabric with polyvinyl chloride dots applied 3/8" apart from one another on one side to create a non-skid backing for the mat. The mat measures 10 x 20 inches and is finished along the four edges with an overlock stitch. The mat is folded and a cardboard sleeve is placed over the mat.

A sample was provided in connection with the 2019 ruling request and CBP determined that the layer of foam measures ⅛ inches (4 millimeters) thick. The cardboard sleeve of the retail packaging includes a photograph of a dog lying on the floor with the mat in the foreground underneath a water and food bowl. The back of the cardboard sleeve states, in part:

> The Kitchen Basics® Pet Bowl Mat is the solution to the age old tradition of cleaning up after a pet that eats and drinks...well, like an animal. The unique, laminated design combines a thin layer of foam between a top layer of high quality, super absorbent microfiber and an anti-skid, water resistant bottom layer.

- Superior absorbency; holds 3 times its weight in water
- Helps protect floors from splashes and spills
- Anti-skid bumps help keep the mat in place
- Cushions water and food bowls
- Machine washable and highly durable
- Folds and stores easily

The manufacturing operations for the Pet Bowl Mat are as follows:

China
- Yarn is formed for the face and backing fabrics.
- Face and backing fabrics are knitted.
- Face fabric is dyed and printed.
- Backing fabric is dyed.
- PVC anti-slip dots are applied to one side of the backing fabric.
- Fabrics are exported to Vietnam.

Vietnam
- Fabrics are cut to size.
- Foam is formed.
- Face fabric, foam and backing fabric are laminated together.
- The mat is finished with an overlock stitch around the edges.
- Mat is folded and packaged under a printed cardboard sleeve and exported to the United States.

ISSUE:

(1) Whether the subject pet bowl mat is classified as an "other textile floor covering[]" under heading 5705, HTSUS, or as an "[o]ther made up article[]" under heading 6307, HTSUS.
(2) What is the country of origin of the subject pet bowl mat?

LAW AND ANALYSIS:

(1) CLASSIFICATION

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 may then be applied.

The 2023 HTSUS provisions under consideration are as follows:

5705	Other carpets and other textile floor coverings, whether or not made up:
	* * *
5705.00.20	Other...
	* * *
6307	Other made up articles, including dress patterns:
	* * *
6307.90	Other:
	* * *

	Other:
	* * *
6307.90.98	Other...

Note 1 to Chapter 57, HTSUS, provides as follows:

> For the purposes of this chapter, the term "*carpets and other textile floor coverings*" means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the "official interpretation of the Harmonized System" at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). 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 id.*

The ENs to Chapter 57 provides, in pertinent part:

GENERAL

> This Chapter covers carpets and other textile floor coverings in which textile materials serve as the exposed surface of the article when in use. It includes articles having the characteristics of textile floor coverings (e.g., thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other furnishing purposes).
>
> The above products are classified in this Chapter whether made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.), in the form of carpet squares, beside rugs, hearth rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up.
>
> * * *

The ENs to 57.05 provides, in pertinent part:

> This heading covers carpets and textile floor coverings, **other than** those covered by a more specific heading of this Chapter.
>
> * * *

At issue is whether the subject pet bowl mat, Item No. 535900, was properly classified as "other textile floor covering[]" under heading 5705, HTSUS, or whether it is classified in heading 6307, HTSUS, as an "[o]ther made up article[]," which is a basket (or residual) provision. Classification in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically. *See E.M. Industries v. United States, 22 Ct. Int'l Trade 156, 999* F. Supp. 1473, 1480 (1998) ("'Basket' or residual provisions of HTSUS Headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading.") Accordingly, if the subject pet bowl mat satisfies the requirements for classification as an "other textile floor covering[]" under heading 5705, HTSUS, or is more specifically provided for elsewhere, it would not be eligible for classification in the residual provision of heading 6307, HTSUS.

To examine classification of the subject pet bowl mat under heading 5705, HTSUS, we consider Note 1 to Chapter 57, HTSUS, which states that, "the term 'carpets and other textile flooring coverings' means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes." The General EN to Chapter 57 explains that the "characteristics" of textile floor coverings include for example, "thickness, stiffness and strength."

CBP has previously stated that, as a guideline, generally, floor coverings should measure more than four square feet "to indicate suitability for use as a floor covering." *See* Headquarters Ruling Letter ("HQ") 952233, dated February 10, 1993 (*citing* HQ 951216 (March 31, 1992) (stating that "[a]ccording to a trade survey, as a rule of thumb, this type of upholstery fabric or "carpeting" must measure over 4 square feet in area to be considered useful for its intended purpose and to distinguish a floor covering from merchandise destined for other uses")). In HQ 952233, we emphasized that the minimum 4 square feet standard was "not a hard and fast rule," but rather, that "[t]he size of the 'floor' to be covered is also a factor in determining what minimum measurement is necessary to qualify as a floor covering."

It follows that the subject pet bowl mat must meet the following criteria to be classifiable in heading 5705, HTSUS: (1) the textile material must be the exposed surface of the article when in use; and (2) it must have the characteristics of a textile floor covering, e.g., it must have some level of thickness, stiffness, and strength. Moreover, the size of the floor to be covered by the pet bowl mat compared to the size of the product itself should be considered in making the classification determination. *See* HQ 952233 (discussed *supra*, wherein CBP discussed the size of the floor covering relative to the floor being covered). These factors contribute to the article's capacity to function as a floor covering.

In applying these factors to the subject pet bowl mat, we note that it meets the first factor. Specifically, the textile material (which is 100% knit pile polyester fabric) is the exposed surface of the subject pet bowl mat when it is used to protect the floor from splashes and spills. The subject pet bowl mat, however, does not meet the second factor as it is thin and flimsy. While it appears strong and sturdy, it is only ⅛ inch (4 millimeters) thick and it is not stiff. Hence, the pet bowl mat does not have the capacity to provide the durability and safety of a floor covering.

With regard to the square footage factor provided by HQ 952233, we note that the subject pet bowl mat measures 10 x 20 inches and has a square foot measurement less than four square feet at 1.3889 square feet. Although the four-square foot minimum measurement is not a hard and fast rule, the subject article falls short of the recommended measurement factor. Due to its small size, the subject pet bowl mat can only provide water absorption immediately beneath the pet's food bowl area and thus cannot safeguard against spills or waste beyond its 1.3889 square feet dimensions. To wit, the square footage of less than one and a half feet is far less than the four-square feet requirement discussed in HQ 952233. Furthermore, the article's intended use is that of a place mat (for a pet during meals) and thus its design and purpose are similar to a table or dinner placemat (that humans use while dining). As a placemat, the pet's food and/or water bowl are placed atop the subject pet bowl mat to help protect floors from splashes and spills. Accordingly, a pet bowl food mat or similar placemat does not serve the purpose of

a floor covering and does not have the functionality or characteristics of a floor covering. Lastly, the subject pet bowl mat is not marketed as a floor covering. On the retail label of this article, the indicia "Kitchen Basics" appears in bold print, indicating that it is marketed and sold amongst kitchen items rather than among carpets, tiles, rugs, or other floor coverings. The retail labeling also states that the pet bowl mat is "machine washable" and "foldable," indicating that it is intended to be removed from the floor with some regularity. Accordingly, we find that the subject pet bowl mat does not meet the criteria for floor coverings of Chapter 57, HTSUS, and is therefore not classified under heading 5705, HTSUS.

Next, we consider whether there is a more appropriate heading in which to classify the subject pet bowl mat. As previously stated, the pet bowl mat performs a similar function as table placemats. CBP has previously classified placemats made of textile under heading 6302, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen," and specifically, in subheadings that provide for table linens or other table linens. *See e.g.*, NY I80551, dated April 29, 2002; NY K80218, dated November 18, 2003; NY N080236, dated October 30, 2009. The subject pet bowl mat is intended for use on the floor to cushion pet water and food bowls and to protect against pet splashes and spills. As such, it is not used on or near a table surface and therefore cannot be classified under a provision which provides for table linen *eo nomine*.

CBP previously classified articles that were substantially similar to the subject pet bowl mat under heading 6307, HTSUS, a residual provision. In NY K89162, dated August 31, 2004, for example, CBP classified, in relevant part, two pet placemats under heading 6307, HTSUS. The two pet placemats in NY K89162, were in the shape of a fish and a bone, were made of 65 percent polyester and 35 percent cotton, contained a thin layer of polyurethane foam between the top and bottom layers of fabric, and had a non-skid surface of rubber dots on the bottom. Much like the subject pet bowl mat, the pet placemats were designed to be used on the floor, under a pet's food dish and water bowl. Similarly, in NY F81208, dated January 7, 2000, CBP classified a pet placemat that was designed to be used under pet dishes, under heading 6307, HTSUS. The pet placemats in NY F81208 were described as being made of two 100 percent polyester woven fabric panels sewn together with a fabric binder. One side of the place mat featured printed words and various animal designs and overall article measured approximately 17–1/2 inches in length and 14 inches in width.

In keeping with our previous decisions concerning substantially similar pet bowl placemats and because the subject articles are not more specifically provided for elsewhere, we find that the subject pet bowl mat, Item No. 535900, is properly classified under heading 6307, HTSUS, and specifically, in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

(2) COUNTRY OF ORIGIN

Section 334 of the Uruguay Round Agreements Act (URAA) (codified at 19 U.S.C. § 3592), enacted on December 8, 1994, provide the rules of origin for textiles and apparel products entered, or withdrawn from warehouse for consumption, on and after July 1, 1996. Section 102.21 of the Code of Federal Regulations (19 C.F.R. § 102.21), implements the URAA. The country of

origin of a textile or apparel product shall be determined by the sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21. *See* 19 C.F.R. § 102.21(c).

Paragraph (c)(1) states, "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." The fabric for the subject pet bowl mat is produced in China starting with the formation of the face and backing fabrics from yarn. Thereafter, the face and backing fabrics are knitted and dyed. Finally, PVC anti-slip dots are applied to the backing fabric. However, the production and final assembly of the product occurs in Vietnam wherein the fabric is cut to size and laminated together with a foam layer between the face and backing fabrics. The mat is then finished with overlock stitches around the edges before being packaged for retail. Because the formation of the fabric and the final assembly of the finished product occur in two different countries, the subject pet bowl mat is not wholly obtained and produced in a single country. As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:"

Paragraph (e) states in pertinent part:

The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

HTSUS	Tariff shift and/or other requirements
6307.90	The country of origin of a good classifiable under subheading 6307.90 is the country, territory or insular possession in which the fabric comprising the good was formed by the fabric-making process.

In NY N307920, CBP applied the rules of origin under 19 C.F.R. § 102.21(c) to determine the country of origin of the subject pet bowl mat. However, NY N307920 incorrectly classified the subject pet mat under heading 5705, HTSUS, and therefore, applied the tariff shift rule for that heading to determine the country of origin. As stated in the above classification analysis, the subject pet bowl mat is not classifiable under heading 5705, HTSUS, as it is not a carpet or other textile floor covering. Instead, the merchandise is classified in heading 6307, HTSUS.

Because the subject pet bowl mat is classified in heading 6307, HTSUS, under 19 C.F.R. § 102.21(c), the rule of origin provides that, "the country of origin for a good classifiable under subheading 6307.90 is the country, territory or insular possession in which the fabric comprising the good was formed by a fabric-making process." Pursuant to 19 C.F.R. § 102.21(b)(2), "a fabric-making process is any manufacturing operation that begins with polymers, fibers, filaments (including strips), yarns, twine, cordage, rope, or fabric strips and results in a textile fabric." According to the facts in NY N307920, the fabric-making process occurs in China. Therefore, since the fabric is formed by the fabric-making process in a single country, the country of origin of the subject pet bowl mat is China.

HOLDING:

By application of GRI 1 and 6, the subject pet bowl mat is classified in heading 6307, HTSUS. Specifically, the pet bowl mat is classified in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other." The general, column one rate of duty is 7% *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 6307.90.98, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent *ad valorem* rate of duty.

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 at https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY N307920, dated December 18, 2019, is hereby MODIFIED.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection to Google's federally registered and recorded "NEST" (U.S. Trademark Registration No. 4,571,759/ CBP Recordation No. TMK 19–01182) and the "NEST (Stylized)" (U.S. Trademark Registration No. 4,309,957/ CBP Recordation No. TMK 19–01183) trademarks. Notice of the receipt of an application for "Lever-Rule" protection was published in the March 22, 2023, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Suzanne Schultz, Intellectual Property Enforcement Branch, Regulations and Rulings, (202) 325–1989.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection for NEST thermostats, intended for sale in the following European countries: Austria, Belgium, Denmark, France, Germany, Great Britain, Ireland, Italy, Netherlands, and Spain, that bear the "NEST" (U.S. Trademark Registration No. 4,571,759/ CBP Recordation No. TMK 19–01182) and the "NEST (Stylized)" (U.S. Trademark Registration No. 4,309,957/ CBP Recordation No. TMK 19–01183) trademarks.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market NEST thermostats differ physically and materially from NEST thermostats authorized for sale in the United Sates with respect to the following product characteristics: the packaging and labeling are not intended to conform to U.S. legal and regulatory requirements, there is no actionable warranty, and there is an incompatibility with U.S. heating systems due to different voltage requirements.

ENFORCEMENT

Importation of NEST thermostats intended for sale in the European countries listed above is restricted, unless the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: August 15, 2023

DATES AND DRAFT AGENDA OF THE SEVENTY-SECOND SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 72nd session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, (Claudia.K.Garver@cbp.dhs.gov), Attorney-Advisor, Tom Beris (Tom.P.Beris@cbp.dhs.gov), Attorney-Advisor, Office of Trade, Regulations and Ruling, U.S. Customs and Border Protection, or Daniel Shepherdson (daniel.shepherdson@usitc.gov), Senior Attorney-Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in

Brussels, Belgium. The next session of the HSC will be the 72nd, and it will be held from Monday September 18, to Friday September 29, 2023.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. U.S. Customs and Border Protection serves as the head of the delegation to the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either U.S. Customs and Border Protection or the ITC. Comments on agenda items may be directed to the above-listed individuals.

GREGORY CONNOR
Chief,
Electronics, Machinery, Automotive, and
International Nomenclature Branch

Attachment

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITEE

-

NC3088Eb

72nd Session

-

Brussels, 7 August 2023.

DRAFT AGENDA OF THE 72nd SESSION OF THE HARMONIZED SYSTEM COMMITTEE

From 18 to 29 September 2023.

N.B.: The Presessional Working Party (to examine the questions under Agenda Item V) will be held on Thursday 14 September 2023 (10 a.m.) and Friday 15 September 2023 (5 p.m.).

18 September 2023: Adoption of the Report of the 62nd Session of the HS Review Sub-Committee.

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U.S. Court of International Trade

Slip Op. 23–113

ELLWOOD CITY FORGE CO., ELLWOOD NATIONAL STEEL CO., ELLWOOD QUALITY STEELS CO., and A. FINKL & SONS, Plaintiffs, v. UNITED STATES, Defendant, and BHARAT FORGE LTD., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 21–00007

[Granting Plaintiffs' Motion for Judgment on the Agency Record and remanding to Commerce with instructions to comply with *Regents*]

Dated: August 11, 2023

Jack A. Levy, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Plaintiffs Ellwood City Forge Co., Ellwood National Steel Co., Ellwood Quality Steels Co., and A. Finkl & Sons. With him on the brief were *Thomas M. Beline*, *Myles S. Getlan*, *James E. Ransdell, IV*, and *Nicole Brunda*.

Sarah E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, *W. Mitch Purdy*, Of Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, DC, for Defendant-Intervenor Bharat Forge Limited. With her on the brief was *Brittany Renee Powell* and *Ronald M. Wisla*.

OPINION

Vaden, Judge:

Plaintiffs Ellwood City Forge Co., Ellwood National Steel Co., Ellwood Quality Steels Co., and A. Finkl & Sons (collectively, Ellwood City) challenge Defendant Department of Commerce's (Commerce) Final Determination as modified by the results following the requested voluntary remand in its antidumping investigation of forged steel fluid end blocks from India. Pls.' Revised Mot. for J. on the Agency R. at 1 (Pls.' Revised Mot.), ECF No. 33; *see Forged Steel Fluid End Blocks from India: Final Negative Determination of Sales at Less Than Fair Value* (Negative Determination), 85 Fed. Reg. 80,003 (Dec. 11, 2020); Final Results of Redetermination Pursuant to Court Remand (Remand Results), ECF No. 29. Ellwood City argues that substantial evidence fails to support Commerce's determination that Defendant-Intervenor Bharat Forge Ltd. (Bharat) did not dump forged steel fluid end blocks at less than fair value and that Com-

merce did not comply with its statutory obligation to conduct on-site verification. Pls.' Revised Mot. at 1–3, ECF No. 42. For the reasons set forth below, the Court **GRANTS** Plaintiffs' Motion for Judgment on the Agency Record and **REMANDS** the case to Commerce for further proceedings consistent with this opinion.

BACKGROUND

The products at issue in this case are forged steel fluid end blocks produced in India for import into the United States. Commerce described the covered merchandise in its announcement of the investigation's initiation:

> The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.
>
> The term "forged" is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 andA788. . . .
>
> The products covered by this investigation are: (1) Cut-to length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm). . . .
>
> A fluid end block may be imported in finished condition (i.e., ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (i.e., forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, and Italy: Initiation of Less-Than-Fair-Value Investigations (Initiation of Investigations), 85 Fed. Reg. 2,394, 2,399 (Jan. 15, 2020).

I. The Disputed Final Determination

On December 19, 2019, Ellwood City petitioned Commerce to initiate an antidumping investigation into the importation of forged steel fluid end blocks from Germany, India, and Italy. Initiation of Investigations, 85 Fed. Reg. 2,394. Bharat, an Indian producer and exporter of fluid end blocks, was selected as a respondent in the petition that initiated the investigation. *Id.* at 2,397–98. Commerce sent Bharat a standard antidumping questionnaire on January 22, 2020. Decision Memorandum for the Preliminary Negative Determination at 3 (PDM), J.A. at 4,179, ECF No. 43. The agency issued further supplemental questionnaires to Bharat from March to July 2020; and Bharat, with the grant of some extensions, submitted timely responses. *Id.*

Bharat's responses were vital to Commerce's determination of the antidumping margin because there is no domestic Indian market for fluid end blocks. Consequently, Commerce calculated the dumping margin using the constructed value of the goods in question, encompassing Bharat's costs of production, sales figures, general and administrative expenses, and profits. *See* 19 U.S.C. § 1677b(e); PDM at 4, J.A. at 4,180, ECF No. 43; Commerce Antidumping Questionnaire at Section D (Jan. 22, 2020), J.A. 80,098–117, ECF. No. 44. In response to Bharat's answers to Commerce's initial questionnaire, Ellwood City filed comments challenging Bharat's submissions and alleging that Bharat had failed to cooperate. Deficiency Comments Concerning Section D Questionnaire Response of Bharat Forge (Section D Deficiency Comments) at 1–43, J.A. 83,140–83 (Apr. 7, 2020), ECF No. 44; Petitioners' Comments in Advance of the Preliminary Determination at 11–38 (Jan. 24, 2020), J.A. at 83,228–66, ECF No. 44.

During the period in which Bharat submitted its questionnaire responses, the World Health Organization classified COVID-19 as a pandemic. *WHO Director General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), https://bit.ly/3Ed8Fdj. On March 15, 2020, the Department of Commerce issued an agency-wide memo prohibiting all travel not "mission-critical and pre-approved by senior bureau leadership." DEP'T OF COMMERCE, *All Hands: Coronavirus Update (3–16–20)*, https://bit.ly/commercecoronavirus. The Centers for Dis-

ease Control issued a Level 4 travel advisory, urging all U.S. citizens to avoid international travel on March 31, 2020. CENTERS FOR DISEASE CONTROL AND PREVENTION, Global Level 4 Health Advisory: Do Not Travel (Mar. 31, 2020). During this period, Petitioners repeatedly noted that there was uncertainty surrounding Commerce's ability to conduct an effective on-site verification. *See, e.g.*, Section D Deficiency Comments at 2, J.A. at 83,141, ECF No. 44; Deficiency Comments on Bharat Forge Limited's Supplemental Section A Questionnaire Response at 2 (Apr. 27, 2020), J.A. at 87,573, ECF No. 44.

On March 26, 2020, Commerce postponed issuance of the results of the preliminary investigation until July 16, 2020. *See Forged Steel Fluid End Blocks from the Federal Republic of Germany, India and Italy: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 17,042 (Mar. 26, 2020). Based on the initial information gathered from Bharat, Commerce issued a Preliminary Negative Determination of Sales at Less Than Fair Value with the preliminary dumping margin for Bharat set at zero. *Forged Steel Fluid End Blocks from India: Preliminary Negative Determination of Sales at Less Than Fair Value, Postponement of Final Determination* (Preliminary Determination), 85 Fed. Reg. 44,517–18 (July 23, 2020). Commerce also stated that it "intends to verify the information relied upon in making its final determination concerning the estimated weighted-average dumping margin calculated for Bharat." *Id.* at 44,518.

In response to Commerce's preliminary determination, Ellwood City filed comments proposing two alternatives: Either (1) Commerce should disregard Bharat's inaccurate cost allocations, cancel verification, and apply adverse inferences drawn from facts otherwise available to the entirety of Bharat's submissions, or (2) Commerce should ask questions Ellwood City suggested "in the event that Commerce conducts verification or issues a verification outline." Petitioners' Comments Following Preliminary Determination at 19–25, J.A. at 83,321–27, ECF No. 44. Instead of performing on-site verification, Commerce issued what it called a "Questionnaire in Lieu of Verification" to Bharat on September 2, 2020. Questionnaire in Lieu of Verification, J.A. at 83,332–38, ECF. No. 44. Ellwood City expressed misgivings about Commerce's decision, noting that Commerce's questionnaire "contains significantly fewer topics than complete sales and cost verification agendas." Petitioners' Opposition to Second Extension at 3 (Sept. 11, 2020), J.A. at 87,606, ECF No. 44. Even Bharat expressed some concerns about the process by reaching out to Commerce and suggesting the possibility of conducting a "virtual verifi-

cation" via teleconference. Bharat Possibility of Virtual Verification to Respond to Questions at 1– 2 (Oct. 7, 2020), J.A. at 87,616–17, ECF No. 44.

Bharat submitted its responses to the questionnaire on September 15, 2020. Bharat Response to Questionnaire in Lieu of On-Site Verification, J.A. at 87,367, ECF No. 44. Bharat sought to answer Commerce's request for more specificity surrounding its cost centers[1] by providing Exhibit D-71. *Id.* at 6–8, Ex. D-71. The exhibit provided a detailed breakdown of location-specific costs with subcategories including general and administrative expenses and manufacturing costs such as forging and machining. *Id.* at Ex. D-71. Commerce asked Bharat about these cost centers because properly allocating costs to the production of the subject merchandise is essential to the accurate calculation of the constructed value of the goods. *See* 19 U.S.C. § 1677b(e).

On October 16, 2020, Ellwood City filed its administrative case brief and again charged that Bharat had falsified evidence and had "***failed verification***." Administrative Case Brief at 12, J.A. at 83,444, ECF No. 44 (emphasis in original). It argued that Bharat's new submissions revealed that the company had intentionally misreported the costs allocated to fluid end block production in its original submissions. *Id.* at 12–13. Ellwood City also argued that Bharat had underreported its general and administrative expenses. *Id.* at 18–26. To illustrate its argument, Ellwood City compared the revised Exhibit D-71 with Bharat's previous submissions and claimed that Bharat had left general and administrative expenses from two cost centers out of its allocation ratio. *Id.* This omission, according to Ellwood City, artificially lowered Bharat's general and administrative expenses attributable to fluid end block production. *Id.* at 25. Lower production costs make a finding of dumping less likely by lowering the value against which Commerce compares U.S. sales prices.

Bharat filed its rebuttal brief on October 29, 2020. Rebuttal Brief of Bharat Forge Limited, J.A. at 90,018, ECF No. 44. Bharat contended that it had submitted no new information but rather had simply provided a further breakdown of cost allocations of the previously reported cost centers. *Id.* at 3–4. Because Ellwood City misunderstood Bharat's calculation method, Bharat asserted that Ellwood City had also mistakenly concluded that Bharat had underreported its costs. *Id.* at 5–7. Bharat claimed that it did nothing more than calculate its general and administrative expenses by following the

[1] The Oxford English Dictionary defines cost centers as follows:

> (a) Chiefly Accounting a part of an organization to which costs may be charged for accounting purposes; (b) Business a section of an organization that adds to costs and does not generate revenue directly; frequently in contrast to profit centre.

OXFORD ENGLISH DICTIONARY (Aug. 2023), https://tinyurl.com/33jh6mx9.

Department's standard methodology and instructions. *Id.* at 7–10.

On November 23, 2020, Ellwood City requested that Commerce strike the allegedly new information that Bharat had submitted in its rebuttal brief. *See* Petitioners' Request to Strike Portions of Bharat Forge's Rebuttal Brief at 1–9, J.A. at 90,050–58, ECF No. 44. Commerce held a hearing via video teleconference to allow both parties to present their cases to the Department on November 16, 2020. *In re* Forged Steel Fluid End Blocks from India (Hearing) at 1, J.A. at 83,537, ECF No. 44. In that hearing, counsel for Ellwood City complimented Commerce's use of a questionnaire in lieu of verification, stating "thankfully, you have issued verification questionnaires to Bharat Forge, and conducted what is in effect a virtual verification." *Id.* at 12. Throughout the hearing, Ellwood City's counsel referred to the questionnaire as a "verification questionnaire" and argued that Bharat had "failed to satisfy the objectives set out in Commerce's verification questionnaire." *Id.* at 16, 18–22, 25.

Nonetheless, in its final Issues & Decision Memorandum (IDM), Commerce stated that it "was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation, as provided for in section 782(i) of the Act." IDM at 2, J.A. at 83,613, ECF No. 44. Commerce then relied on the unverified information as facts otherwise available under 19 U.S.C. § 1677e(a)(2) to calculate Bharat's dumping margin. *Id.* It refused Ellwood City's invitation to apply adverse inferences to the entire record. Instead, Commerce only drew adverse inferences to fill selected gaps in Bharat's submissions — net weight reporting, certain component costs, and sales of two particular products — because in these instances Bharat failed to provide the information Commerce requested. *Id.* at 3–4, 8–10. The agency, however, relied on the remainder of Bharat's submitted data because "in general, Bharat complied with our requests for information, acted to the best of its ability to be transparent in its response, and supplied supporting information that was in greater detail than that contained in prior submissions." *Id.* at 5. Commerce thus rejected Ellwood City's claims that Bharat underreported its production costs and its general and administrative expenses. *Id.* at 5–7. Because of the limited application of adverse inferences, Bharat retained its zero percent dumping margin from the preliminary determination. *See* Final Negative Determination, 85 Fed. Reg. at 80,004.

II. The Present Dispute

Ellwood City filed suit on January 8, 2021. *See* Summons, ECF No. 1. It challenged the legality of Commerce's failure to perform verifi-

cation, alleged that Commerce unlawfully accepted new information in Bharat's rebuttal brief, and asserted that substantial evidence does not support Commerce's acceptance of Bharat's cost allocations and expense calculations. *See* Compl. ¶¶ 23–39, ECF No. 8; Pls.' Mot. for J. on Agency Record (Pls.' Mot.) at 17–18, 32–44, ECF No. 22.

Commerce moved for a voluntary remand "to reconsider its position on the questionnaire in lieu of on-site verification and subsequent application of facts available in this investigation." Def.'s Resp. and Mot. for Voluntary Remand (Mot. for Remand) at 5–6, ECF No. 24. The Court granted Commerce's Motion on October 29, 2021. Order Granting Voluntary Remand (Remand Order), ECF No. 28. The Court gave Commerce 150 days to reconsider its decision and permitted Commerce "at its discretion to perform on-site verification, which would moot all procedural issues created by the agency's decision to short-circuit verification." *Id.* at 5. The Court also noted that travel restrictions to India were now significantly relaxed so that on-site verification was once again possible. *Id.* Commerce had two options on remand under Supreme Court precedent: It could either give a fuller explanation of its reasoning at the time it made its decision, or it could take new agency action. *Id.*

Commerce — after taking the full 150 days — published its Remand Results. Final Results of Redetermination Pursuant to Court Remand (Remand Results), ECF No. 29. The agency did not perform on-site verification, nor did it take new action to verify the information on the record. Instead, Commerce "reconsidered our use of a questionnaire in lieu of on-site verification and no longer find that we were unable to verify Bharat's information." *Id.* at 4. Because of this new determination, the agency no longer needed to rely on facts otherwise available for its final determination because it could rely on the now "verified" information. *Id.* Commerce also rejected Ellwood City's comments arguing that it did not comply with the remand by failing to conduct on-site verification. *Id.* at 7. It asserted that the verification statute gives it discretion in its procedures and that Ellwood City was pleased with the questionnaire during the investigation. *Id.* at 7–8. Because the agency could not have conducted an on-site verification in this investigation during the pandemic, it did not do so now and did not issue a verification report. *Id.* at 8–9.

On March 11, 2022, Ellwood City filed a Revised Motion for Judgment on the Agency Record, arguing that the Remand Results constitute a new agency action because they provide a new rationale. Pls.' Revised Mot. at 22, ECF No. 34 (noting that the agency's current position is "the direct opposite of Commerce's prior position"). It also asserts that substantial evidence does not support Commerce's find-

ing of a *de minimis* dumping margin for Bharat because Bharat underreported its costs and general and administrative expenses. *Id.* at 2–3.

Commerce filed its response brief on May 10, 2022. Def.'s Resp., ECF. No. 38. The agency argues that it complied with the Remand Order and denies that it took new agency action. *Id.* at 24. Instead, it states that the "change in characterization regarding the verification questionnaire through the remand determination did not change the action taken by the agency" but simply "reconsidered and clarified [the] determination." *Id.* Defendant-Intervenor Bharat filed its corrected response brief on May 23, 2022, contending that administrative exhaustion bars Ellwood City's argument that Commerce failed to comply with the verification statute. Def-Int.'s Resp. at 2–5, ECF No. 40. Ellwood City responded in its reply brief that exhaustion does not apply because Commerce's voluntary remand reopened the issue of verification. Pls.' Reply at 12–16, ECF No. 41.

The Court held oral argument on October 20, 2022. ECF No. 47. Counsel for the Government maintained the position that Commerce had not taken new agency action on remand; instead, "it considered itself expounding on its previous reasoning." Transcript (Tr.) at 6:6–7, ECF No. 49. Government counsel also affirmed that there was no reason that the Supreme Court's holding in *Regents* would not apply in the context of a voluntary remand. *Id.* at 24:14–16 (Ms. Kramer: "Your Honor, I don't necessarily see a distinction in applying it to an involuntary versus a voluntary remand.").

Counsel was unable to explain another oddity. Commerce's position here is the exact opposite of its position in another case currently before the Court presenting the same legal issue. *See Bonney Forge Corp. v. United States*, Case No. 20–03837. In that case — argued five days after this case — Commerce took the position that it *had* taken new agency action when it found on remand that it had properly complied with the verification requirement. *See* Remand Results, ECF No. 61, Case No. 20–03837. Agency counsel offices and the requirement that the Department of Justice manage all litigation for cabinet departments exist so that the Government does not take contradictory positions on similar legal questions. That consultation process completely failed in these cases. In the future, Commerce should settle on one legal position before arriving in court rather than trying to literally have it both ways. *Cf. Acquisition 362 LLC v. United States*, 59 F.4th 1247, 1251–52 (Fed. Cir. 2023) ("In the future, we expect Commerce will be both more specific and complete than it was initially about the sequence of government and party actions leading to the challenges presented to the CIT and on appeal.").

STANDARD OF REVIEW

Federal Circuit precedent allows for an agency to request a voluntary remand — without confessing error — to reconsider its position. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Although the scope of issues Commerce may reconsider in its remand can be broad, Supreme Court precedent limits the procedural avenues available to the agency. An agency has two options on remand:

> First, the agency can offer a "fuller explanation of the agency's reasoning *at the time of the agency action*" . . . . This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. Alternatively, the agency can "deal with the problem afresh" by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1907–08 (2020) (*Regents*) (internal citations omitted); *accord SKF*, 254 F.3d at 1028 ("In the second situation, in which the agency seeks to defend its decision on grounds not previously articulated by the agency . . . . we generally decline to consider the agency's new justification for the agency action[.]"); *Timken Co. v. United States*, 894 F.2d 385, 389 (Fed. Cir. 1990) ("[A]gency action cannot be sustained on *post hoc* rationalizations supplied during judicial review.") (citations omitted).

"The court reviews remand determinations for compliance with the court's order." *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 1272, 1274 (2008) (citations omitted); *accord Ad Hoc Shrimp Trade Action Comm. v. United States*, 992 F. Supp. 2d 1285, 1290 (CIT 2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015). "Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989). The Court may also issue a further remand order when the remand results are not supported by substantial evidence or otherwise in accord with the law. *See Nippon Steel Corp. v. ITC*, 494 F.3d 1371, 1379 (Fed. Cir. 2007).

DISCUSSION

Commerce Failed to Comply with *Regents*

The primary issue facing the Court is whether Commerce complied with *Regents*. The agency could comply by either taking new agency action or giving further explanation of its original decision. However, Commerce in its Remand Results and briefing does not even cite *Regents*. Instead, it contradictorily asserts the following: (1) Commerce determines that it had verified Bharat's submissions when it sent the original questionnaire in lieu of verification; (2) it rescinds its application of facts otherwise available, relying on the newly verified information in making its Final Determination; and (3) it maintains that these reversals of its prior positions "did not change the action taken by the agency." Def.'s Resp. at 24, ECF No. 38. Ellwood City counters that Commerce took new agency action because the Remand Results "reversed Commerce's 'prior reasons' with respect to verification." Pls.' Reply at 9, ECF No. 41 (citation omitted). Commerce thus had to comply with the requirements of new agency action and verify the information on which it relied in making its final determination. *Id.* at 10. The Court finds that the case must be **REMANDED** back to the agency to comply with *Regents* because Commerce failed to do so here.

Regents gives an agency two paths on remand: (1) The agency can offer a fuller explanation of its reasoning *at the time* it made the decision in question; or (2) the agency can take *new* agency action and provide *new* reasoning for that action. 140 S. Ct. at 1907–08. When offering a fuller explanation on remand, an agency may only refer to the agency's reasoning "at the time of the agency action" and "may not provide new [reasons] to prevent '*post hoc* rationalization.'" *Id.* (citations omitted). Alternatively, when taking new agency action, an agency "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* at 1908. For example, "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Id.* at 1913 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). And, when deviating from consistent past practice or policy, an agency "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009))).

These two paths offered by *Regents* map onto the Federal Circuit's opinion in *SKF*, which explains the five different approaches an agency may adopt when agency action is subject to judicial review. 254 F.3d at 1027–1030. First, an agency may defend its decision on "the grounds articulated by the agency," and a remand does not normally come into play. *Id.* at 1028. Second, an agency seeks to defend its decision "on grounds not previously articulated by the agency," and here, the court's obligation is to "decline to consider the agency's new justification." *Id.* at 1028. This second situation accords with *Regents*, which extended the bar on *post hoc* rationalizations from the famed *Chenery* case to include agency justifications on remand. *See Sec. & Exch. Comm'n v. Chenery Corp*., 332 U.S. 194, 196 (1947); *Regents*, 140 S. Ct. at 1907–08. Third, an agency may "seek a remand because of intervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation." *SKF*, 254 F.3d at 1028. In this case, *Regents* requires that the agency take new agency action if it is to change its position in light of the intervening event. *Regents*, 140 S. Ct. at 1907–08. Fourth, "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." *SKF*, 254 F.3d at 1029. *Regents* also requires that the agency take new agency action if it wishes to change its previous position in this situation. *Regents*, 140 S. Ct. at 1907–08. Fifth, when an agency admits that it has erred and wishes for a remand to change its previous decision, here too an agency must comply with all the procedural requirements of new agency action under *Regents*. *See SKF*, 254 F.3d at 1029.

Commerce has failed to comply with either pathway offered by *Regents*. In its briefs and at oral argument, the Government claimed that the agency had simply given a fuller explanation of its original decision in its Remand Results. *See* Def.'s Resp. at 24, ECF No. 38; Tr. at 6:6–7, ECF No. 49. If this were an accurate description of what occurred, the agency is guilty of an "impermissible *post hoc* rationalization." *Regents*, 140 S. Ct at 1908 (internal quotation marks omitted). Its Remand Results purporting to clarify the original action taken instead contradict and reverse Commerce's original position. *Compare* IDM at 2, J.A. at 83,613, ECF No. 44 (explaining that Commerce "was unable to conduct on-site verification of the information relied on in making its final determination in this investigation, as provided for in section 782(i) of the Act"), *with* Remand Results at 4, ECF No. 29 (stating that the agency "reconsidered our use of a questionnaire in lieu of on-site verification and no longer find that we

were unable to verify Bharat's information"). Commerce did not further explain the rationale of its original decision; it switched to a new rationale for an entirely different position. *Cf. Regents*, 140 S. Ct. at 1907–08. In short, Commerce took new agency action without complying with the procedural requirements for that action. *Cf.* Tr. at 6:6–7, ECF No. 49 ("Yes, Your Honor, it [the agency] considered itself expounding on its previous reasoning."). *Regents* requires Commerce to make that decision "afresh" and to explain why the prior questionnaire it sent was sufficient and no additional verification was needed in the post-pandemic world of 2022, *i.e.*, during the remand period. Commerce also failed to discuss why its departure from its past practice of on-site verification did not harm Plaintiffs' reliance interests or why it rejected other alternatives, as *Regents* demands. *Compare Regents*, 140 S. Ct. at 1913 (explaining that an agency "must consider the 'alternative[s]' that are 'within the ambit of the existing [policy],'" explain why it did not choose those alternatives, and that "serious reliance interests . . . must be taken into account") (alternations in original, citations omitted), *with* Remand Results at 9, ECF No. 29 (considering only the possibility of an on-site verification, ignoring other alternatives such as a virtual verification, and failing to discuss reliance interests).

Commerce's own decisions have greatly complicated its legal position. When first brought to court, Commerce declined to defend its original decision on the merits. It instead asked for a voluntary remand to reconsider its verification decision. That allowed Plaintiffs to assert an argument they may well have otherwise waived — that the verification process was insufficient. *Compare* Remand Results at 7–8 (quoting Plaintiffs thanking the agency for issuing a verification questionnaire), *with Ellwood City Forge Co. v. United States*, No. 1:21–00077, 2023 CIT LEXIS 113, at *12 (CIT July 24, 2023) (holding that, when an agency asks for a voluntary remand, it typically "obviate[es] any concern that failure to exhaust" by the plaintiff prohibits the agency from considering the question on which it seeks remand). Commerce then chose to reverse its prior position, but it ignored this Court's admonition to follow the Supreme Court's *Regents* opinion and disclaimed that it was making a new decision. *See, e.g.*, Remand Order at 5, ECF No. 28 ("As the *Regents* Court noted, Commerce has two options on remand."). An agency is free to reverse its prior position, but it may only do so by taking new agency action. Having chosen to reverse itself and now assert that it did verify Bharat's information, Commerce cannot short circuit the procedural requirements for new agency action: (1) an explanation for why it now chooses not to do on-site verification, (2) an explanation for the range

of other alternatives the agency considered within the ambit of on-site verification and why it rejected them, and (3) an explanation for why its decision to use only questionnaires did not violate any legitimate reliance interests on Plaintiffs' part. *Regents*, 130 S. Ct. at 1907–08, 1913. Because Commerce ignored *Regents*, its Remand Redetermination is not supported by substantial evidence, fails to comply with the law, and therefore must be returned to the agency.

CONCLUSION

Commerce has changed its mind regarding whether it verified the information it received from Bahrat during its investigation of imports of fluid end blocks from India. Unfortunately, it did not follow the necessary procedural prerequisites that must follow a decision to reverse course. Consequently, it is:

ORDERED that Plaintiffs' Motion for Judgment on the Agency Record is **GRANTED**;

The Court **REMANDS** the case for up to 150 days for Commerce to comply with the requirements of the *Regents* decision; and it is

ORDERED that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Second Remand Redetermination; and it is further

ORDERED that Plaintiffs shall have 30 days from the filing of the Second Remand Redetermination to submit comments to the Court;

ORDERED that Defendant shall have 15 days from the date of Plaintiffs' filing of comments to submit a response; and

ORDERED that Defendant-Intervenor shall have 15 days from the date of Defendant's filing of comments to submit a response.

SO ORDERED.

Dated: August 11, 2023
New York, New York

/s/ *Stephen Alexander Vaden*
JUDGE

Slip Op. 23–114

DILLINGER FRANCE S.A., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION AND SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Judge Gary S. Katzmann
Court No. 17–00159
PUBLIC VERSION

[The court sustains Commerce's *Third Remand Results*.]

Dated: August 15, 2023

Marc E. Montalbine, DeKieffer & Horgan PLCC, of Washington, D.C., argued for Plaintiff Dillinger France S.A. With him on the briefs were *Gregory S. Menegaz*, *Alexandra H. Salzman*, *Merisa A. Horgan*, and *Alexandra H. Salzman*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Stephanie M. Bell, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Nucor Corporation. With her on the brief were *Alan H. Price* and *Christopher B. Weld*.

Roger B. Schagrin, Schagrin Associates, of Washington D.C., for Defendant-Intervenor SSAB Enterprises LLC.

OPINION

Katzmann, Judge:

The court returns to the less-than-fair-value ("LTFV") investigation of certain carbon and alloy steel cut-to-length plate from France to consider the U.S. Department of Commerce ("Commerce")'s latest remand results. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan*, 82 Fed. Reg. 24096 (Dep't Com. May 25, 2017), P.R. 456 ("*Am. Final Determination*"); *see also Final Results of Redetermination Pursuant to Court Remand* (Dep't Com. Nov. 15, 2022), Nov. 16, 2022, ECF No. 120–1 ("*Third Remand Results*"). The sole issue is whether — following the Federal Circuit's ruling in *Dillinger France S.A. v. United States*, 981 F.3d 1318 (Fed. Cir. 2020) ("*Dillinger III*") — Commerce permissibly relied on Plaintiff Dillinger France S.A. ("Dillinger")'s normal books and records to supply missing cost information in calculating antidumping duties.

For the reasons outlined below, the court sustains Commerce's *Third Remand Results*.

BACKGROUND

While the court presumes familiarity with *Dillinger France S.A. v. United States*, 42 CIT __, 350 F. Supp. 3d 1349 (2018) ("*Dillinger I*"), *Dillinger France S.A. v. United States*, 43 CIT __, 393 F. Supp. 3d 1225 (2019) ("*Dillinger II*"), *Dillinger III*, 981 F.3d 1318, and *Dillinger France S.A. v. United States*, 46 CIT __, 589 F. Supp. 3d 1252 (2022) ("*Dillinger IV*"), for ease of reference, the court sets out the relevant legal, factual, and procedural background below.

I. Legal Background

A. Normal Value

When a foreign firm sells a product for less than fair value in the United States, such a product is deemed to be "dumped." *See Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011). Commerce identifies "dumping" by assessing whether an investigated product ("subject merchandise")'s export price — as measured by U.S. sales price — is lower than the product's normal value, which is typically measured by the price of the product in the home market. *See Maverick Tube Corp. v. Toscelik Profil*, 861 F.3d 1269, 1271 (Fed. Cir. 2017); *see also* 19 U.S.C. § 1677b(a)(1)(B)(i). Where Commerce identifies dumping,[1] the agency imposes antidumping duties on the foreign merchandise proportional to the amount by which normal value exceeds the export price. *See* 19 U.S.C. § 1673; *id.* § 1677(35)(A).

To complete these assessments and calculations, Commerce must establish the normal value of the investigated foreign merchandise, which again, generally requires establishing the home market sales price. In determining home market sales price, "Commerce may disregard sales made at less than the manufacturer's cost of production." *Saha Thai*, 635 F.3d at 1338 (citing 19 U.S.C. § 1677b(b)(1)). "Cost of production" is defined as

> [A]n amount equal to the sum of—
>
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during

[1] And where the United States International Trade Commission makes the additional requisite finding — not at issue in the case at bar — that the sale of such merchandise below fair value is materially injuring, threatening, or impeding the establishment of an industry in the United States. *See Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017).

> a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3).

"If no sales in the exporting country remain after disregarding sales below [cost of production], then Commerce will alternatively base [normal value] on the constructed value . . . of the merchandise." *Saha Thai*, 635 F.3d at 1338. The Federal Circuit has explained that cost of production and constructed value "are closely related." *Id.* Constructed value "includes the same or similar elements as [cost of production]" — namely, "(1) the cost of manufacture; (2) 'selling, general, and administrative expenses;' and (3) packaging expenses" — "but with the additional component of profit." *Id.* (quoting 19 U.S.C. § 1677b(b)(3), (e)).

"The statute further explains that such '[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 . . . and reasonably reflect the costs associated with the production and sale of the merchandise.'" *Id.* at 1341–42 (alterations in original) (quoting 19 U.S.C. § 1677b(f)(1)(A)). The Federal Circuit has interpreted "the legislative history of section 1677b(f) . . . [and] its plain meaning[] [to] indicate[] Congress intended that Commerce rely on a producer's or exporter's books and records if they . . . reasonably reflect the costs of production." *Dillinger III*, 981 F.3d at 1323.

B. Facts Otherwise Available & Adverse Inferences

If an interested party "withholds information" or otherwise does not comply with Commerce's requests, *see* 19 U.S.C. § 1677e(a)(2), or if "necessary information is not available on the record," *id.* § 1677e(a)(1), Commerce "shall . . . use facts otherwise available" to fill informational gaps and render determinations, *id.* § 1677e(a). The Federal Circuit has interpreted this provision to mean that "[t]he mere failure of a respondent to furnish requested information -for any reason — requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination."

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The focus of [1677e(a)(1)] is respondent's *failure to provide information*. The reason for the failure is of no moment." (emphasis in original)).

Moreover, where Commerce makes a "valid decision to use facts otherwise available," *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1301, 435 F. Supp. 2d 1261, 1289 (2006), Commerce may then make the additional decision to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available" provided that Commerce supportably finds the respondent "has failed to cooperate by not acting to the best of its ability," *Nippon Steel*, 337 F.3d at 1380–81 (alteration in original) (quoting 19 U.S.C. § 1677e(b)(1)).

II. Factual Background

On May 25, 2017, Commerce imposed an antidumping margin of 6.15 percent on Dillinger's cut-to-length plate products. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from France: Final Determination of Sales at Less than Fair Value*, 82 Fed. Reg. 16363 (Dep't Com. Apr. 4, 2017), P.R. 451; Mem. from J. Maeder to G. Taverman, re: Issues and Decision Memorandum for the Final Affirmative Antidumping Duty Determination and Determination of Sales at Less Than Fair Value (Dep't Com. Mar. 29, 2017), P.R. 445 ("IDM"); *see also Am. Final Determination*, 82 Fed. Reg. at 24098. Dillinger sells plate designated as prime and non-prime, with non-prime plate comprising plates that are rejected for failing to meet the standards for prime plate. *See Dillinger III*, 981 F.3d at 1321. Such non-prime products are an inevitable consequence of the production process of prime products. Because non-prime plate are sold without certification as to grade, type, or chemistry and cannot be used in applications that require such certifications, non-prime plate attract a lower market value than prime plate. *See* IDM at 58–60.

In its normal books and records, Dillinger values non-prime products at their likely selling price — which comes out to [[ ]] Euros/ton. *See* IDM at 59; *see also* Mem. from R.B. Greger to N.M. Harper, re: Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (Dep't Com. Mar. 29, 2017), P.R. 447, C.R. 701; Mem. from R.B. Greger to N.M. Halper, re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination at attach. 2 (Dep't Com. Nov. 4, 2016), P.R. 366, C.R. 405. However, when responding to Commerce's questionnaires in the LTFV investigation, Dillinger reported its costs of

production for non-prime plate as the average cost of production for all prime plate sold during the period of investigation ("POI") of [[ ]] Euros/ton — a figure higher than the likely selling price. *See* IDM at 59; *see also* Dillinger Second Supplemental Section D Response Part II at app. SD-24 (Sept. 28, 2016), P.R. 289, C.R. 338 & 342.

For its part, when calculating normal value, Commerce adjusted the reported costs for non-prime products back to the value recorded in Dillinger's normal books and records — i.e., the lower estimated sales price of [[ ]] Euros/ton — and then allocated the difference between the reported and adjusted figure for non-prime products to the cost of production for prime products. IDM at 59.

III. Procedural Background

A. The Federal Circuit's Remand

Dillinger challenged several aspects of Commerce's determination before this court in *Dillinger I*, including the agency's reliance on Dillinger's normal books and records to reallocate production costs between prime and non-prime plate in calculating normal value. *See* 350 F. Supp. 3d at 1374–77. This court sustained Commerce's cost adjustments. *See id*. However, the Federal Circuit disagreed, ruling in *Dillinger III* that Commerce's determination was erroneous because Dillinger's normal books and records reflect the estimated *selling price* of non-prime plate rather than *costs of production*, and thus failed to satisfy the requirement of § 1677b(f) that an exporter's records "reasonably reflect the costs associated with the production and sale of the merchandise." *See* 981 F.3d at 1321–24 (discussing 19 U.S.C. § 1677b(f)(1)(A)).[2] Accordingly, the Federal Circuit remanded to Commerce "to determine the actual costs of prime and non-prime products." *Id.* at 1324.

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[2] As the Federal Circuit noted in *Dillinger III*:

> It is unclear . . . 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 . . . .

981 F.3d at 1321 n.1. Recall that § 1677b(f)(1)(A) instructs:

> Costs 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 of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A).

B. Reopening the Administrative Record

To comply with the directive of the Federal Circuit "to determine the actual costs of prime and non-prime products," *id.*, on remand, Commerce reopened the administrative record and sent Dillinger a supplemental questionnaire requesting information on the physical characteristics and corresponding actual product-specific — also known as CONNUM[3] -specific — production costs of its non-prime plates. *See* Letter from T.A. Slaughter to Dillinger, re: Remand Redetermination at 3–5 (Dep't Com. Mar. 17, 2021), P.R.R. 9.[4] Dillinger responded to the agency that it was unable to identify all of the physical characteristics of its non-prime products; as such, Dillinger resubmitted production costs for its non-prime products derived from the average cost of producing all prime plate sold during the POI, namely the [[ ]] Euros/ton figure. *See* Letter from Dillinger to G.M. Raimondo, re: Supplemental Questionnaire Response at 7–13 (June 23, 2021), P.R.R. 16, C.R.R. 5.

Commerce determined that Dillinger's response was insufficient to calculate actual costs of production — as required by the Federal Circuit in *Dillinger III* — and that it was, thus, necessary to invoke facts otherwise available under § 1677e(a)(1)[5] in rendering the remand results. *See Final Results of Redetermination Pursuant to Court Remand* at 6–7 (Dep't Com. Aug. 24, 2021), Aug. 25, 2021, ECF No. 85–1 ("*Second Remand Results*"). Because Commerce determined that "not knowing the actual cost of producing the non-prime merchandise directly impacts the amount of costs assigned to the production of the prime products," the agency found that cost information for both non-prime *and* prime products was missing. *Id.* at 6. Commerce utilized Dillinger's normal books and records — the data source to which the Federal Circuit had previously objected — as facts otherwise available to fill the informational gap. *Id.* As a result, Commerce continued to assess a weighted-average dumping margin of 6.15 percent on Dillinger's subject merchandise in the *Second Remand Results*. *Id.* at 22.

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[3] In LTFV investigations, products with identical physical characteristics are categorized by the same control number, or "CONNUM."

[4] P.R.R. refers to the public Remand Redetermination record; C.R.R. refers to the confidential Remand Redetermination record.

[5] Recall that 19 U.S.C. § 1677e(a)(1) instructs in relevant part:

> (a) In general
>
> If . . . necessary information is not available on the record . . . , the administering authority and the Commission shall, subject to section [1677m](d) of this title, use the facts otherwise available in reaching the applicable determination under this [sub]title.

19 U.S.C. § 1677e(a)(1).

C. This Court's Further Remand

Upon review of the *Second Remand Results* in *Dillinger IV*, this court first sustained Commerce's *general* invocation of facts otherwise available to supply the costs of production for both non-prime *and* prime products, but remanded for further explanation Commerce's *particular* selection of Dillinger's normal books and records as the facts otherwise available.

1. General Reliance on Facts Otherwise Available

Concerning the former ruling, this court held that where Dillinger knows the *total* costs it incurred over the POI to produce all of its plate products, but does not know the actual division of these total costs *among* prime and non-prime products, substantial evidence justified Commerce's conclusion that it was necessary to rely on facts otherwise available to supply the costs of production for both non-prime *and* prime plate. 589 F. Supp. 3d at 1260. The court noted that, as Plaintiff itself acknowledges, Dillinger tracks only actual *total* costs of producing two different types of plate — line-pipe plate and regular plate — which when added together equal the actual total costs of producing all plate over the period. *Id.* at 1257. However, prime *and* non-prime plate are produced within each of the line-pipe and regular groups, and Dillinger does not track the costs of prime versus non-prime products within these subgroups. *Id.*

Dillinger, nevertheless, maintained before this court that there was no missing information with respect to the costs of prime plate, such that any adjustments Commerce made on the basis of facts otherwise available must be limited to non-prime plate and cannot alter the properly reported costs of prime plate. *Id.* at 1256–57. But as Plaintiff itself explained, in its submissions to Commerce, Dillinger allocated costs between prime and non-prime products based on a "percentage yield" approach. *See id.* at 1258 n.6. This means that where [[ ]] percent of the total quantity of regular plate produced during the POI was non-prime, Dillinger allocated [[ ]] percent of the actual total costs of producing all regular plate to non-prime plate (and the remainder to prime); and where [[ ]] percent of the total quantity of line-pipe plate produced during the POI was non-prime, Dillinger allocated [[ ]] percent of the actual total costs of producing all line-pipe plate to non-prime plate (and the remainder to prime). *Id.* at 1257.

At oral argument on Commerce's *Second Remand Results*, this court asked the parties to consider the below Excel spreadsheet — in which the court assumed for hypothetical purposes that 60 percent of the plate Dillinger produced during the POI was prime and 40 per-

cent was non-prime — to inform the court's understanding that costs calculated for prime and non-prime plate under Plaintiff's "percentage yield" approach could potentially differ from those calculated under an "actual cost" approach:

	Plate No.	**Prime vs. Non- Prime**	**Cost**	
	1	Prime	$2.00	
	2	Prime	$4.00	
	3	Prime	$6.00	
	4	Prime	$8.00	
	5	Prime	$10.00	
	6	Prime	$12.00	
	7	Non-Prime	$2.00	
	8	Non-Prime	$4.00	
	9	Non-Prime	$6.00	
	10	Non-Prime	$8.00	
		Total Cost	$62.00	
		Non-Prime Costs	**Prime Costs**	**Total Cost**
Percentage Yield Approach (Assigning 60% of total costs ($62) to prime plate and assigning 40% of total costs ($62) to non-prime plate)		$24.80	$37.20	$62.00
Actual Cost Approach (Adding together actual costs of producing non-prime plate and adding together actual costs of producing prime plate)		$20.00	$42.00	$62.00

Id. at 1258 n.6. While it is undisputed that Dillinger does not track costs on the plate-specific basis necessary to complete the "actual cost" approach,[6] the above hypothetical illuminates that not knowing the actual cost of producing the *non*-prime merchandise directly impacts the amount of costs allocated to the production of the *prime* products. Relying on the Federal Circuit's instruction that "[t]he focus of [§ 1677e(a)(1)] is [a] respondent's *failure to provide information*," such that "[t]he mere failure of a respondent to furnish requested information — for any reason — requires Commerce to resort to other sources of information to complete the factual record on which it

[6] Though, as this court noted, parties disagree as to whether Dillinger in fact *could* have supplied such plate-specific cost information. *See, e.g.*, *id.* at 1260 n.10 ("[I]f Dillinger had wanted to present evidence of the specific non-prime products produced, it could have relied on production reports or finished goods inventory excerpts to show which production runs resulted in the production of non-prime plates. Dillinger chose not to do so." (quoting *Second Remand Results* at 19)); *see also Third Remand Results* at 13–14.

makes its determination," *Nippon Steel*, 337 F.3d at 1381 (emphasis in original), this court sustained Commerce's *general* invocation of facts otherwise available to supply the costs of production for both non-prime *and* prime products. *See* 589 F. Supp. 3d at 1257.[7] [,8]

[7] While acknowledging "the doctrine of law of the case generally bars retrial of issues that were previously resolved," Pl.'s Resp. to Ct.'s Apr. 11, 2023 Qs. for Oral Arg at 6, Apr. 26, 2023, ECF No. 143 ("Pl.'s Oral Arg. Subm.") (citing *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001)), Dillinger continues to argue "[t]he informational gap to be filled in this current situation is [only] the actual costs of production of non-prime products," *id*. As support, Dillinger maintains that the court's above hypothetical does not "accurately portray how . . . actual costs were allocated," *id.*, and urges the court to rely on the following hypothetical (which uses generalized, non-proprietary figures from Dillinger's questionnaire submissions):

Step 1: Actual Production Costs

Product Group	Total Actual COP	
Regular Plate (all choices)	€ 205,000,000	a
Line-pipe Plate (all choices)	€ 90,000,000	b
Total	€ 295,000,000	c

Step 2: Standard Production Costs & Variance

Product Group	Total Standard COP	
Regular Plate (all choices)	€ 210,000,000	d
Line-pipe Plate (all choices)	€ 92,000,000	e
Total	€ 302,000,000	f

Product Group	Variance	
Regular Plate (all choices)	0.9762	g = a/d
Line-pipe Plate (all choices)	0.9783	h = b/e
Total	0.9768	i = c/f

Step 3: Allocate Actual Costs to prime & non-prime plate

Regular Plate (non-prime yield rate)	2.30%	j
Line-pipe Plate (non-prime yield rate)	2.60%	k

Product Group	Prime	Non-prime	
Regular Plate	€ 200,285,000	€ 4,715,000	a x j
Line-pipe Plate	€ 87,660,000	€ 2,340,000	b x k
Total	€ 287,945,000	€ 7,055,000	€ 295,000,000

Step 4: Allocate Actual Costs to individual products (CONNUMs)

Prime Plate	**A**	**A x variance (i)**
CONNUM	standard costs/ton	actual costs/ton
785–1-1–1-1–4-1–4-1–40–2-2	€ 1,100.57	€ 1,075.04
765–1-1–1-2–3-1–3-1–40–2-2	€ 998.63	€ 975.46
760–1-1–1-2–3-1–4-1–40–2-2	€ 926.35	€ 904.86
480–1-1–1-1–2-1–4-1–40–2-2	€ 886.32	€ 865.76
480–1-2–1-1–2-1–3-1–40–2-2	€ 721.45	€ 704.71
765–1-1–1-2–3-5–4-1–40–2-1	€ 628.64	€ 614.06
772–1-1–1-2–2-1–6-1–40–2-2	€ 563.21	€ 550.14
* * *	* * *	* * *
765–1-1–1-2–4-5–5-1–40–2-2	€ 500.23	€ 488.62
Total actual costs allocated to prime plate		€ 287,945,000

Non-Prime Plate

CONNUM	Standard costs/ton	Actual costs/ton
000–1-1–1-1–1-1–1-1–40–2-2		€ 542.69
000–1-1–1-1–1-1–3-1–40–2-2		€ 542.69
000–1-1–1-1–1-1–4-1–40–2-2		€ 542.69
000–1-1–1-1–1-1–5-1–40–2-2		€ 542.69
000–1-1–1-1–1-1–1-5–40–2-2		€ 542.69
Total actual costs allocated to non-prime plate		€ 7,055,000

Non-prime plate actual costs	€ 7,055,000	m
Non-prime plate quantity	13,000	n
Non-prime plate actual cost/ton	€ 542.69	m/n

Id. at annex A. The problem for Dillinger is that Step 3 of its hypothetical still employs a "percentage yeild" approach to derive "actual" total costs of prime and non-prime plate. And from there, Step 4 allocates those "actual" total costs of prime and non-prime plate — as derived from the "percentage yield" approach — on a plate-specific basis. Thus, Dillinger's alternative hypothetical does not overcome the fundamental takeaway of the court's simplified hypothetical, which is that: (1) costs calculated for prime and non-prime plate using a "percentage yield" approach potentially differ from those calculated using an "actual cost" approach; and (2) not knowing the actual cost of producing the *non*-prime merchandise directly impacts the amount of costs assigned to the production of the *prime* products.

It may be — as Dillinger suggests — that it is "impossible to track the actual costs of an individual plate." *Id.* at 1. Nevertheless, the Federal Circuit has been clear that "[t]he focus of [19 U.S.C. § 1677e(a)(1)] is [a] respondent's *failure to provide information*. The reason for the failure is of no moment." *Nippon Steel*, 337 F.3d at 1381 (emphasis in original). Thus, in light of the foregoing, no "most cogent of reasons" compel this court to reconsider its prior ruling upholding Commerce's *general* invocation of facts otherwise available to supply the costs of production for both non-prime *and* prime products. *Intergraph Corp.*, 253 F.3d at 697 (quoting *Delong Equip. Co. v. Washington Mills Electro Mins. Corp.*, 990 F.2d 1186, 1196 (11th Cir. 1993)).

[8] Furthermore, in its briefing contesting the *Third Remand Results*, Dillinger argues that Commerce "arbitrar[ily] . . . treat[ed] similar situations differently" when it determined that a respondent in another LTFV investigation, NEXTEEL, "reported costs reflect[ing] the full

2. Particular Selection of Facts Otherwise Available

The court next considered Commerce's use of the costs assigned in Dillinger's normal books and records as the agency's *particular* selection of facts otherwise available to supply the missing cost information for prime and non-prime products. As a threshold matter, this court held that the Federal Circuit's ruling in *Dillinger III* had "not strictly prohibit[ed] Commerce from relying on Dillinger's normal books and records as facts otherwise available." *Id.* at 1261. This was so — in this court's estimation — because at issue before the Federal Circuit in *Dillinger III* was only Commerce's reliance on Dillinger's normal books and records in calculating normal value under 19 U.S.C. § 1677b; accordingly, the Federal Circuit had no reason or occasion to consider what sources Commerce could or could not rely on as facts otherwise available under 19 U.S.C. § 1677e once the agency concluded that it did not have the information it needed to determine the actual costs of prime and non-prime products.

Nevertheless, this court determined that it could not sustain reliance on Dillinger's normal books and records as facts otherwise available where the agency's proffered explanation consisted solely of a rejection of Dillinger's proposed dataset for a flaw that Commerce's selected dataset likewise exhibited. *Dillinger IV*, 589 F. Supp. 3d at 1262. Specifically, Commerce concluded that "it was not appropriate to rely on the overall average cost of producing all prime products as a surrogate for the actual cost of producing the specific non-prime products produced," *Second Remand Results* at 3–4 — as advocated by Dillinger — because doing so "assigns the same cost to products with varying physical characteristics," *id.* at 7. Yet, Commerce selected as facts otherwise available "the non-prime cost information recorded in Dillinger's normal books and records (*i.e.*, the estimated sales prices)," while acknowledging that such data "does not vary by CONNUM and does not reflect cost differences attributable to the physical characteristics," *id.* at 20. Finding a foundational violation of administrative law principles — namely, that "agency action is arbi-

actual costs of producing its prime and non-prime products." Pl.'s Cmts. in Opp. to Third Remand Results at 12–14, Dec. 16, 2022, ECF No. 123 ("Pl.'s Br.") (emphasis added) (discussing *Husteel Co. v. United States*, 46 CIT __, 552 F. Supp. 3d 1405 (2022)). First, such an argument seeks retrial of an issue already resolved — namely, whether Commerce here permissibly determined that it lacked "actual costs" such that reliance on facts otherwise available was appropriate. Second, the court briefly notes that Dillinger has not even alleged that NEXTEEL derived the cost data that it submitted to Commerce — and that Commerce deemed reflective of "actual costs" — via a "percentage yield" approach, as Dillinger did. Where this court has already established that Dillinger's "percentage yield" approach gave rise to a cost-related informational gap, *supra*, and where Dillinger has not shown that NEXTEEL likewise employed such a "percentage yield" approach, here too, the court is not persuaded to reconsider its prior ruling sustaining Commerce's *general* invocation of facts otherwise available to supply the costs of production for both non-prime *and* prime products.

trary," and thereby contrary to law, "when the agency offers insufficient reasons for treating similar situations differently" — this court remanded to Commerce for an affirmative explanation of its selected facts otherwise available to supply the missing cost information. *Dillinger IV*, 589 F. Supp. 3d at 1262 (cleaned up) (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)). Accordingly, this court did not reach or resolve whether the Federal Circuit's ruling in *Dillinger III* otherwise foreclosed use by Commerce of Dillinger's normal books and records as facts otherwise available.

D. Commerce's Third Remand Results

Commerce issued the *Third Remand Results* — the focus of this court's instant review — on November 16, 2022. In said results, Commerce continues to rely on Dillinger's normal books and records as facts otherwise available to supply the missing cost information for prime and non-prime plate, but now provides a two-fold justification for such reliance:

> Commerce first submits that
>
> > [r]elying on Dillinger's normal books and records, as facts available, to value both the prime and non-prime merchandise is the only reasonable approach because it recognizes that, where Dillinger cannot produce 98 perfect plates without producing two imperfect plates, the lost value of the two imperfect plates is actually a cost of producing the 98 perfect ones and should be accounted for as such.

Third Remand Results at 6. Second, Commerce explains that Dillinger's objections to reliance on the normal books and records as facts otherwise available hinge on unsubstantiated assumptions; namely that "the likely selling price [of non-prime plate] must be lower than the cost of producing the product" and that Dillinger's "costs of producing non-prime products cannot be lower than its cost[s] of producing its prime products." *Third Remand Results* at 13. Commerce maintains that "[a]bsent the physical characteristics and actual [cost of production] information for the non-prime products produced, which are solely in the possession of Dillinger, none of the above assumptions are supported by record information." *Id.* In light of the foregoing, Commerce continues in the *Third Remand Results* to rely on Dillinger's normal books and records as facts otherwise available and to assign Dillinger a weighted-average dumping margin of 6.15 percent. *Id.* at 2–3.

On December 16, 2022, Dillinger filed with this court comments in

opposition to Commerce's *Third Remand Results*, *see* Pl.'s Br., to which Defendant the United States ("the Government") and Defendant-Intervenor Nucor Corporation ("Nucor") responded on January 17, 2023, *see* Def.'s Resp. to Cmts. in Opp. to Third Remand Results, Jan. 17, 2023, ECF No. 124 ("Def.'s Br."); Def.-Inter.'s Resp. to Cmts. in Opp. to Third Remand Results, Jan. 17, 2023, ECF No. 125 ("Def.-Inter.'s Br."). The court ordered oral argument on the *Third Remand Results*, *see* Order Scheduling Oral Arg., Apr. 25, 2023, ECF No. 139, and issued questions to the parties for answers in writing, *see* Ct.'s Qs. for Oral Arg., Apr. 11, 2023, ECF No. 133; *see also* Pl.'s Oral Arg. Subm.; Def.'s Resp. to Ct.'s Apr. 11, 2023 Qs., Apr. 26, 2023, ECF No. 141 ("Def.'s Oral Arg. Subm."); Def.-Inter.'s Resp. to Ct.'s Apr. 11, 2023 Qs., Apr. 26, 2022, ECF No. 145 ("Def.-Inter.'s Oral Arg. Subm."). Upon examination of the parties' submissions, the court issued supplemental questions for further written response. *See* Ct.'s Supp. Qs. for Oral Arg., May 1, 2023, ECF No. 146; *see also* Pl.'s Resp. to Ct.'s May 1, 2023 Suppl. Qs., May 8, 2023, ECF No. 150 ("Pl.'s Suppl. Qs. Resp."); Def.'s Resp. to Ct.'s May 1, 2023 Suppl. Qs., May 8, 2023, ECF No. 147 ("Def.'s Suppl. Qs. Resp."); Def.-Inter.'s Resp. to Ct.'s May 1, 2023 Suppl. Qs., May 8, 2023, ECF No. 148 ("Def.- Inter.'s Suppl. Qs. Resp.").

Oral argument was held on May 10, 2023. *See* ECF No. 151. Following oral argument, the parties submitted post-oral argument briefing to the court. *See* Pl.'s Post-Arg. Subm., May 19, 2023, ECF No. 155 ("Pl.'s Suppl. Br."); Def.'s Post-Arg. Subm., May 19, 2023, ECF No. 153; Def.-Inter.'s Post-Arg. Subm., May 19, 2023, ECF No. 154. With these cumulative submissions in hand, the case is now decision ready.

JURISDICTION AND STANDARD OF REVIEW

Dillinger brings this action under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii), and the court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court "will uphold [Commerce's] redetermination pursuant to . . . remand unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Consolidated Bearings Co. v. United States*, 28 CIT 106, 106, 346 F. Supp. 2d 1343, 1344 (2004), *aff'd* 412 F.3d 1266, 1267 (Fed. Cir. 2005).

A determination by Commerce is "supported by substantial evidence" if, after accounting for detracting evidence, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), "more than a mere scintilla" underpins the agency's decision such that "a reasonable mind might accept [it] as adequate to support [the agency's] conclusion," *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1355 (Fed.

Cir. 2018) (quoting *In re Nuvasive, Inc.*, 842 F.3d 1376, 1379 (Fed. Cir. 2016)). Commerce's determination "accords with law" if it abides by all relevant statutes, regulations, and judicial precedent and "the agency's decisional path is reasonably discernable." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).

DISCUSSION

The Government and Defendant-Intervenor Nucor once again ask this court to sustain Commerce's remand results. *See* Def.'s Br. at 12; Def.-Inter.'s Br. at 9. By contrast, Dillinger argues that Commerce's remand results contravene the Federal Circuit's ruling in *Dillinger III*, such that this court should "remand th[e] case back to Commerce with explicit directions to accept Dillinger's costs as reported and to stop shifting costs from nonprime to prime plate," Pl.'s Br. at 22; in the alternative, Plaintiff argues that Commerce's reliance on Dillinger's normal books and records as facts otherwise available imposes an impermissible adverse inference, *id.* at 14–21. This court will uphold Commerce's selection of facts otherwise available so long as it is supported by substantial evidence and otherwise in accordance with law. *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1258 n.5 (Fed. Cir. 2009); *see also* Pl.'s Oral Arg. Subm. at 4; Def.'s Oral Arg. Subm. at 3; Def.-Inter.'s Oral Arg. Subm. at 2–3. Concluding that Commerce's selection satisfies both requirements, the court sustains Commerce's *Third Remand Results*.

I. Commerce's Selection of Facts Otherwise Available Does Not Contravene Dillinger III and Otherwise Accords with Law.

In *Dillinger IV*, this court held that — strictly speaking — the Federal Circuit's ruling in *Dillinger III* did not prohibit Commerce from relying on Dillinger's normal books and records as facts otherwise available to supply missing cost information for Dillinger's prime and non-prime plate.[9] However, since — in accordance with this court's most recent remand — Commerce has now affirmatively explained its reliance on Dillinger's normal books and records as facts otherwise available to supply the missing cost information, this court must proceed to consider in the first instance whether — practically speaking — the Federal Circuit's holding in *Dillinger III* precludes such reliance by necessary implication. The court concludes that it does not after review of the relevant statutory language, legislative

[9] *Supra* pp. 13–14.

history, and caselaw. As such, Commerce's reliance on Dillinger's normal books and records as facts otherwise available accords with law.

A. The Plain Text of the Statute Does Not Constrain Commerce's Selection of Facts Otherwise Available as Plaintiff Suggests.

Dillinger argues that because the "cost of production" is the "the informational gap that is being filled," section 1677b(b)(3) of 19 U.S.C. — which lays out the requirements of "cost of production" — constrains what may be used as facts otherwise available under 19 U.S.C. § 1677e(a)(1), *see* Pl.'s Oral Arg. Subm. at 8; where the Federal Circuit held that Dillinger's normal books and records — which value non-prime plate at their "likely selling price" — do not correspond to the "costs of producing . . . the merchandise" under § 1677b,[10] Plaintiff maintains the necessary implication is that such normal books and records cannot be used as facts otherwise available to supply such missing cost information under § 1677e(a)(1). Pl.'s Oral Arg. Subm. at 7. By contrast, the Government and Nucor submit that 19 U.S.C. § 1677e(a) is an independent statutory provision and that § 1677b(b)(3) does not constrain what Commerce may use as facts otherwise available under § 1677e(a)(1). Def.'s Oral Arg. Subm. at 4; Def.-Inter.'s Oral Arg. Subm. at 5. The court agrees with the Government and Nucor that the plain language of the statute does not constrain Commerce's selection as Plaintiff so suggests.

As noted, the statutory text on facts otherwise available reads in relevant part:

> If —
>
> (1) necessary information is not available on the record . . .
>
> the administering authority and the Commission shall, subject to section 1677m(d)[11] of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a)(1) (footnote not in original). The statute does not define the phrase "the facts otherwise available." Nor does the plain language of § 1677e(a)(1) appear to prescribe or constrain the sources that Commerce may rely upon in applying "the facts otherwise avail-

[10] *Supra* note 2.

[11] No party has identified as relevant to the resolution of this issue 19 U.S.C. § 1677m(d), which outlines Commerce's obligation to afford parties an opportunity to remedy deficient submissions.

able" *at all*, let alone impute the requirements of § 1677b(b)(3) as a constraint.

Nor does 19 U.S.C. § 1677b(b)(3) expressly limit what Commerce may rely upon as facts otherwise available under § 1677e(a)(1). Section 1677b(b)(3) reads:

> (3) Calculation of cost of production
>
> For purposes of this part, the cost of production shall be an amount equal to the sum of—
>
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.
>
> For purposes of subparagraph (A), if the normal value is based on the price of the foreign like product sold for consumption in a country other than the exporting country, the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation.

19 U.S.C. § 1677b(b)(3). The court notes that § 1677b(b)(3) says "*[f]or purposes of this part*, the cost of production shall be . . .," 19 U.S.C. § 1677b(b)(3) (emphasis added), and that both § 1677b and § 1677e fall within Part IV of Subtitle IV of Title 19 of the United States Code. Because the "Definition; special rules" section of 19 U.S.C § 1677(1)–(36) does not otherwise define "cost of production," the court assesses that § 1677b(b)(3) supplies the definition of "cost of production" for every occurrence of that term throughout Part IV. But as established above, § 1677e(a)(1) does not contain the phrase "cost of production" or otherwise cite § 1677b.

That said, § 1677b(b)(3)'s definition is still relevant to § 1677e(a)(1), as by the statute's plain terms, Commerce can invoke facts otherwise available only when "necessary information is not available on the record;" and the definitional requirements of § 1677b(b)(3) establish

what is "necessary information" with regards to "cost of production." Accordingly, this court discerns that § 1677b(b)(3) supplies the criteria by which to assess if there is an *informational gap* with regards to "cost of production." However, where § 1677b(b)(3) does not mention or otherwise cross-reference § 1677e(a), the court finds no textual support for Plaintiff's position that § 1677b(b)(3) limits what sources Commerce may rely upon as facts otherwise available once the agency determines that it does not have the information necessary to satisfy the definitional requirements of "cost of production."

Discerning no such limits in the statutory text, the court next considers the relevant legislative history.

B. The Legislative History is Inconclusive.

The Statement of Administrative Action ("SAA") is the legislative history of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103–465, 108 Stat. 4809 (1994), which codified amendments to § 1677e(a). *See* Statement of Administrative Action, H.R.Rep. No. 103–316, at 869 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1440, at 4198–99; *see also Ningbo Dafa*, 580 F.3d at 1255.[12] Regarding "determinations on the basis of the facts available," specifically, the SAA states in relevant part:

> New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration.
>
> . . .
>
> [N]either Commerce nor the Commission must prove that the facts available are the best alternative information. Rather, the facts available are information or inferences which are reasonable to use under the circumstances. As noted above, the Commission balances all record evidence and draws reasonable in-

[12] By statute, the SAA is "an authoritative expression . . . concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

> ferences in reaching its determinations. It is not possible for the Commission to demonstrate that its inferences are the same as those it would have made if it had perfect information. Similarly, where Commerce uses the facts available to fill gaps in the record, proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done.

1994 U.S.C.C.A.N. at 4198–99.

In an exemplification of "Judge Leventhal's memorable phrase" that "investigation of legislative history" can become "an exercise in 'looking over a crowd and picking out your friends,'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)), Plaintiff and Defendants both claim the SAA as decisive support for their respective conceptions of the interplay between § 1677e(a)(1) and § 1677b(b)(3).

For example, Dillinger latches onto the statement that "Commerce and the Commission must make their determinations based on . . . that which is *most probative* of the issue under consideration," 1994 U.S.C.C.A.N. at 4198 (emphasis added), to suggest that, in accordance with § 1677b(b)(3)'s definition, "the selection of facts available for the actual costs of non-prime products must correspond, *as closely as possible*, to the cost of materials and of fabrication or other processing employed in producing the non-prime products," Pl.'s Br. at 1–2 (emphasis added); Pl.'s Oral Arg. Subm. at 6. By contrast, the Government and Nucor invoke the SAA's statements that facts otherwise available must be "reasonable to use under the circumstances" and need not be "the best alternative information," 1994 U.S.C.C.A.N. at 4198, as support for their position that the relied upon dataset must only be "a reasonable approximation of Dillinger's costs," Def.-Inter.'s Oral Arg. Subm. at 8; Def.'s Oral Arg. Subm. at 3 (substantively similar), without "correspond[ing] to the cost of materials or other processing employed in producing non-prime products" under § 1677b(b)(3), Def.'s Br. at 9.

While parties contest whether the facts otherwise available must be the "most probative" or "best" information, *see* 1994 U.S.C.C.A.N. at 4198 (requiring Commerce to rely on the "most probative" information, while acknowledging that "[i]t is not possible" to "prov[e] that the facts selected are the best alternative facts"), everyone agrees that there must be at least some kind of correlation between the "issue under consideration" — i.e., the gap to be filled — and the

selected record evidence, *see id.* (directing Commerce to use that which is "probative of the issue under consideration"). Because "[l]egislative history . . . is meant to clear up ambiguity, not create it," *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011), and because the plain text of § 1677e(a)(1) contains no express indications that "the facts otherwise available" must be the "best" alternative information to "reach[] the applicable determination," *see* 19 U.S.C. § 1677e(a)(1), the court accepts only the baseline point of agreement that the selected facts otherwise available must relate in some way to the issue under consideration: Here, the gap to be filled is the cost of production information for prime and non-prime plate; thus, Commerce's selected facts otherwise available must somehow correlate to Dillinger's costs.[13]

But what exactly is required to establish such a correlation remains "murky, ambiguous, and contradictory." *Exxon Mobil Corp.*, 545 U.S. at 568. Specifically, the SAA does not address — let alone resolve — whether this court should impute the requirements of the statutory provision underlying the informational gap as the standard by which to assess the "reasonableness" of the agency's selection of facts otherwise available. *See* 1994 U.S.C.C.A.N. at 4198 (instructing the selected facts otherwise available must be "reasonable to use under the circumstances"). This court looks to related Federal Circuit caselaw to discern that it should not.

C. Federal Circuit Caselaw Supports that § 1677b(b)(3) Does Not Constrain Commerce's Selection of Facts Otherwise Available Under § 1677e(a)(1).

Although the Federal Circuit has not spoken on the precise issue of the case at bar, this court distills and applies principles from related decisions to conclude that the requirements of § 1677b(b)(3) do not constrain Commerce's selection of facts otherwise available under § 1677e(a)(1).

The court first considers the Federal Circuit's opinion in *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1346 (Fed. Cir. 2016). There, the Federal Circuit considered whether Commerce's selection of certain record evidence as adverse facts available under 19 U.S.C. § 1677e(b) was impermissible because it, inter alia, "relie[d] upon incomplete criteria in light of other statutory and regulatory criteria."

[13] Such a conclusion aligns with the Federal Circuit's prior treatment of the SAA. *See, e.g.*, *Ningbo Dafa*, 580 F.3d at 1252 ("When § 1677e(a) applies, Commerce may use as 'facts available' any 'information or inferences which are reasonable to use under the circumstances' to make the applicable determination or *substitute for the missing information*." (emphasis added) (quoting 1994 U.S.C.C.A.N. at 4198)).

Nan Ya, 810 F.3d at 1346. The Federal Circuit first laid out the statutory text at issue,[14] which read:

> If [Commerce] . . . finds that 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] . . . , [Commerce] . . . , in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

Id. at 1347 (quoting 19 U.S.C. § 1677e(b) (2006), *amended by* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362). In light of this text, the Federal Circuit concluded "[t]he statute simply does not require Commerce to select facts that . . . align with standards articulated in other statutes and regulations." *Id.* ; *see also Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1301 (Fed. Cir. 2021) (quoting *Nan Ya*, 810 F.3d at 1347); *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1381 (Fed. Cir. 2016) (quoting *Nan Ya*, 810 F.3d at 1347). Thus, where § 1677e(b) did not "contain[] any of the requirements [Nan Ya] allege[d]," the Federal Circuit declined to "impose conditions not present in or suggested by the statute's text." 810 F.3d at 1347.

This court acknowledges that *Nan Ya* dealt with *adverse* facts available — whereas the case at bar deals only with facts otherwise available or "neutral facts available" — and that "Commerce has greater latitude in determining dumping margins when dealing with [adverse facts available]." *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1357 n.12 (Fed. Cir. 2016). However, because the Federal Circuit's decision in *Nan Ya* turned on foundational tenets of statutory interpretation — i.e., parsing the statute's plain text — and not on the particular characteristics of adverse facts available,

[14] The Federal Circuit noted that "[d]uring the pendency of the appeal, Congress amended . . . [the] provisions at issue." *Nan Ya*, 810 F.3d at 1337 n.2. Although the Federal Circuit's decision considered the pre-amended text of 19 U.S.C. § 1677e(b), the specific textual changes are not relevant here.

this court deems transferrable the Federal Circuit's core interpretive conclusion: namely that, where — as with 19 U.S.C. § 1677e(a)(1) — the plain text does not "require Commerce to select facts that . . . align with [any] standards articulated in other statutes and regulations," *Nan Ya*, 810 F.3d at 1347, the court cannot agree with Dillinger that Commerce's selection of replacement cost information is constrained by the definitional "cost of production" requirements under § 1677b(b)(3).

On first glance, such a conclusion might seem difficult to reconcile with the Federal Circuit's further opinion in *Ningbo Dafa*, 580 F.3d at 1254–58. There, the Federal Circuit addressed whether 19 U.S.C. § 1677b(c)(1) — which lays out procedures for calculating normal value in non-market economy cases — precludes Commerce from invoking facts otherwise available under § 1677e(a) to supply information on "factors of production" missing from the record. *Id.*

Section 19 U.S.C. § 1677b(c)(1) instructs:

> (c) Nonmarket economy countries
>
> (1) In general
>
> If—
>
> (A) the subject merchandise is exported from a nonmarket economy country, and
>
> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a),
>
> the administering authority shall 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. *Except as provided in paragraph (2), the 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 the administering authority*.

19 U.S.C. § 1677b(c)(1) (emphasis added).[15] Pursuant to Commerce's "longstanding policy that market economy prices are the 'best available information' [to value factors of production] under 19 U.S.C. § 1677b(c)(1)," Commerce requested that Ningbo Dafa Chemical Fiber

[15] Commerce in *Ningbo Dafa* did not purport to rely on the exception in paragraph (2).

Company ("Ningbo") — a Chinese manufacturer — provide invoices for its market economy purchases of a certain input used to produce the subject merchandise under investigation for dumping. *Ningbo Dafa*, 580 F.3d at 1251, 1257. Where Ningbo supplied Commerce with invoices from its qualified market economy purchases, but not in the "form and manner requested" by Commerce, the agency invoked facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B)[16] to supply the missing input values. In litigation before this court and the Federal Circuit, Ningbo argued that § 1677b(c)(1)'s "best available information" standard barred Commerce from invoking facts otherwise available to value factors of production. *Ningbo Dafa*, 580 F.3d at 1254.

In rejecting Ningbo's position, the Federal Circuit delineated "the proper interpretation and interaction of 19 U.S.C. § 1677b(c)(1) and § 1677e(a)." *Id.* The court noted that "[b]oth § 1677b and § 1677e are found in Subtitle IV of Title 19 of the United States Code" and that

> Section 1677e(a) specifically provides: "If . . . (1) necessary information is not available on the record, or (2) an interested party or any other person . . . fails to provide such information . . . in the form and manner requested," Commerce "shall . . . use the facts otherwise available in reaching the applicable determination *under this subtitle*."

Id. (alterations and emphasis in original) (quoting 19 U.S.C. § 1677e(a)). Accordingly, where Commerce "shall . . . use the facts otherwise available in reaching the applicable determination under this subtitle," and where § 1677b falls within "this subtitle," the Federal Circuit concluded that Commerce is not barred from relying on facts otherwise available under § 1677e(a) to value factors of

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[16] 19 U.S.C. § 1677e(a)(2) instructs, in relevant part:

> (a) In general
> If—
> . . .
> (2) an interested party or any other person—
> . . .
> (B) *fails to provide* [*information* that has been requested by the administering authority] 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,
> . . .
> the administering authority and the Commission 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)(2) (emphasis added).

production under § 1677b(c)(1). *Id.* Furthermore, the court noted that § 1677b(c)(1) "provides that in NME investigations, Commerce 'shall' use the 'best available information regarding the values of such factors [of production]." *Id.* (alteration in original). Thus, bringing the pieces together, the Federal Circuit held that "under § 1677e(a), where necessary information is unavailable on the record or a party fails to provide requested information, Commerce 'shall' use the 'facts otherwise available' to fill information gaps when determining the value of the factors of production under § 1677b(c)(1) *using the 'best available information*.'" *Id.* (emphasis added).

This court notes that it might be tempting to infer from *Ningbo Dafa* that the standards and/or requirements of the statutory provision underlying the informational gap to be filled govern the selection of facts otherwise available; there the Federal Circuit imputed "the 'best available information' mandate" of § 1677b(c)(1) into Commerce's application of facts otherwise available under § 1677e(a) to value factors of production. *Id.* at 1258 (quoting § 1677b(c)(1)). However, to divine any such overarching, "per se" rule would not only overread the Federal Circuit's holding in *Ningbo Dafa*,[17] but also would ignore unique aspects of the "interaction of 19 U.S.C. § 1677b(c)(1) and § 1677(e)(a)." *Id.* at 1254.

Specifically, recall that § 1677b(c)(1) states "*[e]xcept as provided in paragraph (2)*, the valuation of the factors of production shall be based on the best available information." 19 U.S.C. § 1677b(c)(1) (emphasis added). This particular language — "except as provided in paragraph (2)" — expressly establishes the *only circumstances* in which the factors of production need not be based on the "best available information." Because paragraph (2) does not mention or otherwise implicate the facts otherwise available provision of § 1677(e)(a), Commerce is required — by § 1677b(c)(1)'s plain terms — to adhere to the "'best available information' mandate" in applying facts otherwise available under § 1677e(a) to value factors of production. *See Conn. Nat.'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). By contrast, 19 U.S.C. § 1677b(b)(3) — the provision at issue in the case at bar — contains no equivalent limiting language. *Supra* pp. 18–21 (establishing that § 1677b(b)(3) provides the definition of "cost of production" in the ordinary course,

[17] After all, the Federal Circuit in *Ningbo Dafa* undertook only to resolve whether § 1677b(c)(1)'s "best available information" standard *barred* Commerce from invoking facts otherwise available under § 1677e(a) when valuing factors of production, and not to delineate any "per se" or methodologies for applying facts otherwise available.

but does not expressly cabin Commerce's discretion in selecting facts otherwise available to supply missing cost of production information).

The Federal Circuit's pronouncement in *Ningbo Dafa* that Commerce must adhere to the "best available information" mandate of § 1677b(c)(1) in filling "factor of production"–related gaps via facts otherwise available, 580 F.3d at 1254, exists comfortably alongside the appeals court's further pronouncement in *Nan Ya* that Commerce is "simply . . . not require[d] . . . to select facts . . . that align with standards articulated in other statutes and regulations," 810 F.3d at 1347. This is so,[18] because the Federal Circuit in *Nan Ya* parsed only the relevant plain text of 19 U.S.C. § 1677e, and not that of the "other statutory and regulatory criteria" that Nan Ya claimed Commerce's selection of adverse facts available failed to meet. 810 F.3d at 1346. Thus, it is entirely consistent to hold that the plain language of § 1677e(a)–(b) — without more — "does not require Commerce to select facts that . . . align with standards articulated in other statutes and regulations," *id.* at 1347, while holding open the possibility that — where explicit — the standards and requirements articulated in other statutes and regulations can override or cabin Commerce's discretion under § 1677e(a)–(b).[19]

Thus, applying the principles distilled from the Federal Circuit's decisions in *Nan Ya* and *Ningbo Dafa*, where the plain text of § 1677e(a) does not prescribe the sources that Commerce may use when applying facts otherwise available, and where the plain text of § 1677b(b)(3) on cost of production does not expressly override or cabin Commerce's discretion under § 1677e(a), this court concludes that § 1677b(b)(3)'s definitional requirements do not constrain Commerce's selection of facts otherwise available to fill in the missing cost information.

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[18] Not merely because the Federal Circuit's opinion in *Nan Ya* addressed the application of adverse facts available, as opposed to facts otherwise available; as this court explained above, *supra* p. 25, the Federal Circuit's conclusion in *Nan Ya* turned on a plain text rationale that applies with equal force to the language of 19 U.S.C. § 1677e(a) on facts otherwise available.

[19] The court notes that such an interpretation accords with the "whole act" canon of statutory construction. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act . . . ."); *see also* Norman Singer & Shambie Singer, 2 *Sutherland Statutes and Statutory Construction* § 46:5 (7th ed. 2022) ("[E]ach part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."). Indeed, a contrary conclusion could give rise to tension between 19 U.S.C. § 1677e(a) — which by its plain text does not constrain what sources Commerce may use when applying facts otherwise available — and § 1677b(c)(1) — which the Federal Circuit interprets as requiring adherence to that provision's "best available information" standard even in a facts otherwise available scenario.

D. Summation: Commerce's Reliance on Dillinger's Normal Books and Records as Facts Otherwise Available Does Not Contravene Dillinger III and Otherwise Accords with Law.

In sum, because the Federal Circuit in *Dillinger III* held that Plaintiff's normal "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)," 981 F.3d at 1321, this court had to confront — in the first instance — whether the Federal Circuit's holding precludes by necessary implication Commerce's reliance on said normal books and records as facts otherwise available under § 1677e(a)(1) to supply the missing cost information. Plaintiff has argued fervently that it does, submitting that where "cost of production" is "the informational gap that is being filled," Pl.'s Oral Arg. Subm. at 8, section 1677b(b)(3) requires that "the selection of facts available . . . must correspond, as closely as possible, to the cost of materials and of fabrication or other processing employed in produc[tion]," Pl.'s Br. at 1–2.

This court disagrees. After review of the plain language of the relevant statutory provisions and related Federal Circuit caselaw, the court declines to impute the definitional requirements of § 1677b(b)(3) as the standard by which it assesses the "reasonableness" of Commerce's reliance on Dillinger's normal books and records as facts otherwise available under § 1677e(a)(1) to supply the missing cost information. *See* 1994 U.S.C.C.A.N. at 4198 (instructing that the selected facts otherwise available must be "reasonable to use under the circumstances").

Nevertheless, after review of the relevant legislative history, this court concludes that there must be at least *some kind* of connection between the gap to be filled and the selected facts otherwise available, even if the selected facts otherwise available need not be the "best alternative information." *See* 1994 U.S.C.C.A.N. at 4198 (directing Commerce to use that which is "probative of the *issue under consideration*" (emphasis added)). Here, the gap to be filled is the costs of producing the prime and non-prime plate. This leads the court — in closing — to resolve a further question posed by the parties: whether the Federal Circuit's holding in *Dillinger III* is sufficiently broad so as to preclude a finding of *any* such connection — even without imputing the underlying requirements of § 1677b(b)(3) as the guiding standard — between Dillinger's normal books and records and the missing cost information. This court concludes that it is not.[20]

[20] This conclusion likewise applies to the Federal Circuit's decision in *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992).

As the Federal Circuit explained in *Dillinger III*:

> It is unclear . . . 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*.[21]

981 F.3d at 1321 n.1 (emphasis added). The Federal Circuit further interpreted "the legislative history of section 1677b(f) . . . [and] its plain meaning[] [to] indicate[] Congress intended that Commerce rely on a producer's or exporter's books and records if they . . . reasonably reflect the *costs of production*." *Dillinger III*, 981 F.3d at 1323 (emphasis added). Where "costs of production" is a defined term, *see* 19 U.S.C. § 1677b(b)(3), this court concludes that the Federal Circuit's ruling in *Dillinger III* — that "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)*" — turned on a determination that Dillinger's books and records did not satisfy the definitional requirements of § 1677b(b)(3). 981 F.3d at 1321.

Because this court has already resolved not to impute § 1677b(b)(3)'s definitional requirements as the standard for assessing the "reasonableness" of Commerce's selection of facts otherwise available, it — correspondingly —does not consider itself precluded from finding that Dillinger's normal books and records bear some kind of connection to "the issue under consideration," i.e., costs, for purposes of § 1677e(a). *See* 1994 U.S.C.C.A.N. at 4198. Thus, this court concludes that Commerce's reliance on Dillinger's normal books and records as facts otherwise available does not contravene *Dillinger III* and otherwise accords with law.

II. Commerce's Selection of Facts Otherwise Available is Supported by Substantial Evidence.

The court notes, however, that it is not enough to hold that Commerce's selection of facts otherwise available accords with law; Com-

[21] Again, § 1677b(f)(1)(A) instructs:

> Costs 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 of the exporting country (or the producing country, where appropriate) and *reasonably reflect the costs associated with the production* and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A) (emphasis added).

merce's reliance on Dillinger's normal books and records under § 1677e(a) to supply the missing cost information must also be supported by substantial evidence. *See Ningbo Dafa*, 580 F.3d at 1256 ("[I]t is not enough that the law permits Commerce to apply 'facts available' in valuing factors of production. . . . In addition, substantial evidence must support Commerce's" specific selection of facts otherwise available.).

Before delving into the substantial evidence review, the court pauses briefly to demarcate the scope of its inquiry. In light of the preceding discussion, Commerce need only show that substantial evidence supports that its selected facts otherwise available are "probative of the issue under consideration" such that they relate in some way to Dillinger's costs. Making such a showing does not require Commerce to show that substantial evidence supports that its selected facts otherwise available are the "best alternative information" or that they meet the standards articulated in other statutes, such as 19 U.S.C. § 1677b(b)(3) on costs of production. Accordingly, this court's substantial evidence inquiry here is a narrow one: Accounting for detracting evidence, does "more than a mere scintilla" support that Commerce's selected facts available — i.e., Dillinger's normal books and records — are probative of the missing cost information such that "a reasonable mind might accept" their use under the circumstances? *Elbit*, 881 F.3d at 1356. The court concludes that Commerce has met this reasonableness standard and, thus, sustains the *Third Remand Results*.

A. Dillinger's Normal Books and Records Are "Probative of the Issue under Consideration."

Commerce asserts "there is record evidence to demonstrate that the use of the likely selling price of non-prime products" — as recorded in Dillinger's normal books and records — "results in a reasonable allocation of total costs," *Third Remand Results* at 15, and this court agrees.

Commerce first notes the undisputed fact that "the production of non-prime products is an inevitable consequence of its production of prime products." *Id.* at 5. Commerce next cites to Note II.4.1 of Dillinger's audited 2015 financial statement, which states:

II.4. Stocks and work-in-progress

II.4.1. Modes and Methods of Evaluation

. . .

- Work-in-progress, 1st choice intermediate and finished products: These stocks are valued at their weighted-average production

> cost, this cost including direct and indirect costs that can be reasonably related with their production.
>
> • The stock of 2nd choice sheet metal is valued at its likely selling prices.

Id. at 15 (citing Dillinger France S.A. Section A Resp. app. 18, at 600, June 29, 2016, ECF No. 158). Commerce interprets this note to constitute an "acknowledg[ment]" by Dillinger's auditor that any "lost value attributable to the production of non-prime products is an indirect cost of producing prime products," such that the figures in Dillinger's normal books and records "recognize[] the total direct costs (*i.e.*, direct materials and conversion costs) and indirect costs (*i.e.*, the lost value of the non-prime plates) attributable to the production of prime plates." *Id.* at 15–16. Accordingly, Commerce concludes that where "Dillinger failed to provide the [actual cost] information requested by Commerce, which is solely in its control,"

> [r]elying on Dillinger's normal books and records, as facts available, to value both the prime and non-prime merchandise is the only reasonable approach . . . . [I]t recognizes that, where Dillinger cannot produce 98 perfect plates without producing two imperfect plates, the lost value of the two imperfect plates is actually a cost of producing the 98 perfect ones and should be accounted for as such.

Id. at 6, 14. This court assesses that in light of the above identified record evidence and the agency's explanation, "more than a mere scintilla" supports that Dillinger's normal books and records are "probative" of the missing cost information, such that they are "reasonable to use under the circumstances." *Elbit Sys.*, 881 F.3d at 1355; 1994 U.S.C.C.A.N. at 4198.

B. Dillinger's Counter arguments Are Unavailing.

Plaintiff submits several counterarguments as to why it is "unreasonable" to rely on Dillinger's normal and books records as facts otherwise available, including that: (1) "the use of the likely selling price in place of the cost of production was specifically prohibited by the" Federal Circuit, Pl.'s Br. at 7; (2) "Commerce fails to explain how this 'likely selling price' in any way corresponds to the cost of materials and of fabrication or other processing employed in producing the non-prime products," *id.* at 2; and that (3) "[t]here is no provision in the statute to reduce the costs of materials, fabrication and processing employed in producing the merchandise by the 'lost value' resulting from the sale of the merchandise," *id.* at 8.

While Commerce responds to Dillinger's counter arguments on the merits in the *Third Remand Results*,[22] as a threshold matter, each of these arguments presupposes that this court will impute the underlying requirements of 19 U.S.C. § 1677b(b)(3) as the standard for assessing reliance on Dillinger's normal books and records as facts otherwise available to supply the missing cost information. Because this court has already held that the underlying requirements of § 1677b(b)(3) do not here govern, such that the Federal Circuit's *Dillinger III* decision is not here decisive, *supra*, the court rejects the above counterarguments outright.

Dillinger's only counterargument that requires further discussion is that Commerce's proffered rationale — i.e., that any "lost value attributable to the production of non-prime products is an indirect cost of producing prime products," *Third Remand Results* at 15 — concedes "that the sales price of non-prime products does not cover the costs of production of those products," such that the "likely selling price" in Dillinger's normal books and records "bears no relationship with the actual costs of production," Pl.'s Br. at 8, 21. While this argument has some initial appeal, Commerce explains that it rests on unsubstantiated assumptions. This is so, because "the 'actual' costs of nonprime products are dependent on the physical characteristics of the non-prime products (e.g., products which undergo more processing have higher processing costs)," and Dillinger has not provided any information on those physical characteristics necessary to establish their actual costs. *See* Def.'s Suppl. Qs. Resp. at 2. Commerce is, therefore, faced with a situation where Dillinger did not submit "information which would have permitted Commerce to determine the actual costs of producing non-prime products." *Third Remand Results* at 16. To the extent that the selling price *is* lower than the cost of producing the non-prime products — again, a fact that Commerce does not know on the current record —"Commerce's selected approach recognizes that . . . the difference between the unknowable 'actual' costs of producing the non-prime products and their selling price is the lost value of production to be borne as an indirect cost of

[22] For example, Dillinger argues that where the production of non-prime products is an inevitable consequence of the production of prime products, a simple comparison of the [[ ]] Euros/ton likely selling price for non-prime plate to the lowest total cost of manufacture reported for prime plate of [[ ]] Euros/ton establishes that the likely selling price recorded in Dillinger's normal books and records is not "probative" of the cost of producing the non-prime products. Pl.'s Br. at 2–3. Commerce responds on the merits that Dillinger's argument rests on several unsubstantiated assumptions, including that: (1) Plaintiff has in fact reported the actual costs of producing the *prime* products; and that (2) the prime and non-prime products incurred the same processing costs (which is unknown because Dillinger did not submit the physical characteristics of the non-prime plate necessary to derive said processing costs). *See Second Remand Results* at 6; *Third Remand* Results at 12.

producing the prime products." Def.'s Oral Arg. Subm. at 9; *see also Third Remand Results* at 16 (substantively similar).

Because this explanation establishes that Dillinger's normal books and records are "probative of the issue under consideration," i.e., costs, and because Dillinger's counterarguments rest either on imputing the definitional requirements of 19 U.S.C. § 1677b(b)(3) as the governing standard or on unsubstantiated assumptions, Commerce's selection of facts otherwise available is supported by substantial evidence.

C. Summation: Under the Substantial Evidence Standard, Ties Go to the Agency.

Dillinger insists that "[t]he most accurate information on the administrative record" — and thereby, "[t]he most reasonable calculation of actual production costs of non-prime plate" — are the figures that Dillinger derived via its percentage yield approach. Pl.'s Br. at 6; *see also id.* at 11 ("[T]he guiding principle for choosing what facts to apply is accuracy in the given case." (quoting *Shandong Rongxin Imp. & Exp. Co. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1365, 1370 (2019))). But the Federal Circuit has established that a determination by Commerce is "'accurate' if it is correct as a mathematical and factual matter, [and] thus supported by substantial evidence." *Nan Ya*, 810 F.3d at 1344. Given the broad discretion that Commerce has in selecting facts otherwise available, *supra* pp. 18–33 (establishing that the plain language of 19 U.S.C. § 1677e(a) imposes no constraints, such that Commerce's selection of facts otherwise available need only be "reasonable under the circumstances" and not necessarily the "best alternative information"), substantial evidence supports that Dillinger's normal books and records are "probative" of costs and, therefore, "reasonable" to supply the missing cost information.

It may well be that Dillinger's proposed dataset also represents a "reasonable" cost allocation method.[23] But where, as here, substantial evidence supports Commerce's selection of facts otherwise available, a court "may [not] displace the [agency's] choice between two fairly conflicting views, even [if] the court [might] justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 477; *see also In re Cree, Inc.*, 818 F.3d 694, 701 (Fed. Cir. 2016) ("[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial

[23] A point this court need take no view on.

evidence." (alteration in original) (quoting *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002))). In short, "[u]nder the substantial evidence standard, ties go to the agency." *MTD Prods. Inc. v. United States*, 47 CIT __, __, Slip Op. 23–34, at 21 (Mar. 16, 2023).

III. Commerce's Selection of Facts Otherwise Available Does Not Impose an Impermissible Adverse Inference.

Having held that Commerce's selection of facts otherwise available is supported by substantial evidence and in accordance with law, the court proceeds to consider Plaintiff's alternative argument: that reliance on Dillinger's normal books and records as facts otherwise available imposes an impermissible adverse inference. Pl.'s Br. at 14–21; *see* Oral Arg. at 24:18–32 (assertion by Plaintiff's counsel that "the adverse inference is a supplemental argument . . . the real main argument is that it's not the most probative").

As discussed extensively above, if "necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), Commerce "shall . . . use facts otherwise available" to fill informational gaps and render determinations, *id.* § 1677e(a). Additionally, where Commerce makes a "valid decision to use facts otherwise available," *Shandong Huarong*, 30 CIT at 1301, 435 F. Supp. 2d at 1289, Commerce may then make the additional decision to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available" provided that Commerce supportably finds the respondent "has failed to cooperate by not acting to the best of its ability," *Nippon Steel*, 337 F.3d at 1380–81 (quoting 19 U.S.C. § 1677e(b)(1)).

Commerce does not here purport to have imposed an adverse inference by relying on Dillinger's normal books and records to fill the cost-related informational gap. *See Third Remand Results* at 17. Nevertheless, Dillinger maintains that "[b]y rejecting all of the cost of production figures . . . and applying an unreasonably low cost of production to non-prime plate based upon resale value, Commerce is applying an adverse inference that . . . increases the dumping margin." Pl.'s Br. at 21.

The problem for Dillinger is that it "provides no basis for concluding that relying on [its normal books and records] imposed an 'adverse inference' other than to assert that it is so." Def.-Inter.'s Oral Arg. Subm. at 13. Dillinger has provided no authority in which a court has imputed an adverse inference into Commerce's selection of facts otherwise available. *See Huvis Corp v. United States*, 31 CIT 1803, 1808, 525 F. Supp. 2d 1370, 1376 (2007) (rejecting an argument that Commerce's selected facts otherwise available were "so high that they must be characterized as 'adverse'" where respondent "cite[d] no

statute, regulation, or case law for its claim"), *aff'd*, 570 F.3d 1347 (Fed. Cir. 2009).[24] Instead, Dillinger merely notes that reliance on its own preferred facts otherwise available would reduce its dumping margin from 6.15 percent to 5.91 percent. Pl.'s Oral Arg. Subm. at 13. This is insufficient.

As Defendant-Intervenor persuasively argues:

> If Commerce were deemed to have imposed an adverse inference simply because a party can propose "facts available" that would result in a lower margin[,] [that] would effectively create a "favorable inference" standard in the statute. Such a standard, however, is not required by the statute or implicated by the SAA.

Def.-Inter.'s Oral Arg. Subm. at 12. In concluding that Commerce did not here impose an impermissible adverse inference, the court does not foreclose the possibility that Commerce may in the future select as facts otherwise available information that "must be characterized as 'adverse' under the antidumping law." *Huvis*, 31 CIT at 1808, 525 F. Supp. 2d at 1376 (citation omitted). The court merely holds that Dillinger has not made such a showing in the case at bar.

CONCLUSION

For the foregoing reasons, the court concludes that Commerce's selection of facts otherwise available to supply the missing cost of production information for Dillinger's prime and non-prime plate was supported by substantial evidence and otherwise in accordance with law. Accordingly, the court sustains Commerce's *Third Remand Results*.

SO ORDERED.

Dated: August 15, 2023
New York, New York

/*s*/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE

[24] Dillinger's citations to *National Steel Corp. v. United States*, 18 CIT 1126, 870 F. Supp. 1130 (1994), *Garg Tube Export LLP v. United States*, 45 CIT __, 527 F. Supp. 3d 1362 (2021), and *Hyundai Electric & Energy Systems v. United States*, 2022 WL 3273811 (Fed. Cir. Aug. 11, 2022) are inapposite. None of these cases involved a court imputing an adverse inference into Commerce's selection of facts otherwise available. *Contra Huvis*, 570 F.3d at 1353–54 (disagreeing "that the constructed market price . . . constitute[s] an adverse inference against [respondent]").

Slip Op. 23–115

UNITED STATES, Plaintiff, v. WANXIANG AMERICA CORPORATION, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 22–00205

[Wanxiang's Motion to Dismiss is denied.]

Dated: August 16, 2023

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Plaintiff United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Steven J. Holtkamp*, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of Chicago, IL.

Michael E. Roll, Roll & Harris LLP, of Los Angeles, CA, argued for Defendant Wanxiang America Corporation. With him on the brief was *Brett I. Harris*.

OPINION AND ORDER

Katzmann, Judge:

This case implicates important questions of fair notice and culpable intent when facing the specter of civil administrative penalties. Plaintiff the United States ("the Government") brings an action seeking more than $97 million in lost revenue and civil penalties against Defendant Wanxiang America Corporation ("Wanxiang") for nine counts of grossly negligent and negligent violations of 19 U.S.C. § 1592 across hundreds of entries. The Complaint pleads two categories of claims. First, the Government alleges that Wanxiang negligently failed to identify that its entries of wheel hub assemblies ("WHAs") were subject to the antidumping duty order on taper roller bearings ("TRBs") and, in turn, did not pay the requisite antidumping duties.[1]

[1] A "bearing" is "a machine part in which another part (such as a journal or pin) turns or slides." *Bearing*, Merriam-Webster, https://www.merriam-webster.com/dictionary/bearing (last updated Aug. 11, 2023). "TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a preassembled 'set.'" *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997).

WHAs, while similar to TRBs, are "significantly different products" according to Wanxiang. Def.'s Br. at 8. In connection with a sunset review of the *TRB Order*, the International Trade Commission ("ITC") stated that:

> All TRBs . . . *including* wheel hub assemblies, share the same basic elements (i.e., cups, cones, rolling elements, and cages) and perform the same basic functions of reducing friction among moving parts, carrying loads, and handling radial and thrust forces. Indeed, most of the value of a wheel hub assembly is attributed to components common to TRBs and wheel hub assemblies.

See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China, 52 Fed. Reg. 22667 (Dep't Com. June 15, 1987) ("*TRB Order*"). Second, the Government alleges that Wanxiang negligently classified its entries of automotive parts and accessories under incorrect item numbers of the Harmonized Tariff Schedule of the United States ("HTSUS"); some of those classifications, the Government further alleges, resulted from gross negligence because Wanxiang knew that those classifications were incorrect.

Wanxiang moved to dismiss the Complaint, *see* Compl., July 13, 2022, ECF No. 2, for failure to state a claim under USCIT Rule 12(b)(6), *see* Def.'s Mot. to Dismiss, Oct. 12, 2022, ECF No. 12. Per Wanxiang, both categories of claims fail as a matter of law. First, Defendant contends that while it is now clear that the *TRB Order* applies to WHAs, it had no fair notice at the time of the entries; the Government's attempt to collect duties and penalties on Wanxiang's then-reasonable interpretation of the *TRB Order* amounts to an impermissibly retroactive application of law. Second, Wanxiang argues that the alleged misclassifications of automotive parts and accessories fail for three reasons: (i) misclassifications alone cannot constitute the basis for a false statement under 19 U.S.C. § 1592; (ii) classification under a particular tariff heading was correct as a matter of law; and (iii) an alleged nonbinding notice from Customs cannot, without more, plausibly establish gross negligence or negligence.

Wanxiang's Motion to Dismiss is denied. Considering the issues relating to automotive parts first, the court holds that (i) an alleged misclassification, without more, sufficiently pleads falsity under § 1592; (ii) Wanxiang's proposed tariff heading improperly wades into the merits at the pleadings stage; and (iii) the nonbinding nature of a Customs notice does not vitiate an importer's duty of reasonable care and can support a factual finding that an importer acted in gross negligence of the customs laws. Finally, accepting all allegations in the Complaint as true and construing all reasonable inferences in favor of Plaintiff, the court concludes that Wanxiang's fair notice

Tapered Roller Bearings from China at 12, Inv. No. 731-TA-344 (Third Review), USITC Pub. 4343 (Aug. 2012) (emphasis added). Nonetheless, the ITC found that the majority of market participants indicated that TRBs and WHAs:

> do not have the same physical characteristics or end uses, citing, for example, that wheel hub assemblies are dedicated for automotive use whereas TRBs have multiple applications and that wheel hub assemblies incorporate additional features or parts, such as flanges or ABS components not found on TRBs.

Id. The question of whether WHAs are "significantly different" from TRBs is relevant to whether Wanxiang exercised reasonable care in not identifying WHA entries as subject to the *TRB Order*. *See infra* pp. 30–32. For that reason, apart from presuming the pleaded allegations as true and drawing all reasonable inferences in favor of the Government, the court expresses no view on the degree of similarity between the two products at this stage.

objection raises relevant questions about whether Wanxiang acted negligently but does not preclude § 1592 liability as a matter of law.

BACKGROUND

I. Legal Framework

It is an importer's responsibility to exercise reasonable care when entering merchandise into the United States. *See* 19 U.S.C. § 1484(a); 19 C.F.R. pt. 171, app. B(D)(6) (2022). An importer must, "using reasonable care," "make entry . . . by filing with [Customs] . . . such information as is necessary to enable [Customs] to determine whether the merchandise may be released from custody of the Bureau of Customs and Border Protection." 19 U.S.C. § 1484(a)(1)(A). Customs's regulations require that importers file an "entry summary," and, at time of entry, file "[e]vidence of the right to make an entry," a "commercial invoice," and a "packing list." 19 C.F.R. § 142.3(a)–(b). Among other requirements, "[t]he entry summary filed for merchandise subject to an antidumping or countervailing duty order must include the unique identifying number assigned by the Department of Commerce, International Trade Administration." *Id.* § 141.61(c).

19 U.S.C. § 1592 enables the United States to enforce those requirements against importers. Under § 1592, the United States may file suit in the Court of International Trade to collect lost revenue and civil penalties for the fraudulent, grossly negligent, or negligent entry of merchandise into the United States by means of material false information or material omission.[2] Subsection 1592(a) states in relevant part:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

[2] Before filing suit in court, Customs must initiate an administrative process. *Id.* § 1592(b). As part of that administrative process, Customs must issue a "pre-penalty notice" to the allegedly offending importer, a "written penalty notice," and ultimately a "final determination and the findings of fact and conclusions of law on which such a determination is based." *Id.* The importer has two opportunities to make representations to Customs defending its conduct: first after the pre-penalty notice, and second after the written penalty notice. *Id.* § 1592(b)(1)(A)(vii), (b)(2).

> (ii) any omission which is material . . . .

19 U.S.C. § 1592(a)(1)(A). Claims under § 1592(a) require, then, at most four elements:

> (1) act or omission;
>
> (2) materiality;
>
> (3) falsity (if the violation is not premised on an omission); and
>
> (4) culpability.

See id.[3]

Under element four, Customs's regulations further define the three degrees of culpability in § 1592: fraud, gross negligence, and negligence. *See* 19 C.F.R. pt. 171, app. B(C) (2022). Only gross negligence and negligence are at issue here. Grossly negligent violations of § 1592 "result[] from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." *Id.* pt. 171, app. B(C)(2); *United States v. Ford Motor Co.*, 463 F.3d 1286, 1292 (Fed. Cir. 2006) ("An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care."). Moreover, "if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation." 19 U.S.C. § 1592(e)(3). The maximum penalty for gross negligence is "the lesser of (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived." *Id.* § 1592(c)(2)(A).

By contrast, an importer's conduct is negligent if:

> it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient.

19 C.F.R. pt. 171, app. B(C)(1). As a general rule, a failure "(a) to ensure that statements made and information provided in connection

[3] Section 1592 liability may also be premised on aiding and abetting conduct, which is not at issue in this case. *See id.* § 1592(a)(1)(B).

with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation" would constitute negligence. *Id.* In negligence cases, "Customs has the burden merely to show that a materially false statement or omission occurred; once it has done so, the defendant must affirmatively demonstrate that it exercised reasonable care under the circumstances." *Ford*, 463 F.3d at 1279; *see also* 19 U.S.C. § 1592(e)(4) (shifting burden to the alleged violator to show that its act or omission "did not occur as a result of negligence"). The maximum penalty for negligence is "the lesser of (i) the domestic value of the merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A).

Finally, subsection 1592(d) allows the United States to recover any lawful duties, taxes, or fees lost "as a result of a violation of subsection (a) . . . , whether or not a monetary penalty is assessed." *Id.* § 1592(d).

II. Factual Background

The following facts are allegations pleaded in the Complaint. Defendant Wanxiang is a subsidiary of Wanxiang Group Corporation, a multinational automotive components manufacturing company located in the People's Republic of China ("China"). Compl. ¶ 6. Wanxiang imported universal joints and parts thereof (including crosses, cross assemblies, yokes, caps, cups, bearing caps, and bearing kits), WHAs incorporating radial ball and tapered roller bearings, radial ball bearings, tapered roller bearings, and other parts and accessories of automobiles (including axles, cages for double offset joints of constant velocity axles ("CV"), races for CV axles used in utility vehicles, CV-joint parts, tube assemblies, and steering shafts for combines) into the United States from October 1, 2007, to September 30, 2012. *Id.* ¶¶ 8–9. That merchandise, the Government alleges, was negligently or grossly negligently entered into the United States by means of material false statements or omissions in violation of 19 U.S.C. § 1592. *See id.* ¶ 9.

The Government asks that the court enter judgment against Wanxiang for (1) unpaid duties, taxes and fees (lost revenue) pursuant to 19 U.S.C. § 1592(d) in the amount of $31,185,209.11, plus pre-judgment interest pursuant to 19 U.S.C. § 1505, and (2) a penalty in the amount of $66,190,766.98, plus interest, for negligent and grossly negligent violations of 19 U.S.C. § 1592(a). *Id.* at 13. "[A]bsent judgment on Counts Five and Seven for grossly negligent violations of 19 U.S.C. § 1592(a)," the Government alternatively requests that the court assess a penalty in the amount of $62,370,418.22, plus interest,

for negligent violations of 19 U.S.C. § 1592(a). *Id.* at 14. To support its claim for relief, the Complaint pleads nine counts that are summarized in the following sections.

A. Count 1: Recovery of Lost Revenue Relating to All Products

The United States demands unpaid customs and antidumping duties, taxes, or fees (lost revenue) in the amount of $31,185,209.11 under 19 U.S.C. § 1592(d). *See id.* ¶¶ 58–59.

B. Count 2: Penalty for Negligence Relating to Wheel Hub Assemblies

In 1987, Commerce issued an antidumping duty order covering TRBs and parts thereof, finished or unfinished, from China. *See TRB Order*, 52 Fed. Reg. 22667. The scope of the antidumping duty order, unchanged from that of the underlying antidumping duty investigation, encompassed:

> [T]apered roller bearings and parts thereof, currently classified in *Tariff Schedules of the United States (TSUS)* items 680.30 and 680.39; flange, take-up cartridge, and hanger units incorporating tapered roller bearings, currently classified in TSUS item 681.10; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use, currently classified in item 692.32 or elsewhere in the TSUS.

Tapered Roller Bearings, Rollers and Parts Thereof, Finished or Unfinished, From the People's Republic of China; Initiation of Antidumping Duty Investigation, 51 Fed. Reg. 33283, 33284 (Dep't Com. Sep. 19, 1986); *see also Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 3833, 3833 (Dep't Com. Feb. 6, 1987) (detailing the same scope). The antidumping case number assigned to the *TRB Order* is A-570–601. 52 Fed. Reg. at 22667.

From October 1, 2007, to September 30, 2012, Wanxiang entered WHAs exported by Wanxiang Qianchao Company Limited into the United States. *Id.* ¶ 20. The Government alleges three material false statements or omissions in violation of 19 U.S.C. § 1592 in connection with Wanxiang's entry of WHAs: (1) Wanxiang identified the WHAs on the relevant entry summary as "01" consumption entries, not as "03" antidumping entries, *see id.* ¶ 23; (2) Wanxiang omitted the antidumping case number, A-570–601, on the relevant entry sum-

mary, *see id.* ¶ 24; and (3) Wanxiang classified the WHAs as automobile parts under Harmonized Tariff Schedule of the United States (HTSUS) heading 8708, in either subheading 8708.99.6890 or subheading 8708.99.8180, at a duty rate of 2.5 percent *ad valorem*, *see id.* ¶ 26.

Those three statements or omissions, the Complaint alleges, resulted from a lack of reasonable care and amount to a negligent violation of 19 U.S.C. § 1592. *Id.* ¶ 61. The Government seeks a penalty for negligence in the amount of $53,879,970.62, which represents two times the total loss of antidumping duties of $26,939,985.31 for the WHAs. *Id.* ¶ 62.

C. Count 3: Penalty for Negligence Relating to Radial Ball Bearings and TRBs

From October 1, 2007, to September 30, 2012, Wanxiang entered radial ball bearings and TRBs into the United States. *Id.* ¶ 29. Wanxiang classified the radial ball and TRBs that it entered under HTSUS heading 8708, in either subheading 8708.99.6890 or subheading 8708.99.8180, at a duty rate of 2.5 percent *ad valorem*. *Id.* ¶ 30. The Complaint alleges that the entries are instead properly classifiable under HTSUS heading 8482, which covers "Ball or roller bearings," and are specifically described by subheading 8482.10.5016 at a duty rate of 9 percent *ad valorem*, subheading 8482.10.5068 at a duty rate of 9 percent *ad valorem*, subheading 8482.20.0080 at a duty rate of 5.8 percent *ad valorem*, and subheading 8482.99.0500 at a duty rate of 9.9 percent *ad valorem*. *Id.* ¶ 31.

That false statement, the Complaint alleges, resulted from a lack of reasonable care and amounts to a negligent violation of 19 U.S.C. § 1592. *Id.* ¶ 64. The Government seeks a penalty for negligence in the amount of $1,204,204.64, which represents two times the total loss of antidumping duties of $602,102.32 for the for the radial ball bearings and TRBs. *Id.* ¶ 65.

D. Counts 4–6: Universal Joints and Parts of Universal Joints

From October 1, 2007, to September 30, 2012, Wanxiang entered universal joints and parts and accessories of universal joints (including crosses, cross assemblies, yokes, caps, cups, bearing caps, and bearing kits) into the United States. *Id.* ¶ 34. Before July 1, 2009, Wanxiang classified the universal joints and parts and accessories of universal joints under several HTSUS headings: (1) Heading 8708, in subheading 8708.94.7510 at a duty rate of 2.5 percent *ad valorem*, subheading 8708.99.1600 duty free, and subheading 8708.99.6890 at

a duty rate of 2.5 percent *ad valorem* ; (2) Heading 8709, in subheading 8709.90.0000 as duty free; and Heading 8483, in subheadings 8483.10.5000, 8483.90.0030, and 8483.90.0080, all duty free. *Id.* ¶ 35.

Those false statements before July 1, 2009, the Complaint alleges, resulted from a lack of reasonable care and amounts to a negligent violation of 19 U.S.C. § 1592. *Id.* ¶ 67. The Government seeks a penalty for negligence in the amount of $3,368,808.32, which represents two times the total loss of duties of $1,684,404.16 for the universal joints and parts and accessories of universal joints entered on and between October 1, 2007, and July 1, 2009. *Id.* ¶ 68.

On July 1, 2009, Customs issued a CBP Form 29, "Notice of Action," to Wanxiang. *Id.* ¶ 36. In the Notice of Action, Customs stated that Wanxiang had misclassified crosses and steering yokes in entry number BZF-60075095, under HTSUS subheading 8432.90.0080 as duty free, and also advised Wanxiang that the correct tariff classification of crosses and steering yokes is under HTSUS subheading 8483.90.8040 at a duty rate of 2.8 percent *ad valorem*. *Id.* Following the Notice of Action on July 1, 2009, Wanxiang continued to classify universal joints and parts and accessories of universal joints (including crosses, cross assemblies, yokes, caps, cups, bearing caps, and bearing kits) into the United States under subheading 8708.94.7510 at a duty rate of 2.5 percent *ad valorem*, subheading 8708.99.1600 duty free, subheading 8708.99.6890 at a duty rate of 2.5 percent *ad valorem*, subheading 8709.90.0000 duty free, and subheadings 8483.10.5000, 8483.90.0030, and 8483.90.0080, all duty free. *Id.* ¶ 37.

Count 5 of the Complaint charges that Wanxiang's conduct after the Notice of Action on July 1, 2009, was grossly negligent. *Id.* ¶ 70. The Government seeks a penalty for gross negligence in the amount of $7,557,676.92, which represents four times the total loss of revenue of $1,889,419.23 for the universal joints and parts and accessories of universal joints entered after July 1, 2009, and until September 30, 2012. *Id.* ¶ 71. In the alternative, Count 6 charges that Wanxiang's conduct after the Notice of Action on July 1, 2009, was negligent. *Id.* ¶ 73. The Government seeks a penalty for negligence in the amount of $3,778,838.46, which represents two times the total loss of revenue of $1,889,419.23 for the universal joints and parts and accessories of universal joints entered after July 1, 2009, and until September 30, 2012. *Id.* ¶ 74.

E. Counts 7–8: Universal Joints That Were Entered Under a Duty-Free Actual Use Provision for Agricultural Parts

Wanxiang also entered universal joints duty free as parts of agricultural machines under HTSUS Heading 9817, subheading 9817.00.6000, an actual use provision that is subject to the requirements of 19 C.F.R. §§ 10.133–139. *Id.* ¶ 42. The Complaint alleges that "Wanxiang was aware of" the relevant requirements in the *Code of Federal Regulations* at the time of the entry. *Id.* ¶ 43.

Count 7 charges that Wanxiang's conduct was grossly negligent. *Id.* ¶ 76. The Government seeks a penalty for gross negligence in the amount of $83,020.60, which represents four times the total loss of revenue of $20,755.15 for the agriculture machine parts. *Id.* ¶ 77. In the alternative, Count 8 charges that Wanxiang's conduct was negligent. *Id.* ¶ 79. The Government seeks a penalty for negligence in the amount of $41,510.30, which represents two times the total loss of revenue of $20,755.15 for the agricultural machine parts. *Id.* ¶ 80.

F. Count 9: Miscellaneous Parts

Finally, Wanxiang entered miscellaneous parts and accessories into the United States. *Id.*¶ 46. Wanxiang classified these miscellaneous parts and accessories under several HTSUS subheadings, including subheadings 8432.90.0080, 8708.99.1600, and 8709.90.0000, all duty-free tariff provisions. *Id.* ¶ 47. The Complaint alleges that the entries are instead properly classifiable under HTSUS subheading 8483.90.8010 at a duty rate of 2.8 percent *ad valorem*, subheading 8708.50.5110 at a duty rate of 2.5 percent *ad valorem*, or subheading 8708.99.6890 at a duty rate of 2.5 percent *ad valorem*. *Id.* ¶ 48.

Count 9 charges that Wanxiang's conduct was negligent. *Id.* ¶ 82. The Government seeks a penalty for negligence in the amount of $97,085.88, which represents two times the total loss of revenue of $48,542.94 for the miscellaneous parts and accessories. *Id.* ¶ 83.

III. Procedural History

On January 17, 2018, Customs issued a pre-penalty notice to Wanxiang that CBP was contemplating issuing a demand for duties in the amount of $35,973,268.39 and a penalty in the amount of $77,157,756.08 for violation of 19 U.S.C. § 1592. *Id.* ¶ 51. Wanxiang responded to the pre-penalty notice on June 27, 2018. *Id.* ¶ 52. On April 11, 2019, Customs issued a notice to Wanxiang assessing a penalty in the amount of $66,190,766.98 for multiple negligent and grossly negligent violations of 19 U.S.C. § 1592, and demanding

payment of $31,185,209.11 in lost revenue. *Id.* ¶ 53. Wanxiang has not paid the total amount of $97,375,976.09 in lost revenue and penalties that Customs has demanded. *Id.* ¶ 55.

Seeking to collect lost revenue under § 1592(d) and assess penalties under § 1592(c), the Government timely filed this action. *See* Compl. Wanxiang filed the instant Motion to Dismiss the Complaint on October 12, 2022. *See* Def.'s Mot. to Dismiss; Def.'s Mem. of Law in Support of Def.'s Mot. to Dismiss, Oct. 12, 2022, ECF No. 12–1 ("Def.'s Br."). The United States filed a response on December 21, 2022, *see* Pl.'s Opp. to Def.'s Mot. to Dismiss, Dec. 21, 2022, ECF No. 15, to which Wanxiang filed a reply on February 3, 2023, *see* Def.'s Reply, Feb. 3, 2023, ECF No. 23. The court issued questions in advance of oral argument, *see* Ct.'s Qs. for Oral Arg., Apr. 7, 2023, ECF No. 26, to which the parties filed responses, *see* Pl.'s Resp. to Ct.'s Qs., Apr. 20, 2023, ECF No. 27; Def.'s Resp. to Ct.'s Qs., Apr. 20, 2023, ECF No. 28. The court invited parties to file submissions after oral argument on May 17, 2023, *see* Oral Arg., May 17, 2023, ECF No. 34, and both parties made such submissions on May 26, 2023, *see* Pl.'s Post Oral Arg. Br., May 26, 2023, ECF No. 35; Def.'s Letter to the Ct., May 26, 2023, ECF No. 36.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction under 28 U.S.C. § 1582, which grants to the Court of International Trade "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under section 592 . . . of the Tariff Act of 1930." *Id.* § 1582(1).

Before the court is Wanxiang's Motion to Dismiss the Complaint for failure to state a claim under USCIT Rule 12(b)(6). *See* Mot. to Dismiss at 1. Identical to its FRCP analogue, USCIT Rule 12(b)(6) allows litigants to move to dismiss any or all claims for relief in a pleading for "failure to state a claim upon which relief can be granted." USCIT R. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1284 (Fed. Cir. 2014). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

When considering a motion to dismiss, the court must accept well-pleaded factual allegations in the Complaint to be true and draw all reasonable inferences in favor of the nonmoving party. *Hartford Fire*, 772 F.3d at 1284. The court's factual review is usually limited to the four corners of the Complaint but may also include "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (alteration in original) (citation omitted).

DISCUSSION

Wanxiang's challenges to the Complaint are grouped into two categories. First, seeking to dismiss Counts 3 through 7 of the Complaint, Wanxiang argues that the Complaint fails to state a § 1592 claim with respect to its tariff classification of automotive parts and accessories for three different reasons. Second, taking aim at Count 2 of the Complaint, Wanxiang contends that the Complaint fails to state a § 1592 claim with respect to the WHA entries because Wanxiang did not have fair notice that WHAs were subject to the *TRB Order*. The below table summarizes each count and Wanxiang's corresponding defenses.

Upon consideration, none of Wanxiang's defenses support dismissal at this preliminary stage, and the court concludes that the Complaint's allegations are sufficient to plausibly establish relief under § 1592 for all nine counts.

No.	Description of Count	Alleged Culpability	Amount/Penalty Demanded	Wanxiang's Defense
1.	Deprivation of lawful duties under 1592(d)	Strict Liability	$31,185,209.11	• No violation of § 1592 occurred
Count Relating to WHAs (Count 2)				
2.	Incorrect entry of WHAs covered by Tapered Roller Bearing Order	Negligence	$53,879,970.62	• Lack of fair notice
Counts Relating to Automotive Parts and Accessories (Counts 3–9)				
3.	Incorrect entry of radial ball bearings and tapered roller bearings	Negligence	$1,204,204.64	• A misclassification is not a false statement
4.	Incorrect entry of universal joints and parts and accessories of universal joints before July 1. 2009	Negligence	$3,368,808.32	• A misclassification is not a false statement • Classification under HTSUS 8708 was correct

No.	Description of Count	Alleged Culpability	Amount/Penalty Demanded	Wanxiang's Defense
5.	Incorrect entry of universal joints and parts and accessories of universal joints entered after July 1, 2009	Gross Negligence	$7,557,676.92	• A misclassification is not a false statement • Classification under HTSUS 8708 was con-ect • Notice of Action cannot establish gross negligence
6.	Incorrect entry of miiversal joints and parts and accessories of universal joints entered after July 1. 2009	Negligence (alternatively from Count 5)	$3,778,838.46	• A misclassification is not a false statement • Classification under HTSUS 8708 was con-ect • Notice of Action cannot establish negligence
7.	Incorrect entry of entries of universal joints under a duty-free actual use provision for agriculture machine parts	Gross Negligence	$83,020.60	• A misclassification is not a false statement
8.	Incorrect entry of entries of universal joints under a duty-free actual use provision for agriculture machine parts	Negligence (alternatively from Count 7)	$41,510.30	• A misclassification is not a false statement
9.	Incorrect entry of miscellaneous parts	Negligence	$97,085.88	• A misclassification is not a false statement
	Total Amount Demanded: **Assuming, gross negligence on Counts 5 and 7**		$97,375,976.09	

I. The Complaint States a § 1592 Claim with Respect to Wanxiang's Tariff Classification of Automotive Parts and Accessories

Wanxiang argues that various counts within Counts 3 through 9 fail to state a claim for three reasons. First, Wanxiang contends that alleged misclassifications, standing alone, cannot constitute false statements under § 1592 because Wanxiang's misclassifications were the result of bona fide disagreement over the law and not misstatements of fact. Second, Wanxiang claims that its classification for universal joints was correct as a matter of law and, therefore, cannot be a false statement. And third, Wanxiang urges the court to dismiss the charges of gross negligence and negligence premised on the Notice of Action from Customs because the Notice of Action was not prospectively binding on Wanxiang. The court considers and finds unpersuasive in turn all three contentions.

A. Counts 3 Through 9 State a Claim Because Misclassifications Can Constitute False Statements.

Seeking to dismiss Counts 3 through 9, Wanxiang argues that the Complaint's allegations that Wanxiang misclassified the articles at issue in those counts cannot, without more, constitute false statements required for § 1592 liability. *See* Def.'s Br. at 39–44. Defendant insists that the tariff classifications asserted by Wanxiang in its entry paperwork are legal conclusions upon which reasonable minds can disagree, not statements of fact that constitute the "false statements and omissions in violation of 19 U.S.C. § 1592(a)" as alleged in the Complaint. *Id.* at 41–42, 44.

Wanxiang's argument hinges on the meaning of falsity in § 1592. As discussed above, pleading a § 1592 claim premised on an act, rather than omission, requires four elements: (1) the act; (2) falsity; (3) materiality; (4) culpability. *See* 19 U.S.C. § 1592(a)(1)(A). It is uncontested that misclassification qualifies as a "written . . . statement," *see id.*, and that the Complaint adequately pleaded the misclassifications as "material," *see* Def.'s Br. at 39–45; Def.'s Reply at 28. The precise question then is not whether the misclassification is more legal or factual in nature, but whether the Government can establish that Wanxiang's classification was "false" under § 1592.

"False" is undefined both in § 1592 and the agency's accompanying regulations. *See* 19 U.S.C. § 1592; 19 C.F.R. pt. 171, app. B(C). So the court turns to "its ordinary meaning." *United States v. Sterling Footwear*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1128 (2017) (citing *United States v. Rockwell Automation Inc.*, 30 CIT 1552, 1557, 462 F. Supp. 2d 1243, 1248 (2006)). A statement is "false" when it is "untrue," "deceitful," or "erroneous." *False*, *Black's Law Dictionary* (11th ed. 2019); *see also Sterling Footwear*, 217 F. Supp. 3d at 1128 (defining "false" in § 1592 as "untrue" or "not genuine; inauthentic"). And even if a statement is material and false, the statement must also have been the result of culpable intent—fraud, gross negligence, or negligence—in order to establish § 1592 liability. *See* 19 U.S.C. § 1592(a)(1); *see also id.* § 1592(a)(2) (noting further that "clerical errors or mistakes of fact are not violations . . . unless they are part of a pattern of negligent conduct").

A misclassification on the entry paperwork, standing alone, is a false written statement that may establish § 1592 liability. The act of declaring that an article is classified under a particular HTSUS subheading includes at least two component assertions: (1) a legal assertion about the proper meaning of the specific terms in the tariff provision, and (2) a factual assertion that the application of the facts to the law would justify a particular subheading as properly con-

strued. *See Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (whereas "[t]he proper scope and meaning of a tariff classification term is a question of law," the question of "whether the goods at issue fall within a particular tariff term as properly construed is a question of fact"). Whether the first assertion is false is related to the meanings of "wrong" or "erroneous"; the importer unlawfully construes the tariff provision. Whether the second assertion is false implicates the definitions of "untrue" or even "deceitful"; the importer is misrepresenting the nature of the product or has failed to correctly apply the law to a set of facts. One or both of those assertions may be at issue in any given case where an alleged misclassification forms the basis for § 1592 liability.

Prior decisions of this court have similarly considered misclassifications to be false statements under § 1592. *See, e.g.*, *United States v. Cruzin Cooler, LLC*, 44 CIT __, __, 459 F. Supp. 3d 1366, 1375 (2020) ("[A] misclassification of merchandise on Customs' entry documentation establishes a false statement."); *United States v. Six Star Wholesale, Inc.*, 43 CIT __, __, 359 F. Supp. 3d 1314, 1317, 1319–21 (2019) (the defendant "falsely classif[ied] 27 entries of wire hangers as 'clothes racks,'" "falsely indicat[ed] that no antidumping duties should be assessed" by filing "01" type entries, and was at fault for "erroneous descriptions and classification of the subject merchandise")[4] ; *Sterling Footwear*, 279 F. Supp. 3d at 1135–37 (evaluating "whether the undisputed facts demonstrate the falsity of the asserted classification" and concluding that "the unrebutted evidence demonstrates the existence of a false statement; i.e., that the subject entries were misclassified"); *United States v. Int'l Trading Servs., LLC*, 41 CIT __, __, 222 F. Supp. 3d 1325, 1332 (2017) (finding that "the classification of the entries under subheading 1701.99.0500 constituted a false statement" because the entries were "not covered by the provisions of" an applicable general note in the HTSUS); *United States v. Optrex Am., Inc.*, 32 CIT 620, 631–32, 560 F. Supp. 2d 1326, 1336–37 (2008) ("Customs has proven by a preponderance of the evidence that Optrex made material false statements or omissions . . . . During the period under review, Optrex classified LCD glass panels under HTSUS heading 8531, which the Federal Circuit has since declared the wrong classification for such devices."), *appeal voluntarily dismissed*, 329 F. App'x 264 (Fed. Cir. 2009). Wanxiang does not

[4] Particularly analogous to the Complaint here, the complaint in *Six Star Wholesale* pleaded misclassification of polyethylene retail carrier bags ("PRCBs") without any other allegations of untrue factual descriptions in the Customs paperwork. *See* Compl. ¶¶ 14–15, *Six Star Wholesale*, 359 F. Supp. 3d 1314 (CIT filed Oct. 8, 2014). Reviewing a motion for default judgment, the court nonetheless found that the complaint was well pleaded and assessed penalties based in part on the misclassification of PRCBs. *See Six Star Wholesale*, 359 F. Supp. 3d at 1319, 1321–23.

cite to, nor is the court aware of, a case where pleading falsity under § 1592 has required the narrower allegation that a statement of fact was untrue. *See* Def.'s Br. at 39–45; Def.'s Reply at 25–28.[5]

At the root of Wanxiang's argument about falsity are well-founded concerns that reasonable disagreements in classification may still subject an importer to § 1592 liability. It warns that "[a]llowing the Government's case to proceed . . . would amount to a judicial rewriting of § 1592 to cover the declaration of wrong legal conclusions." Def.'s Reply at 27. Because § 1592 raises the specter of civil penalties against importers, Wanxiang is right to question the outer bounds of unlawful conduct. Two significant hurdles for the Government, however, keep the risk of regulatory overbreadth at bay.

First, the Government has the burden of proving that Wanxiang's classifications were actually false; put simply, that another HTSUS subheading must apply. *See* 19 U.S.C. 1592(e)(3)–(4) ("the United States shall have the burden of proof to establish all the elements of the alleged violation" in gross negligence cases, and to establish only "the act or omission constituting the violation" in negligence cases); *see also, e.g.*, *Sterling Footwear*, 279 F. Supp. 3d at 1135–37 (false because of statements from Customs that the article was misclassi-

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[5] Wanxiang appears to ground its interpretation of § 1592 being limited to misstatements of fact in § 1484, which states that an importer's "entry shall set forth such facts in regard to the importation as the Secretary may require." 19 U.S.C. § 1484(d)(1); *see* Def.'s Br. at 16–17. But Wanxiang cites no case for the proposition, nor does the court find it convincing, that because an importer's duty requires accurate statements of fact—which no party disputes—falsity must be limited to untrue statements of fact.

Wanxiang's citation to *Fabrene, Inc. v. United States*, 17 CIT 911 (1993), is unavailing for two reasons. *See* Def.'s Br. at 42. First, the statute in that case stated that Customs may reliquidate an entry to correct "a clerical error, mistake of *fact*, or other inadvertence not amounting to *an error in the construction of a law*." 19 U.S.C. § 1520(c)(1) (1988) (repealed 2004) (emphasis added). Unlike § 1592, § 1520 did not include the word "false" and expressly distinguished between mistakes of fact and erroneous constructions of law. Second, the complaint in that case alleged that if Customs had physically examined the sample of imported merchandise instead of relying on the NIS description, then it would have properly classified that merchandise. *See Fabrene*, 17 CIT at 914. But "Customs' reliance on the NIS description does not *itself* establish a mistake of fact," which was defined as "'a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist'"; the complaint, therefore, failed to state a claim. *Id.* (emphasis added) (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp 1395, 1399 (1972)). The court next reasoned that the misclassification by Customs in that case resulted from an error in the construction of the applicable law—another reason that the complaint failed to state a claim—but it did not hold that misclassifications always result from errors in law. *See id.*

Wanxiang's analogies to the doctrines of perjury, misrepresentation, and fraud, *see* Def.'s Br. at 42–44, are also inapplicable because those doctrines expressly require misstatements of fact. *See United States v. Debrow*, 346 U.S. 374, 376 (1953) (requiring "a false statement willfully made as to facts material to the hearing" under 18 U.S.C. § 1621); Restatement (Second) of Conts. § 159 (Am. L. Inst. 1981) ("A misrepresentation is an assertion that is not in accord with the facts."); *id.* §§ 161–162 (relying on that definition of misrepresentation to define fraudulent conduct). The more persuasive analogy is the False Claims Act, *see infra* note 6.

fied, the court's conclusion that one subheading clearly applied to the physical samples, and the determination that none of the defendant's proffered evidence raised a genuine issue of material fact); *Int'l Trading Servs.*, 222 F. Supp. 3d at 1332 (false because the evidence established that the entries were not covered by the provisions of an HTSUS general note); *Optrex Am.*, 560 F. Supp. 2d at 1337 (false because a Federal Circuit case had "defined the proper classification scheme for the company's LCDs").

Second, the culpability element ensures that Wanxiang will not be liable for classifications based on reasonable differences in opinion. In this case, the Government has charged either negligence, *see* Compl. ¶¶ 64, 67, 73, 79, 82, for which Wanxiang must show that the material false statement did not "result[] from . . . the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances," 19 C.F.R. pt. 171, app. B(C)(1); or gross negligence, *see* Compl. ¶¶ 70, 76, for which the Government must show that the material false statement "result[ed] from an act or acts . . . done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute," 19 C.F.R. pt. 171, app. B(C)(2). And as Customs's own regulations make clear, an "*unreasonable* classification will be considered a lack of reasonable care (e.g., imported snow skis are classified as water skis)," which "may result in imposition of a section 592 penalty for fraud, gross negligence or negligence." *Id.* pt. 171, app. B(D)(6) (emphasis added).

That leads us to the broader point. Wanxiang's arguments about reasonable disagreement are actually not falsity arguments at all; they are better understood as defenses to the Government's allegations of its culpability. As discussed above, Customs regulations frame the question of reasonable versus unreasonable classification in terms of an importer's failure to exercise reasonable care. *See id.* pt. 171, app. B(D)(6). So, too, did a congressional report in even greater detail. A joint Senate committee report on the North American Free Trade Agreement Implementation Act, which revised provisions of § 1592, states that "the failure to follow a binding ruling is a lack of reasonable care," but that "an honest, good faith professional disagreement as to the correct classification of a technical matter shall not be considered to be lack of reasonable care unless such disagreement has no reasonable basis (e.g., snow skis are entered as water skis)." S. Rep. No. 103–189, at 73 (1993) (emphasis added). And notably, courts interpreting the False Claims Act—a statute analogous to § 1592 because it authorizes civil penalties for false statements made to the Government—have slotted similar arguments

regarding reasonable disagreement over legal ambiguity into the falsity, not culpability, element.[6] Any potential determination that Wanxiang is culpable for its alleged false statements will require a degree of culpability that exceeds reasonable disagreement between Wanxiang and Customs about which HTSUS subheading applies; but that has little to do with whether the classification that Wanxiang chose was indeed false.

In the factual allegations relevant to each of Counts 3 through 9, the Complaint pleads the HTSUS subheadings under which Wanxiang classified the automotive parts and accessories that it entered into the United States. *See* Compl. ¶¶ 30, 35, 37, 42, 47. And for each count, Government further pleads either the alternative classification that it alleges would have been proper (and, therefore, that it intends to prove must apply), *see id.* ¶¶ 31, 36, 48, or a more specific reason as to why Wanxiang's proposed classification does not apply, *see id.* ¶¶ 42–43. Those same facts and legal conclusions substantiate the Government's allegations that Wanxiang either failed to exercise reasonable care, *see id.* ¶¶ 64, 67, 73, 79, 82, or acted with actual knowledge of or in wanton disregard of the applicable laws, *see id.* ¶¶ 70, 76. Those allegations establish falsity and culpability "above the speculative level on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555 (citation and footnote omitted). The Complaint adequately pleads § 1592 claims for the automotive parts, and Wanxiang's arguments about reasonable disagreement are unpersuasive at this stage and better suited for later in the litigation.

B. Counts 4 Through 6 State a Claim Because Wanxiang Cannot Establish That Its Misclassification for Universal Joints Was Not False as a Matter of Law.

Wanxiang also argues that the Complaint failed to state a claim for Counts 4 through 6 because the universal joints imported by Wanxiang are not properly classified as "Parts of Universal Joints" under HTSUS heading 8483, as claimed by Customs, but rather under

[6] *See* 31 U.S.C. § 3729. The FCA states, in the part most analogous to § 1592, that "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty." *Id.* § 3729(a)(1). But the argument "that a defendant cannot be held liable for failing to comply with an ambiguous term[] go[es] to whether the government proved knowledge," not whether the statement was false. *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287 (D.C. Cir. 2015); *see also United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 384 (4th Cir. 2015); *United States v. Bourseau*, 531 F.3d 1159, 1164 n.2 (9th Cir. 2008). So, too, here. Wanxiang's core argument about the reasonableness of its classifications goes to culpability, not falsity.

HTSUS heading 8708. *See* Def.'s Br. at 45–48. Reframing the argument in terms of the § 1592's elements, Wanxiang effectively contends that the classifications alleged in Counts 4–6 was not false as a matter of law because HTSUS heading 8483 does not apply. *Id.* This challenge, too, is premature.

Even if the court were to accept Wanxiang's legal reasoning,[7] its proposed classification requires the court to draw factual inferences in its favor. Wanxiang argues that Note 2(e) to HTSUS Section XVII provides that "the expressions 'parts' and 'parts and accessories' do not apply to . . . articles of heading 84.81 or 84.82 or, provided they constitute integral parts of engines or motors, articles of heading 84.83," Def.'s Br. at 46 (quoting HTSUS Section XVII, Note 2), and further cites to Customs decisions making the distinction on the basis of whether the parts "constitute integral parts of engines or motors," *id.* at 46–47 (citing NY N198080 (Jan. 13, 2012) (clutch release bearings); NY F81211 (Jan. 6, 2000) (suspension strut bearings); NY C82026 (Jan. 29, 1998) (strut component)). But nowhere does the Complaint allege that the universal joints are exclusively automotive parts or not part of an engine or motor. *Compare* Def.'s Br. at 47 ("The universal joints . . . at issue in this case are *designed* and *used exclusively* as parts of automobiles— an undisputed fact in this case." (emphasis added)), *with* Compl. ¶ 8 ("This action involves Wanxiang's importation of universal joints and parts thereof . . . , wheel hub assemblies . . . , tapered roller bearings, and other parts and accessories of automobiles . . . into the United States.").

Wanxiang's own legal theory relies on the premature factual finding that its universal joints are "clearly not a part of an engine or a motor." Def.'s Br. at 47 (emphasis omitted). But the court declines to do so where, in considering a motion to dismiss, it must draw plausible inferences in favor of the Government. Wanxiang's argument is unsuccessful at this stage.

C. Counts 5 and 6 State a Claim Because Failure to Follow a Notice of Action from Customs Plausibly Establishes Gross Negligence and Negligence.

Wanxiang further argues that the Complaint fails to state claims for gross negligence and negligence in Counts 5 and 6 because Customs's Notice of Action "does not establish a legal requirement that an

[7] The court expresses no view on the legal merits at this stage. The Government counters that Wanxiang ignored the CIT's decision in *Mitsubishi Elecs. Am., Inc. v. United States*, 19 CIT 378, 882 F. Supp. 171 (1995), Customs's rulings and informed compliance publications, and the relevant terms of the HTSUS, when it allegedly misclassified its parts and accessories of universal joints. *See* Pl.'s Br. at 33–34.

importer must follow for future entries." Def.'s Br. at 49. The court nonetheless concludes that the Complaint states a claim for Counts 5 and 6.

The Notice of Action goes to show breach, not duty. The allegation that Wanxiang continued to misclassify entries after receiving a Notice of Action regarding universal joints and parts of universal joints gives rise to a plausible conclusion that Wanxiang's subsequent misclassifications "result[ed] from an act or acts . . . done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171, app. B(C)(2); *see also Sterling Footwear*, 279 F. Supp. 3d at 1139 (concluding that the Government demonstrated gross negligence in showing, by a preponderance of the evidence, that "Sterling failed to correct its errors when pointed out by CBP and, instead, continued to make entries using the incorrect classification"). And if the Notice of Action plausibly establishes grossly negligent conduct, it also plausibly establishes negligent conduct, which is a lower level of culpability.

Wanxiang's argument that the Notice of Action is entry-specific and does not create a prospectively binding obligation is beside the point. Generally, "notices of action are intended to serve as entry-specific notifications." *Int'l Custom Prods., Inc. v. United States*, 748 F.3d 1182, 1187 (Fed. Cir. 2014). The duty underlying the Government's gross negligence and negligence claims, however, is not rooted in the Notice of Action, but in § 1484, which requires importers use "reasonable care" in filing with CBP "the declared value, classification and rate of duty applicable to the merchandise," and "such other information as is necessary to enable the Customs Service to . . . properly assess duties on the merchandise." 19 U.S.C. § 1484. There is therefore no need for "a legal duty to consult with Customs regarding the classification of the universal joint parts in this case" to find that there was breach under § 1592. Def.'s Br. at 50.

Insofar as Wanxiang also contends that an alleged misclassification following a Notice of Action cannot establish breach under 19 U.S.C. § 1592, that argument, too, is unsupported. To dismiss Counts 5 and 6 would effectively foreclose the Government's ability to use relevant yet nonbinding statements by Customs to allege and eventually prove gross negligence or negligence. That overbroad result is not only devoid of any support in the statutory or regulatory text but also inconsistent with this court's prior case law. *See Sterling Footwear*, 279 F. Supp. 3d at 1138–39 & n.36 (finding that the defendant's instruction to its broker to enter the same classification after Cus-

toms had issued two notices of action established, in part, the defendant's "indifference to or disregard for its statutory obligations" on motion for summary judgment); *cf. Optrex Am.*, 560 F. Supp. 2d at 1337 (reasoning that even though certain entries before the court were not at issue in a relevant classification judgment by the Federal Circuit, those entries had "the same technical characteristics as those covered by the judgment" and were therefore subject to the Federal Circuit's holding).

Questions about the Notice of Action's entry-specific nature is likely relevant for a factfinder when evaluating whether Wanxiang breached its legal duty as an importer in a grossly negligent or negligent manner. *See* 19 C.F.R. pt. 171, app. B(C)(1)–(2). But, tasked here with evaluating the sufficiency of the Complaint, the court concludes that the Government has adequately pleaded gross negligence and negligence in Counts 5 and 6.

II. The Complaint States a Claim That Wanxiang Negligently Violated § 1592 with Respect to Its Entries of WHAs

Wanxiang also raises a fair notice defense to Customs's initiation of § 1592 administrative proceedings and this lawsuit that followed with regards to the WHA entries. Defendant argues that "the Commerce Department did not publish its decision that WHAs were considered to be within the scope of the antidumping duty order on TRBs until December 6, 2011," which date was after all of Wanxiang's WHA entries for which the Government seeks to collect antidumping duties and penalties. Def.'s Br. at 2 (emphasis omitted); Compl. attach. A at 1–3, July 13, 2022, ECF No. 2–1 (showing entries from June 24, 2011, to November 30, 2011); *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order*, 76 Fed. Reg. 76143, 76143 (Dep't Com. Dec. 6, 2011) ("On April 18, 2011, in response to an inquiry from New Trend Engineering Limited ('New Trend'), the Department ruled that . . . New Trend's splined and non-splined wheel hub assemblies without antilock braking system ('ABS') elements are included in the scope of the order."). Grounding its argument in principles of fair notice in administrative law, Wanxiang argues that the Complaint fails to state a claim (1) "because the legal obligation to enter WHAs as subject to the TRB [O]rder did not exist until December 6, 2011," and (2) because Wanxiang "should not be penalized for failing to exercise reasonable care in meeting a legal responsibility that was not communicated to the trade community at the time these entries were filed." Def.'s Br. at 4 (emphasis omitted).

Fair notice is an essential safeguard against overbroad administrative action. "It is well established that '[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not [impose] civil or criminal liability.'" *Fuji Photo Film Co. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1292 (Fed. Cir. 2007) (alteration in original) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995), *as corrected* (June 19, 1995)). "The requirement therefore reflects the broader due-process principle that before an agency may enforce an order or regulation by means of a penalty or monetary sanction, it must 'provide regulated parties fair warning of the conduct [the order or regulation] prohibits or requires.'" *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1300–01 (Fed. Cir. 2013) (alteration in original) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012)); *see also Tai-Ao Aluminum (Taishan) Co. v. United States*, 983 F.3d 487, 494–95 (Fed. Cir. 2020) (holding that Commerce could not suspend liquidation of entries before adequate notice was given that importers' products would be subject to an anti-circumvention inquiry); *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 801 (Fed. Cir. 2020) (holding that Commerce exceeded its regulatory authority in retroactively suspending liquidation on entries dated before a scope inquiry is initiated); *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1319 (Fed. Cir. 2020) ("When Commerce rules that a product falls within the scope of an order, but 'there has been no [previous] suspension of liquidation,' a new suspension must be ordered beginning only 'on or after the date of initiation of the scope inquiry.'" (quoting 19 C.F.R. § 351.225(l)(3))); *Trans Tex. Tire, LLC v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1289, 1304 (2021) ("[A]dequate notice is essential where Commerce attempts to apply retroactive duties.").

Unlike those fair notice cases, however, the fair notice argument here is one degree removed from the law being applied. Wanxiang does not dispute that it had fair notice of the relevant provisions of 19 U.S.C. § 1592; it insists instead that a lack of fair notice regarding the *TRB Order*'s applicability prevents any finding of negligence—that Wanxiang's conduct related to the WHAs cannot have been a failure

to exercise reasonable care.[8] *See* Def.'s Br. at 4. But the negligence inquiry of § 1592 sweeps broader than only whether an antidumping order was clear. In *Star Pipe Products v. United States*, Commerce instructed Customs to "continue to suspend liquidation" after it had found that importer Star Pipe's Joint Restraint Kits were within the scope of an antidumping order; Star Pipe challenged Commerce's instruction as improperly assessing duties on imports before the initiation of the scope proceedings. 981 F.3d 1067, 1078 (Fed. Cir. 2020). In holding Star Pipe's challenge moot because the pre-initiation entries were liquidated with no duties, the Federal Circuit reasoned that:

> 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(l)(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.*

Id. at 1079 (emphasis added).

Put simply, Customs may still assess that Wanxiang failed to exercise reasonable care in navigating regulatory uncertainty. *Star Pipe* coheres with the other case law; none of the cases that Wanxiang cites apply a statute like § 1592, which, in its inquiry about whether an importer exercised reasonable care, considers a scope of conduct broader than the conduct which is being allegedly retroactively targeted. Without reaching a particular outcome at this preliminary stage where only the Complaint is before the court, the court notes that Wanxiang, confronted with regulatory uncertainty, could have: requested a public version of Commerce's preliminary determination

[8] Wanxiang also appears to frame the question of fair notice as one of "legal obligation" or duty under § 1592. *See* Def.'s Br. at 4. But that argument, once again eliding the difference between duty and breach, is summarily disposed for the same reasons as in subsection I.C. The potential ambiguity of whether the *TRB Order* covered Wanxiang's WHAs before December 6, 2011—a factual question better reserved for later stages of litigation, as discussed below—does not somehow vitiate an importer's duty of reasonable care under § 1592, which is rooted in § 1484. *See supra* pp. 24–25.

in the New Trend scope ruling, *see* 19 C.F.R. § 351.104(b); sought a pre-importation classification ruling or a binding ruling letter from CBP headquarters to ascertain the correct classification of the WHAs; sought its own scope ruling from Commerce to determine whether its WHAs were covered by the *TRB Order*; or consulted a customs expert to whom it had provided complete and accurate information. *See* 19 C.F.R. pt. 171, app. B(D)(6) (defining "reasonable care" to include responsibilities such as "taking measures that *will lead to* and *assure* the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met" (emphasis added)); S. Rep. No. 103–189, at 73 (using the same language and indicating the Senate Committee's belief that "seeking guidance from the Customs Service" or "consulting with a customs broker" are "aids for proper compliance"). In listing these possible actions, the court does not intimate a view as to whether they occurred or whether the failure to take those steps is justified. But to hold for Wanxiang now would bar the Government from enforcing § 1592 against importers that negligently fail to correctly identify their entries, so long as those importers show that there was some uncertainty in the applicable classification. That result could encourage gamesmanship in classifying entries and absolve importers from exercising reasonable care in taking the appropriate actions with Customs and Commerce to clarify the classification applicable to their entries.

The path to negligence in this case, therefore, must be particular to the regulatory environment at the time of Wanxiang's entries. Determining negligence here would require a factfinder to consider, among other potential evidence, information describing the WHAs that Wanxiang entered into the United States,[9] statements by Customs and Commerce about the *TRB Order*'s applicability to WHAs that Wanxiang was actually or constructively aware of,[10] and efforts by

[9] Wanxiang explains the differences between WHAs and TRBs in its briefing. *See* Def.'s Br. at 6–9; *see also supra* note 1.

[10] Wanxiang has identified the following public statements by Commerce and Customs that, in its view, support its claim that alternative classification of WHAs as not included by the *TRB Order* was reasonable before December 6, 2011.

- *Notice of Scope Rulings*, 76 Fed. Reg. 31301, 31302 (Dep't Com. May 31, 2011) (noting that New Trend had filed a scope request on "whether certain wheel hub units are within the scope of the antidumping duty order" and that there was a "preliminary ruling [on] December 13, 2010," without noting its outcome).
- *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 76 Fed. Reg. 3086, 3087 (Dep't Com. Jan. 19, 2011) (covering "shipments of tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use").

Wanxiang to understand and apply the law at the time.[11] And, of particular importance considering the due process concerns in this case, Wanxiang's contentions about Commerce's procedural deficiencies are also relevant to the determination of whether Wanxiang exercised reasonable care.[12]

At the motion to dismiss stage, the court concludes that the Complaint sufficiently pleads a negligent violation of § 1592 in Count 2. The Government specifies the entries at issue by referencing an

- *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2008–2009 Administrative Review of the Antidumping Duty Order*, 75 Fed. Reg. 41148, 41149 (Dep't Com. July 15, 2010) ("For the purposes of these preliminary results, because the Department has not yet determined whether wheel hub assemblies are covered by the scope of the order on TRBs, the Department will continue to base its antidumping margin calculation on New Torch's original U.S. sales database, which does not include wheel hub assemblies.").
- Letter from E. Begnal, Dep't of Com., re: Scope Inquiry (Tapered Roller Bearings) at 1 (June 15, 2010) ("The Department finds that it cannot determine whether New Trend's wheel hub assemblies should be excluded from the scope of the Order based solely upon New Trend's application for a scope clarification and the descriptions of the merchandise referred to in 19 CFR § 351.225(k)(1).").
- N.Y. Ruling Letter 818084 (Feb. 7, 1996) ("It is the opinion of this office that the subject wheel hub assemblies would not be subject to antidumping duties under the current Department of Commerce investigation on tapered roller bearings from China, as published in the Federal Register on June 15, 1987."); *see also* N.Y. Ruling Letter N137737 (Jan. 6, 2011); Customs HQ Ruling Letter H013123 (Apr. 14, 2008); N.Y. Ruling Letter N022275 (Feb. 6, 2008); N.Y. Ruling Letter N018286 (Nov. 2, 2007); N.Y. Ruling Letter M87799 (Nov. 15, 2006); N.Y. Ruling Letter I85202 (Aug. 20, 2002); N.Y. Ruling Letter G82534 (Oct. 10, 2000); N.Y. Ruling Letter 855471 (Sept. 10, 1990).

[11] In addition to the actions listed above, *see supra* pp. 29–30, Wanxiang could have requested from Commerce a paper copy of the actual public version of the preliminary scope ruling. See 19 C.F.R. § 351.104(b). Moreover, it is possible that a request for public records of the preliminary ruling in May 2011 would have revealed Commerce's final ruling, dated April 18, 2011, which definitively stated that WHAs are within the scope of the *TRB Order*. *See Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order*, 76 Fed. Reg. at 76143. The court, once again, does not express a view at the pleadings stage as to whether Wanxiang took or should have taken these steps.

[12] First, Wanxiang states that it should have been included on the "scope service list"—a list of entities that Commerce is required by regulation to notify—of the New Trend scope request proceedings. *See* Def.'s Br. at 23 & ex. 2 (citing 19 C.F.R. § 351.225(e)–(f), (n)). Had Wanxiang been on the scope service list, it would likely have received actual notice of Commerce's final determinations in April 2011 that WHAs were covered by the *TRB Order*. *See* 19 C.F.R. § 351.225(e) (2011) (requiring notice to the "scope service list of the initiation of a scope inquiry" that cannot be resolved solely on the (k)(1) factors); *id.* § 351.225(f)(3) (requiring notice to the "scope service list . . . of the preliminary scope ruling"); *id.* § 351.225(f)(4) (requiring notice to the "scope service list . . . of the final scope ruling"). The C.F.R. defines "scope service list" to "include all persons that have participated in any segment of the [antidumping or countervailing duty] proceeding." *Id.* § 351.225(n).

Second, Wanxiang argues that Commerce's delayed Federal Register notice in May 2011 merely stated that a preliminary determination had been reached without expressly mentioning the outcome. *See* Def.'s Reply at 17–20. Wanxiang could have taken action to retrieve the publicly available copy of that preliminary determination. *See supra* note 11. But if Wanxiang can factually establish that it was entitled to actual notice via the scope service list, notice via the Federal Register would possibly be "insufficient in law," *Camp v. U.S. Bureau of Land Mgmt.*, 183 F.3d 1141, 1144 (9th Cir. 1999) (applying 44 U.S.C. § 1507), though likely still relevant to a factfinder's overall assessment.

attachment, *see* Compl. ¶ 20 & attach. A at 1–3, and alleges three material false statements or omissions: Wanxiang's identification of the entries as "01" consumption entries rather than "03" antidumping entries, *see id.* ¶ 23; Wanxiang's omission of the antidumping case number, *see id.* ¶ 24; and Wanxiang's classification of the entries under HTSUS heading 8708, *see id.* ¶ 26. The Complaint further pleads that those material false statements and omissions amounted to a failure to "exercise reasonable care," *see id.* ¶ 61, and that Wanxiang is liable to the United States for penalties representing two times the total loss of antidumping duties for the WHAs, *see id.* ¶¶ 25, 28, 62.

Accepting the Complaint's factual assertions as true and construing any reasonable inferences in Plaintiff's favor, the court concludes that the Complaint adequately states a § 1592 claim with regards to Wanxiang's WHA entries. Because § 1592 assesses whether Wanxiang exercised reasonable care in navigating the regulatory environment at the time of its entries, the potential fair notice issues with the *TRB Order* do not categorically preclude § 1592 liability. But because Wanxiang's fair notice argument is one that may negate the Government's allegation that Wanxiang "did not exercise reasonable care" in entering WHAs, *see* Compl. ¶ 61, it may be pleaded as a negative defense in the Answer, *see* USCIT R. 12(h)(2).

CONCLUSION

For the foregoing reasons, the court concludes that the Complaint states a claim for Counts 1 through 9.[13] Wanxiang's Motion to Dismiss is denied. Per USCIT Rule 12(a)(2)(A), Wanxiang must serve an answer within fourteen days after notice of this opinion.

SO ORDERED.

Dated: August 16, 2023
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

[13] Because the court holds that the Complaint states a claim for Counts 2 through 9, which means that each of those Counts is premised on a plausible violation of § 1592(a), Count 1 is also sufficiently pleaded for its full amount demanded. *See* 19 U.S.C. § 1592(d) (requiring only "a violation of subsection (a) . . . whether or not a monetary penalty is assessed").

Slip Op. 23–116

SECOND NATURE DESIGNS LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00131

[The court redesignates Defendant's counterclaim as a defense and dismisses the motion to dismiss the counterclaim as moot. The court severs and dismisses Entry No. 551–72801710 for lack of subject matter jurisdiction.]

Dated: August 17, 2023

John M. Peterson, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson LLP, of New York, N.Y., for Plaintiff Second Nature Designs, Ltd.

Brandon A. Kennedy, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, *Aimee Lee*, Assistant Director. Of counsel on the brief was *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, N.Y.

OPINION AND ORDER

Katzmann, Judge:

Plaintiff/Counterclaim-Defendant Second Nature Designs Ltd. ("Plaintiff") brings this action against Defendant/Counterclaim-Plaintiff the United States ("Defendant" or "the Government") to contest the denial of its 19 U.S.C. § 1514 protest against the classification of and assessment of duty on certain entries of decorative items. Plaintiff raises two motions to dismiss at the pleadings stage. First, Plaintiff moves to dismiss the counterclaim pleaded by Defendant in its Answer to the Complaint for failure to state a claim under USCIT Rule 12(b)(6). *See* Pl.'s Mot. to Dismiss Def.'s Countercl. & Sever Entry No. 551–72801710, at 7–26, Mar. 2, 2023, ECF No. 34 ("Pl.'s Br."); Answer & Countercl. at 4, Feb. 14, 2023, ECF No. 29. In the alternative, Plaintiff moves to designate the counterclaim as a defense under USCIT Rule 8(d)(2). *See* Pl.'s Br. at 1. Second, Plaintiff moves to sever Entry No. 551–72801710 from the Amended Summons and dismiss it because no party has standing to challenge the denial of a protest of that entry by U.S. Customs and Border Protection ("Customs"). *See* Pl.'s Br. at 26–27; Am. Summons at 5, Jan. 30, 2023, ECF No. 28.

The court first holds that the Government fails to state a counterclaim in its Answer. The court redesignates the counterclaim as a defense under USCIT Rule 8(d)(2) and dismisses the motion to dismiss the counterclaim as moot. The court then grants Plaintiff's second motion by severing Entry No. 551–72801710 from the

Amended Summons and dismissing it for lack of subject matter jurisdiction under USCIT Rule 12(b)(1).

BACKGROUND

This case involves the classification of numerous decorative items imported by Plaintiff in 149 entries filed with Customs from July 11, 2016, to December 23, 2016. *See* Am. Summons at 3–6. Plaintiff describes the merchandise as consisting "of certain various natural branches, flowers, wood, and similar merchandise which is dried and decorated," and "[s]ome products are arranged into various bouquets." Compl. ¶ 6. Plaintiff contests Customs's denial of its protest that followed Customs's liquidation of most of Plaintiff's entries under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 0604.90.60[1] and assessed duty at the rate of 7 percent *ad valorem*, Compl. ¶¶ 8–10, and of the remainder of Plaintiff's entries under HTSUS subheading 0604.90.30,[2] a duty-free provision, *see* Mot. to Am. Summons, Jan. 30, 2023, ECF No. 26. The court granted a consent motion to amend the summons that struck all such duty-free entries except one, reducing the number of entries to 137. *See* Order, Jan. 30, 2023, ECF No. 27. This case proceeds in parallel with *Second Nature Designs Ltd. v. United States*, No. 17–00271, which arises from an earlier denial of protest by Customs and involves the disputed classification of similar merchandise over the same two HTSUS provisions at issue in this case. *See Second Nature Designs, Ltd. v. United States* ("*Second Nature I*"), 46 CIT __, __, 586 F. Supp. 3d 1334, 1337 (2022).

Plaintiff filed the Complaint on September 26, 2022, *see* Compl., Sept. 26, 2022, ECF No. 20, and the Amended Summons was deemed filed on January 30, 2023, *see* Am. Summons. Defendant's Answer, which included a counterclaim, was filed on February 14, 2023. *See* Answer & Countercl. On March 2, 2023, Plaintiff moved to dismiss the counterclaim and sever and dismiss Entry No. 551–72801710 from the Amended Summons. *See* Pl.'s Br. The Government contested both motions in a response brief, *see* Def./Countercl. Pl.'s Mem. of L. in Opp'n to Pl.'s Mot. to Dismiss Countercl. & Sever Entry No. 551–72801710, Apr. 6, 2023, ECF No. 37 ("Def.'s Br."), to which Plain-

[1] "Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other: Other."

[2] "Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other: dried or bleached."

tiff filed a reply, *see* Pl.'s Reply in Supp. of Mot. to Dismiss Def.'s Countercl., May 17, 2023, ECF No. 40.

DISCUSSION

The court has subject matter jurisdiction under 28 U.S.C. § 1581(a), which grants to the Court of International Trade "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). The court's exclusive jurisdiction also extends to validly pleaded counterclaims involving the same "merchandise that is the subject matter of such civil action." *Id.* § 1583.

Motions to dismiss under USCIT Rule 12(b) allow litigants to dismiss any or all claims for relief in any pleading for lack of subject matter jurisdiction, *see* USCIT R. 12(b)(1), or for failure to state a claim, *see* USCIT R. 12(b)(6). A summons in a § 1581(a) action and a counterclaim stated in an answer are both pleadings to which USCIT Rule 12 applies. *See* USCIT R. 7(a)(2) (answers in § 1581(a) actions); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (summons in § 1581(a) actions). When considering a motion to dismiss, the court must accept well-pleaded factual allegations to be true and draw all reasonable inferences in favor of the nonmoving party. *Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021). To survive a motion to dismiss for failure to state a claim in particular, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

I. Motion to Dismiss the Counterclaim for Failure to State a Claim

Defendant pleaded the following counterclaim in its Answer:

> Defendant/Counterclaim-Plaintiff, United States, brings this counterclaim pursuant to 19 U.S.C. §§ 1503, 1505(b) & (c), the tariff code (19 U.S.C. § 1202 *et seq.*), and 28 U.S.C. §§ 1582(3), 1583, 2643(b) & (c), seeking an order from the Court reclassifying 44 styles of the subject merchandise, identified in paragraph 9 of this counterclaim, under subheading 6702.90.65, HTSUS, which carries a duty rate of 17 percent *ad valorem*. Pursuant to this reclassification of the imported merchandise, the Government seeks the recovery of additional duties owed, plus interest as provided by law, including interest pursuant to 19 U.S.C. § 1505(b), (c), and all pre- and post-judgment interest provided by law, from Second Nature.

Answer & Countercl. at 5.[3] Defendant notes that this court's prior decisions have "held that the Government lacks a cause of action to assert counterclaims for underpaid duty on the same merchandise for which plaintiff claims a duty refund." *Id.* at 4 n.2 (citing *Second Nature I*, 586 F. Supp. 3d 1334; *Cyber Power Sys. (USA) Inc. v. United States*, 46 CIT __, 586 F. Supp. 3d 1325 (2022)). Having included the counterclaim to preserve its rights on potential appeal of that legal question, Defendant nonetheless requests that the motion to dismiss be denied. *See id.*; Def.'s Br. at 5.

Defendant fails to state a counterclaim. Three cases are persuasive here: *Second Nature I*, *Cyber Power*, and *Maple Leaf Marketing, Inc. v. United States*, 47 CIT __, __, Slip Op. 23–90 (June 14, 2023). In *Second Nature I*, the Government sought leave to amend its answer to include a counterclaim that the merchandise at issue should have been correctly classified under HTSUS subheading 6702.90.65, carrying a duty rate of 17 percent *ad valorem*, rather than HTSUS subheading 0604.90.60, under which Customs had initially assessed duties at 7 percent *ad valorem*. 586 F. Supp. 3d at 1337–38 & nn.3–4. The decision adopted the court's conclusions in *Cyber Power*, *see Second Nature I*, 586 F. Supp. 3d at 1338, which held that "Congress did not provide the United States with any statutory authority"—either expressly or impliedly—"to assert counterclaims challenging the liquidated classification and duty rate," *Cyber Power*, 586 F. Supp. 3d at 1333. And after the briefing for the instant motion was filed, this court in *Maple Leaf* "reaffirm[ed] the reasoning and conclusions of *Cyber Power* and *Second Nature [I]*" and redenominated the Government's counterclaim in that case—which cites the same statutory provisions invoked in this case—to reliquidate entries under an HTSUS subheading with a higher duty rate as a defense. Slip Op. 23–90, at 3–8.

So too here. The counterclaims in *Second Nature I* and this case both request reclassification of the goods at issue to HTSUS subheading 6702.90.65, which carries a higher rate than that of the duties

[3] The description of HTSUS subheading 6702.90.65 is: "Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other."

initially assessed by Customs.[4] The counterclaim here cites to 19 U.S.C. §§ 1503, 1505(b)–(c), the tariff code (19 U.S.C. § 1202 *et seq.*), and 28 U.S.C. §§ 1582(3), 1583, and 2643(b)–(c). *See* Answer & Countercl. at 5. The *Cyber Power* court, however, considered nearly all of those provisions in its search for authority. It concluded that none of them—either independently or "cobble[d] together"—established a cause of action for the Government to bring a counterclaim challenging the liquidated classification and duty rate. *Cyber Power*, 586 F. Supp. 3d at 1330; *see also id.* at 1330 ("Section 1202 only sets forth the HTSUS . . . ."); *id.* at 1330 n.9 (Section 1505 "is relevant only after the [CIT] orders reliquidation."); *id.* at 1331 ("Section 1503 relates to valuation, not classification . . . . [and] does not grant Defendant a cause of action . . . ."); *id.* at 1331 n.10 ("Sections 1583 and 2643 unambiguously grant powers to the Court, not to litigants before the Court."); *id.* at 1333 n.14 ("[T]he plain meaning of Section 1583 is clear and the statute is purely jurisdictional."). The *Second Nature I* court "adopt[ed] the conclusions" of *Cyber Power*, 586 F. Supp. 3d at 1338, and the *Maple Leaf* court reiterated those conclusions before holding that "Defendant has failed to assert a valid statutory basis to support its cause of action," Slip Op. 23–90, at 8. And although "Congress may have intended to permit the assertion of counterclaims through the enactment of 28 U.S.C. § 1583," the court is ultimately "bound by the text of the statute, which provides only that the court has jurisdiction to hear counterclaims properly asserted." *Second Nature I*, 586 F. Supp. 3d at 1338 n.5 (citing H.R. Rep. No. 96–1235, at 35 (1980)).

The only provision cited in this case's counterclaim that was not addressed by the court's adoption of *Cyber Power* in *Second Nature I* is 28 U.S.C. § 1582(3), which grants to the CIT "exclusive jurisdiction of any civil action which arises out of an import transaction and which

[4] The Government moved to include the following counterclaim in *Second Nature I*:

> Defendant/counterclaim plaintiff, United States (the Government), brings this counterclaim pursuant to 28 U.S.C. §§ 1583(1) & 2643(b) in order to reclassify the imported merchandise at issue under subheading 6702.90.65, HTSUS, and to recover the 17 percent ad valorem duty applicable under that subheading, with interest as provided for by law, including but not limited to interest pursuant to 19 U.S.C. § 1505(b)–(c), and post-judgment interest.

Def.'s Am. Answer & Supp. Pleading Asserting a Countercl. at 7, *Second Nature I*, No. 17–00271 (CIT filed Jan. 28, 2022), ECF No. 92–1. The counterclaim in *Cyber Power* also cited only to 28 U.S.C. §§ 1583(1) and 2643(b). *See* Answer & Countercl. at 8, *Cyber Power*, No. 21–00200 (CIT filed Dec. 21, 2021), ECF No. 14.

The court further notes that *Second Nature I* involved a motion for leave to amend, and this one involves a motion to dismiss an already pleaded counterclaim. To be clear, that distinction is without difference. The newly added portions of an amended pleading are as operative as terms that have survived from the initial pleading, *see* USCIT R. 15, and the *Second Nature I* court found the grant of leave to amend to be proper, *see* 586 F. Supp. 3d at 1338–43.

is commenced by the United States . . . to recover customs duties." 28 U.S.C. § 1582(3). But because the plain language of § 1582 clearly establishes that it is jurisdictional, § 1582—just like § 1583—"does not create any substantive cause of action" for the Government to bring a counterclaim. *Cyber Power*, 586 F. Supp. 3d at 1333; *see also Maple Leaf*, Slip Op. 23–90, at 7 ("[Section 1582] is jurisdictional, and does not create any cause of action."). Applying *Second Nature I*, *Cyber Power*, and *Maple Leaf*, the court concludes that the Government fails to state a counterclaim because it lacks statutory authority for its cause of action.[5]

But that alone does not warrant dismissal. "If a party mistakenly designates a defense as a counterclaim . . . , the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." USCIT R. 8(d)(2). Invoking Rule 8(d)(2), the court in *Second Nature I* redenominated the Government's proposed counterclaim as a proposed defense. 586 F. Supp. 3d at 1339, 1342. The decision recognized that "although the Government has no cause of action for the assertion of a *counterclaim* for increased duties, it is not barred from otherwise arguing for a different classification at a higher duty rate." *Id.* at 1339 (emphasis in original); *see also Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("[T]he court's duty is to find the *correct* result . . . .") (emphasis in original); *Cyber Power*, 586 F. Supp. 3d at 1334 & n.16 (redenominating the counterclaim as a defense).; *Maple Leaf*, Slip Op. 23–90, at 8 (same). The Government's "assertion of alternative classifications [was] permissible" in *Second Nature I*, and the court granted its motion to amend the answer to include the proposed counterclaim as a defense. 586 F. Supp. 3d at 1339, 1343. The Government's assertion of alternative classifications at a higher duty is just as permissible here. The court accordingly redesignates the Government's counterclaim as a validly pleaded defense and dismisses Plaintiff's motion to dismiss the counterclaim as moot.

[5] In so holding, the court adopts the relatively narrow reasoning of those three cases. Plaintiff argues that Defendant's counterclaim is barred by the finality of liquidation set out in 19 U.S.C. § 1514(a). *See* Pl.'s Br. at 7–18. Because the Government has not identified a valid statutory basis for the counterclaim, the court declines to reach the interpretive question of whether § 1514(a) sets a broader bar on counterclaims. *See also Cyber Power*, 586 F. Supp. 3d at 1332 ("There is nothing in the language of Section 1514 . . . that gives rise to an implied right of the United States to assert a counterclaim."). The court also does not reach Plaintiff's argument that the Government's counterclaim violates the Constitution. *See id.* at 22–23; Pl.'s Reply at 13–17.

II. Motion to Sever and Dismiss Entry No. 551–72801710 for Lack of Subject Matter Jurisdiction

The summons is the "initial pleading in actions to contest the denial of a protest" under 28 U.S.C. § 1581(a). *DaimlerChrysler Corp.*, 442 F.3d at 1318. The summons, therefore, "must establish the court's jurisdiction." *Id.* It follows that challenges to protest denials of particular entries included in a summons must be justiciable under Article III of the Constitution, which limits the federal judicial power to actual cases and controversies. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–62 (1992). This court may accordingly sever and dismiss particular entries for lack of subject matter jurisdiction or as nonjusticiable. *See, e.g.*, *Weslo Inc. v. United States*, 25 CIT 561, 566, 167 F. Supp. 2d 1348, 1353 (2001); *Bousa, Inc. v. United States*, 22 CIT 888, 888 (1998); *Mercado Juarez/Dos Gringos v. United States*, 16 CIT 625, 627, 796 F. Supp. 531, 532 (1992).

Plaintiff does not dispute that it lacks standing to challenge the denial of a protest of Entry No. 551–72801710. The Amended Summons includes Entry No. 551–72801710, which was assessed duty free in liquidation by Customs under HTSUS subheading 0604.90.30. *See* Am. Summons at 5; Pl.'s Br. at 26. But "[t]his Court has held that challenges to the correctness of Customs['s] classification decisions where the liquidation is duty-free present a 'moot question or an abstract proposition' because plaintiff has not suffered an injury or harm that the court's order can redress." *Apple Inc. v. United States*, 43 CIT __, __, 375 F. Supp. 3d 1288, 1297 (2019), *aff'd*, 964 F.3d 1087 (Fed. Cir. 2020) (quoting *3V, Inc. v. United States*, 23 CIT 1047, 1049–52, 83 F. Supp. 2d 1351, 1353–55 (1999)).

Nor, though it asserts otherwise, can the Government present a live case or controversy involving Entry No. 551–72801710 because its alleged counterclaim ultimately has no basis in any express or implied cause of action.[6] *See* Def.'s Br. at 25; *see also Maple Leaf*, Slip

[6] As discussed above, the court holds that the Government failed to state a counterclaim in its Answer. *See supra* p. 7. But, unlike with the other applicable entries in the Amended Summons, the Government's argument for reclassifying Entry No. 551–72801710 cannot be designated as a defense under USCIT Rule 8(d). There is no affirmative claim by Second Nature regarding Entry No. 551–72801710 to which the Government's potential defense can attach. *See* USCIT R. 12(b) (defenses correspond to "claim[s] for relief").

For the entries that remain in the Amended Summons, the court may conclude that the appropriate classification carries a duty at a rate higher than that initially assessed by Customs. *See Jarvis Clark*, 733 F.2d at 878. If so, Second Nature may be liable to the Government for increased duties. *See Cyber Power*, 586 F. Supp. 3d at 1332 n.13, 1334 ("[T]he right of the United States to recover duties owed as a result of the Court's obligation to reach the correct result [is] a right addressed by *Jarvis Clark*."). But contrary to the Government's contention, *see* Def.'s Br. at 24 (citing *Cormorant Shipholding Corp. v. United States*, 33 CIT 440, 447 n.17, 617 F. Supp. 2d 1276 n.17 (2009)), the court's ability to order the payment of increased duties from Second Nature does not depend on whether there is

Op. 23–90, at 8; *Second Nature I*, 586 F. Supp. 3d at 1338; *Cyber Power*, 586 F. Supp. 3d at 1333. Because neither party may lawfully dispute the protest denial of Entry No. 551–72801710, the court severs that entry from the Amended Summons and dismisses it for lack of subject matter jurisdiction under USCIT Rule 12(b)(1).

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that the Counterclaim, *see* Answer at 5, is redenominated as a defense under USCIT Rule 8(d)(2); and it is further

ORDERED that the Motion to Dismiss the Counterclaim is **DISMISSED AS MOOT**; and it is further

ORDERED that Entry No. 551–72801710 is **SEVERED** from the Amended Summons, *see* Am. Summons at 5, and **DISMISSED** for lack of subject matter jurisdiction under USCIT R. 12(b)(1).

Dated: August 17, 2023
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

a counterclaim. *See* 28 U.S.C. § 2643(b) (authorizing the court to order procedures as it "considers necessary to enable it to reach the correct decision"); *id.* § 2643(c)(1) (authorizing the court to "order any other form of relief that is appropriate in a civil action"); *see also Cyber Power*, 586 F. Supp. 3d at 1333 n.15 (distinguishing *Cormorant* because "that court analyzed whether the [CIT] had jurisdiction over the United States' counterclaim pursuant to 28 U.S.C. § 1583," not whether the counterclaim stated a claim).

Slip Op. 23–117

SUZANO S.A. (F/K/A SUZANO PAPEL E CELULOSE S.A.), Plaintiff, v. UNITED STATES, Defendant, and DOMTAR CORPORATION, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00069

JUDGMENT

Following two remand orders, *see Suzano S.A. v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1225, 1228 (2022), ECF No. 56; *Suzano S.A. v. United States* ("*Suzano II*"), 47 CIT __, __, 633 F. Supp. 3d 1232, 1238–43 (2023), ECF No. 67, the U.S. Department of Commerce ("Commerce") submitted the *Final Results of Redetermination Pursuant to Court Remand*, July 19, 2023, ECF No. 68 ("*Second Remand Results*"). Plaintiff Suzano S.A. and Defendant-Intervenor Domtar Corporation are not submitting additional comments, and all parties request that the court enter judgment sustaining the *Second Remand Results*. *See* Joint Status Report Concerning the Remand Redetermination at 2, Aug. 10, 2023, ECF No. 70.

In the first remand proceedings, Plaintiff opposed and Defendant-Intervenor supported Commerce's inclusion of derivative losses in Suzano's financial expense rate. *See Suzano II*, 633 F. Supp. 3d at 1234–35. On second remand, Commerce "continue[d] to find that Suzano's derivative losses are not extraordinary and that it is reasonable to include the derivative losses in the calculation of Suzano's financial expense rate." *Second Remand Results* at 18. Commerce also stated:

> While we continue to find that Suzano's derivative losses are not extraordinary, *given the facts at issue*, a reasonable mind may not conclude that the significant derivative losses are reflective of only Suzano's costs but, rather, that these costs are associated with Suzano's expanded operations, including Fibria's operations. . . . Accordingly, *for the purposes of this case*, we . . . rely on the calculation of Suzano's financial expenses to reflect the combination of Suzano and Fibria's financial expenses and cost of sales as reported by Suzano.

Id. at 20 (emphasis in original). Particular to the facts of this case, Commerce's decision to "revise[] Suzano's financial expense rate to include Fibria's financial expenses and cost of sales" reduced the dumping margin from 32.31 percent to 8.63 percent. *Id.* at 24–25. Plaintiff and Defendant-Intervenor now request judgment "[w]ithout waiving their rights in any other proceedings and without expressing

support for any factual findings or legal conclusions in the Second Remand Results." Status Report at 2.

It is hereby:

ORDERED that the *Second Remand Results* are **SUSTAINED**; and it is further

ORDERED that the entries at issue in this litigation shall be liquidated in accordance with the final court decision in this action as provided in 19 U.S.C. § 1516a(e) and in accordance with the Order for Statutory Injunction, Mar. 5, 2021, ECF No. 11.

Dated: August 18, 2023
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 23–118

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN HOME ASSURANCE COMPANY, Defendant.

Before: Richard K. Eaton, Judge
Court No. 20–00175
PUBLIC VERSION

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: August 18, 2023

Peter A. Mancuso, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Plaintiff United States of America. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-In-Charge. Of counsel on the brief was *Suzanna Hartzell-Ballard*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

Taylor Pillsbury, Meeks, Sheppard, Leo & Pillsbury, of Laguna Beach, CA, argued for Defendant American Home Assurance Company. With him on the brief was *Michael B. Jackson*.

OPINION

Eaton, Judge:

This is a collection action commenced by the United States, on behalf of the Department of Homeland Security, U.S. Customs and Border Protection ("Plaintiff" or "Customs"), for recovery on customs bonds. Jurisdiction is found under 28 U.S.C. § 1582(2) (2018).[1]

Before the court are Customs' motion for summary judgment and the cross-motion for summary judgment of Defendant American Home Assurance Company ("Defendant" or "AHAC"), the company that wrote the contested bonds. *See* Pl.'s Mem. Supp. Mot. Summ. J., ECF No. 22 ("Pl.'s Br."); Def.'s Mem. Supp. Cross-Mot. Summ. J. and Resp. Pl.'s Mot. Summ. J., ECF No. 23 ("Def.'s Br."); Pl.'s Resp. to Cross-Mot. and Reply in Supp. Mot. Summ. J., ECF No. 24 ("Pl.'s Reply"); Def.'s Reply in Supp. Cross-Mot., ECF No. 27; *see also* Def.'s Suppl. Br. Supp. Cross-Mot. Summ. J., ECF No. 54; Def.'s Am. Suppl. Br. Supp. Cross-Mot. Summ. J., ECF No. 67 ("Def.'s Am. Suppl. Br."); Pl.'s Mem. Resp. Def.'s Am. Suppl. Br., ECF No. 68 ("Pl.'s Resp. Am.

[1] This Court has exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." 28 U.S.C. § 1582(2).

Suppl. Br."); Def.'s Reply Pl.'s Resp. Def.'s Am. Suppl. Br., ECF No. 69 ("Def.'s Reply Am. Suppl. Br."). The court has accepted for filing two amicus curiae briefs.[2]

Each party has filed a statement of undisputed material facts in support of its motion, as required by Rule 56.3. *See* USCIT R. 56.3(a); *see also* Pl.'s R. 56.3 Statement, ECF No. 22–1 ("Pl.'s SOF"); Def.'s R. 56.3 Statement, ECF No. 23–1 ("Def.'s SOF"). The parties agree on the facts not in dispute, except in a few limited instances that are not material to the court's analysis of the issues. *See* Pl.'s Resp. Def.'s SOF, ECF No. 24–1 (admitting all, except portions of paragraphs 6, 9, 12, 17, 20, and 23); Def.'s Resp. Pl.'s SOF, ECF No. 27–1 (admitting all).

By its motion, Customs asks the court to award it unpaid duties in the amount of $379,009.00 plus interest[3] for AHAC's alleged breach of eight single transaction bonds[4] that secured the payment of anti-dumping duties owed on entries of preserved mushrooms from the People's Republic of China ("China").[5] *See* Pl.'s Br. at 1–2.

By its cross-motion, AHAC argues that it is entitled to summary judgment because Customs' claims are barred (1) under the doctrine of res judicata, or in the alternative, (2) by the applicable statute of limitations.[6] *See* Def.'s Br. at 10–21.

For the following reasons, the court finds that Customs' claims are barred by the running of the statute of limitations. Accordingly, Customs' motion is denied, and AHAC's cross-motion is granted.

BACKGROUND

Between February 2001 and January 2002, U.S. importers Panjee Co., Ltd. ("Panjee") and Pan Pacific Products, Inc. ("Pan Pacific")

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[2] Domestic producers of agricultural products submitted a brief in support of Customs' position. *See* Mem. of Amici Curiae at 1 & Ex. 1, ECF Nos. 41–1 & 41–2. The Customs Surety Coalition, comprised of the International Trade Surety Association, the National Association of Surety Bond Producers, Inc., the Surety & Fidelity Association of America, and the Customs Surety Association, submitted a brief in support of AHAC's position. *See* Mem. of Amicus Curiae Customs Surety Coal. at 1, ECF No. 39; *see also* Pl.'s Resp. Customs Surety Coal.'s Amicus Curiae Br., ECF No. 44.

[3] The amount of $379,009.00 is the total contractual limit of the bonds that are the subject of this case and includes interest pursuant to 19 U.S.C. § 1505. *See* Pl.'s Br. at 1. In addition, Customs seeks (1) pre-judgment interest pursuant to 19 U.S.C. § 580, (2) equitable interest, and (3) post-judgment interest pursuant to 28 U.S.C. § 1961. *See* Compl. at 11, ECF No. 3.

[4] A single transaction bond covers the obligations arising from one entry of merchandise. *See Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006).

[5] The entries at issue were subject to the antidumping duty order published as *Certain Preserved Mushrooms From the People's Republic of China*, 64 Fed. Reg. 8,308 (Dep't of Commerce Feb. 19, 1999).

[6] AHAC also asks the court to award it legal costs and expenses. *See* Def.'s Br. at 2.

imported preserved mushrooms from China into the United States. Pl.'s SOF ¶¶ 1, 19. Panjee made six entries between February and May 2001. *Id.* ¶ 1. Pan Pacific made two entries—one in March 2001, and the other in January 2002.[7] *Id.* ¶ 19.

In the entry summaries accompanying their respective entries, Panjee and Pan Pacific each asserted that the imported merchandise was subject to the antidumping duty order on preserved mushrooms from China, at a specified rate.[8] *Id.* ¶¶ 4, 22.

Normally, an importer is required to deposit with Customs, at the time of entry, a cash deposit equal to the amount of duties and fees estimated to be payable on the imported merchandise. *See* 19 U.S.C. § 1505(a) (2018); *see also* 19 C.F.R. § 141.1 (the importer is liable for duties). Here, in lieu of making a cash deposit of the estimated duties, Panjee and Pan Pacific deposited with Customs single transaction bonds: six bonds to cover Panjee's entries, and two bonds to cover Pan Pacific's entries. Pl.'s SOF ¶¶ 9, 27. These bonds were permitted, for a time,[9] in new shipper reviews, to take the place of cash deposits of estimated duties otherwise required on merchandise that was subject to an antidumping or countervailing duty order. So, at the time of importation, the importers believed that they owed antidumping duties on their respective entries of merchandise, and the single transaction bonds took the place of the cash deposits that would otherwise be required as the source of payment for those duties at liquidation. The stated amount of the bonds was sufficient to pay the estimated duties. Pl.'s SOF ¶¶ 5, 8, 23, 26.

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[7] Both importers dissolved within a year or two of making their respective entries. Pan Pacific dissolved in July 2002, and Panjee dissolved in March 2003. *See* Def.'s Br. Exs. 2 & 3, ECF Nos. 23–2 & 23–3.

[8] The antidumping duty rate specified in the entry paperwork was 198.63% *ad valorem*.

[9] *See* 19 U.S.C. § 1675(a)(2)(B)(iii) (2012) ("The administering authority shall, at the time a review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise."); *see also Certain Preserved Mushrooms From the People's Republic of China: Initiation of New Shipper Antidumping Duty Review*, 65 Fed. Reg. 17,257 (Dep't of Commerce Mar. 31, 2000). The law permitting the bond option was suspended in 2006 and later revoked when the statute was amended in 2016. *See* Pension Protection Act of 2006, Pub. L. No. 109–280, § 1632, 120 Stat. 780 (2006) (suspending bonding option); Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 433, 130 Stat. 122, 171 (2016) (revoking bonding option).

Panjee's six entries liquidated by operation of law[10] on February 20, 2003. *Id.* ¶ 10. One of Pan Pacific's two entries also liquidated by operation of law on February 20, 2003, and the other liquidated by operation of law on January 11, 2004. *Id.* ¶ 28. All eight entries liquidated at the rate asserted at the time of entry. *See supra* note 8; Pl.'s SOF ¶¶ 10, 28.

Then, more than a decade passed. During that time, Customs took no action to collect on the debts owed by the importers for duties on their respective entries. That is, Customs did not send a bill to Panjee or to Pan Pacific. Nor did Customs commence a lawsuit against either importer. Customs also took no steps to obtain payment of the duties by calling on AHAC's bonds even though they would have been sufficient to pay the duties owed. In its motion papers, Customs does not offer any reason for its failure to take action to collect on the importers' debts. Nor does it explain why it took no action to collect these debts from AHAC, whose bonds made it both jointly and jointly and severally liable for the debts. At oral argument, Customs' counsel's explanation for the delay was that the collection of duties on the eight entries had "slipped through the cracks" at the agency.[11]

On September 26, 2014, about eleven years after liquidation, Customs sent six bills to Panjee and two bills to Pan Pacific for the duties owed on each of their respective entries. Pl.'s SOF ¶¶ 12, 30. Each of the eight bills contained identical language: "*This Bill is a notice of debt currently owed to* [*Customs*]." Pl.'s Br. Exs. 4 & 8, ECF Nos. 22–5 & 22–9 (emphasis added).

Thereafter, on July 6, 2015, and February 3, 2016, Customs issued notices to AHAC of the outstanding bills via a "Formal Demand on Surety for Payment of Delinquent Amounts Due," otherwise known

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[10] Liquidation by operation of law, or "deemed liquidation," occurs when Customs fails to liquidate an entry within statutorily prescribed time limits:

> [W]hen a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b), within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. *Any entry (other than an entry with respect to which liquidation has been extended under subsection (b)) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record . . . .*

19 U.S.C. § 1504(d) (emphasis added).

[11] When asked at oral argument why Customs waited so long to seek payment from the importers, or from the surety, counsel stated:

> [I]t seems that it slipped through the cracks and nobody knew at Customs at the port level that there were still these bonds that needed — or these duties that needed to be collected on. So, we will fall on the sword there and say we don't have an answer. It seems like it was a mistake, and one hand didn't know what the other one was doing, and they didn't realize that this was outstanding.

Transcript of Oral Argument (Jan. 4, 2023) ("Tr.") at 45:22–25, 46:1–4, ECF No. 70.

as a "612 report." *See* Pl.'s SOF ¶¶ 14, 32; Pl.'s Br. Exs. 5 & 9, ECF Nos. 22–6 & 22–10; *see also* Pl.'s Br. Ex. 3 ¶¶ 16, 28, ECF No. 22–4. For Customs, the 612 report constituted a demand for payment.[12] AHAC did not pay. *See* Pl.'s SOF ¶¶ 16, 34.

On September 16, 2020, four years after the last 612 report and more than sixteen years after liquidation, Customs commenced this action by filing a summons and complaint to collect on the eight single transaction bonds: Count I is based on Panjee's six entries; Counts II and III are based on Pan Pacific's two entries. *See* Compl., ECF No. 3. In its amended answer, AHAC raised several affirmative defenses, including that Customs' claims were barred under the doctrine of res judicata and by the applicable statute of limitations. *See* Am. Answer at 9–10, ECF No. 18.

Motion practice followed. After court-ordered supplemental discovery and briefing,[13] the parties' cross-motions for summary judgment are now before the court for decision.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citation omitted).

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[12] Although titled "Formal Demand on Surety for Payment of Delinquent Amounts Due," the 612 report does not appear to make an actual demand on a surety. That is, the report does not contain demand language, nor is there evidence that Customs enclosed any kind of demand letter with the report. Instead, the report is a computer printout that identifies the delinquent debtor by name and identification number and lists other information, including: bill number; the bond number; billing location; "document date"; bill date; the total amount, principal amount, and interest amount due; and the "age category" of the bill (either 60, 90, or 120 days, or longer). As shall be seen, the bills themselves do not appear to be a prerequisite to the establishment of the debt itself, or to the accrual of a cause of action against the importers or AHAC.

[13] On April 6, 2022, the court granted Customs' request for discovery on AHAC's affirmative defenses and claims of prejudice, in particular with respect to the defense of laches. *See* Order (Apr. 6, 2022), ECF No. 66. Though AHAC did not include the defense of laches in its opening brief, it had asserted laches as an affirmative defense in its amended answer, and the court asked about this defense at oral argument. *See* Tr. 40:7–14. After discovery, the parties filed supplemental briefs in support of their respective motions for summary judgment. *See* Def.'s Am. Suppl. Br.; Pl.'s Resp. Am. Suppl. Br.; Def.'s Reply Am. Suppl. Br. AHAC's "primary defense" remains "that Plaintiff's claims are time-barred under the applicable statute of limitations." Def.'s Am. Suppl. Br. at 2.

DISCUSSION

I. Customs' Claims Are Not Barred Under the Doctrine of Res Judicata

Under the doctrine of res judicata (or claim preclusion), "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (citations omitted); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1071 (Fed. Cir. 1994) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based upon the same claim or cause of action."). "Over the years, the doctrine has come to incorporate common law concepts of merger and bar,[14] and will thus also bar a second suit raising claims based on the *same set of transactional facts*." *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (emphasis added) (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)).

Under case law, "to prevail on a claim of *res judicata*, the party asserting the bar must prove that (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of *transactional facts* as the first." *Id.* (emphasis added) (first citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); and then citing *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000)).

The Federal Circuit has adopted the approach set out in the Restatement (Second) of Judgments § 24 to determine what it means for a second action to be "based on the same set of transactional facts." *Id.*; *see also Young Eng'rs, Inc. v. U.S. Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983). Section 24 states in part:

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

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[14] "When the plaintiff obtains a judgment in [its] favor, [its] claim 'merges' in the judgment; [it] may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a 'bar.'" *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978) (citations omitted).

Restatement (Second) of Judgments § 24(2) (1982), Westlaw (database updated May 2023) ("Restatement"). Considering this standard, "courts have defined 'transaction' in terms of a 'core of operative facts,' the 'same operative facts,' or the 'same nucleus of operative facts,' and 'based on the same, or nearly the same factual allegations.'" *Ammex, Inc.*, 334 F.3d at 1056 (citations omitted) (quoting *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 226 (7th Cir. 1993)).

Here, AHAC argues that res judicata precludes Customs' claims based on a prior case, referred to herein as *AHAC 2016*. *See generally United States v. Am. Home Assurance Co.*, 39 CIT __, 151 F. Supp. 3d 1328 (2015), *amended* Mar. 15, 2016 ("*AHAC 2016*"), *aff'd without opinion*, No. 2018–1960 (Fed. Cir. Sept. 6, 2019). *AHAC 2016* was an action commenced by Customs to collect on bonds that were written by AHAC to secure antidumping duties and interest owed on, inter alia, entries of preserved mushrooms from China. The primary issue in that case was whether the publication in the Federal Register of notices of partial rescission of an administrative review lifted the suspension of liquidation as to the relevant entries for purposes of 19 U.S.C. § 1504(d), the statute that provides for liquidation by operation of law, or "deemed liquidation." *See* 19 U.S.C. § 1504(d) ("Any entry . . . not liquidated by [Customs] within 6 months after receiving . . . notice [of the removal of suspension] shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.").

Relevant to this case, *AHAC 2016* held that some of Customs' bond claims were untimely because the claims or causes of action for duties accrued on the date of deemed liquidation, which had occurred more than six years before the commencement of the lawsuit. *AHAC 2016*, 39 CIT at __, 151 F. Supp. 3d at 1340. For AHAC, since this case involves the same parties, and *AHAC 2016* resulted in a final judgment on the merits, the inquiry for the court here "reduces to an analysis of the transactional facts involved in the two causes of action." Def.'s Br. at 11. Noting that "a common set of transactional facts is to be identified 'pragmatically,'" as provided in the Restatement, AHAC maintains that Customs' claims in this lawsuit and in *AHAC 2016* are based on the same set of transactional facts:

> Here, the facts underlying the CIT's decision in AHAC 2016 and the present case are the same as follows: (1) same importers (Panjee & Pan Pacific); (2) same commodity (preserved mushrooms); (3) entries made within same period of review [i.e., February 1, 2001, through January 31, 2002]; (4) same suppliers (Raoping Xingyu & Shenxian Dongxing); (5) same deemed liquidation/time-barred issue; (6) same cause of action (Govern-

> ment collection action on AHAC's bonds for antidumping duties plus interest); and (7) same deemed liquidation dates (February 20, 2003 and January 11, 2004). Therefore, since the parties are identical, AHAC 2016 resulted in a valid final judgment on the merits and both cases have the same core of operative facts, *res judicata* precludes the Government from bringing this collection action.

Id. at 11–12 (citing Restatement § 24). For AHAC, by bringing this lawsuit on claims that could have been brought in *AHAC 2016*, Customs is "asking for a second bite at the apple," i.e., attempting to obtain a different result on claims that share a common set of transactional facts with those dismissed in *AHAC 2016*. *Id.* at 13.

In response, Customs maintains that "[a]lthough AHAC discusses perceived similarities between the two cases," the claims brought in this lawsuit arise out of a different set of "transactional facts" than the claims before the Court in *AHAC 2016*:

> Here, AHAC's defense of *res judicata* is without merit because the "transactions" that form the basis of this civil action are not the same as that of *AHAC 2016*. . . . For example, this action was commenced to collect, for the first time, antidumping duties on eight entries of goods that were not at issue in *AHAC 2016*. In an effort to collect those antidumping duties, the Government issued eight bills to the importers, which went unpaid — none of these bills were at issue in *AHAC 2016*.
>
> Because the importers failed to pay their bills, the Government sought payment from AHAC, as surety, under eight [single transaction bonds] by issuing eight separate demands for payment . . . . *The eight bonds issued by AHAC to secure the antidumping duties, and the eight demands for payment that AHAC defaulted on, were not at issue in AHAC 2016*. Moreover, each bond issued by AHAC is a separate and distinct contract between the parties with a unique execution date and specific limit on liability.
>
> Thus, each entry at issue in this litigation, with its associated bills for payment and [single transaction bonds] that were breached by the obligors' default, is a separate and distinct commercial transaction.

Pl.'s Reply at 8–9 (citations omitted) (emphasis added). In other words, for Customs, there is no common set of transactional facts

between those in *AHAC 2016* and those asserted here because this case involves different entries and different bonds, and importantly: "each breach of a bond by an importer produces a separate obligation on the surety to make payment permitting the creditor to obtain judgment on any one, or any number, of the bonds without affecting the right to maintain a collection action on the others." *Id.* at 9.

The court finds that, while there is no dispute that this case involves the same parties as in *AHAC 2016*, and that *AHAC 2016* resulted in a final judgment on the merits dismissing some of Customs' claims, the claims raised by Customs in this action are not based on the same set of "transactional facts" as those in *AHAC 2016*. It is, of course true, as AHAC points out, that there are factual similarities between this case and *AHAC 2016*. Nonetheless, Customs is correct that the eight claims here arise out of eight distinct contracts, or commercial transactions, none of which were before the Court in *AHAC 2016*.

It is undisputed that the entries related to the dismissed claims in *AHAC 2016* and the entries here were secured by different bonds. Each bond carries with it distinct obligations. And though some of the conditions of the bond (as set forth in Customs' regulations), the imported merchandise (preserved mushrooms from China), and even the U.S. importers, may be the same here as in *AHAC 2016*, each single transaction bond is a separate contract and brings with it its own set of operative facts. *See Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1168–69 (Fed. Cir. 2011) (finding that claims brought in separate actions that are "premised on independent contracts" were "not based upon substantially the same operative facts" and citing *Cromwell v. County of Sac*, 94 U.S. 351, 358–59 (1876) for the holding that "for the purpose of res judicata . . ., because the two suits involved separate contracts, a prior suit for recovery of coupons attached to [the same] bonds did not involve the same claim as a later suit for recovery of later maturing coupons attached to the same bonds.").

The comments to § 24 of the Restatement illustrate what constitutes a "transaction":

> *d. Successive acts or events as transaction or connected series; considerations of business practice.*
>
> . . .
>
> When a number of items are overdue on *a* running account between two persons, and the creditor, bringing an action on *the* account, fails to include one among several past due items,

> judgment for or against the creditor precludes a further action by him to recover the omitted item. This conforms to ordinary commercial understanding and convenience. *On the other hand, when there is an undertaking, for which the whole consideration has been previously given, to make a series of payments of money—perhaps represented by a series of promissory notes, whether or not negotiable—the obligation to make each payment is considered separate from the others and judgment can be obtained on any one or a number of them without affecting the right to maintain an action on the others. The same applies to the obligations represented by coupons attached to bonds or other evidences of indebtedness which are similarly considered separate.*

Restatement § 24 cmt. d (emphasis added). Put another way, each bond represented a separate promise to pay—separate, that is, from those contained in the other bonds. Thus, even if we were dealing with one bond that secured each of the entries successively, e.g., a continuous bond, AHAC's res judicata defense would not succeed. All the more so here. AHAC issued eight single transaction bonds, each of which is supported by consideration in the form of a premium payment. Each bond corresponds to a distinct entry of merchandise, on a specified date,[15] and limits AHAC's liability up to a different dollar amount. *See* Pl.'s SOF ¶¶ 8, 26. Therefore, like a suit on a coupon snipped from a bond, when there were still coupon bonds, each coupon's obligation was not part of the same transaction as the other coupons even though the terms of payment (though not necessarily the amount owed) were identified and contained in the same instrument. If the coupons attached to a bond did not constitute a single transaction, then necessarily each of AHAC's bonds is an undertaking on which Customs may seek to recover "without affecting the right to maintain an action on the others." Restatement § 24 cmt. d. That the court will find, later in this opinion, that the cause of action on each bond accrued at liquidation does not change its finding with respect to separate transactions. Even if the liquidation of the entries at issue is on the approximate or even the same date as those at issue in *AHAC 2016*, each bond has a separate set of transactional facts.

It strikes the court that, had the bonds at issue in this case not "slipped through the cracks," as Customs' counsel stated at oral ar-

[15] While AHAC seems to indicate that at least one of the entries here and in *AHAC 2016* were entered on the same date, there does not appear to be anything in the record demonstrating this to be the case.

gument, the claims here might have been litigated in *AHAC 2016*, and considered with the others. Tr. at 45:22–25. And while the various holdings in *AHAC 2016* may well have persuasive weight with the court, Customs' claims on the eight single transaction bonds cannot be said to be precluded under the doctrine of res judicata because the bonds at issue here, though similar in many respects to those under review in *AHAC 2016*, are distinct contracts that were not before the Court in that case, and represent separate transactions. *See Trusted Integration*, 659 F.3d at 1168–69; *see also* Restatement § 24 cmt. d.

II. Customs' Claims Are Barred by the Statute of Limitations

Next, the court will consider AHAC's defense that Customs' action to recover on the bonds is barred by the statute of limitations. *See* Def.'s Br. at 15 ("[I]f the Government's claims are not precluded by *res judicata*, the Government's claims are nevertheless time-barred as they were commenced more than six (6) years after the claims accrued, e.g. from the date the entries deemed liquidated.").

A statute of limitations establishes a period of time in which a plaintiff may bring an action in court:

> At common law there was no fixed time for the bringing of an action. Personal actions were merely confined to the joint lifetimes of the parties. The Statute of Limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action. The statutes embody an important policy of giving repose to human affairs.

DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 33 (6th ed. 2018) (quoting *Flanagan v. Mount Eden Gen. Hosp.*, 248 N.E.2d 871, 872 (N.Y. 1969)). In other words, statutes of limitations encourage plaintiffs to commence suit within a reasonable time of the accrual of their legal claim.

Title 28 U.S.C. § 2415(a), which the parties assert applies here, limits the time in which the United States may commence an action sounding in contract to seek money damages: "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2415(a). The legislative history surrounding the enactment of § 2415(a) evinces congressional intent that, like private plaintiffs, the United States must act timely to commence suit:

> Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident

> or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. . . . Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

S. REP. NO. 89–1328 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2502, 2503–04; *see also United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1055–56 & n.4 (Fed. Cir. 1996) ("Congress enacted section 2415 'to promote fairness . . . notwithstanding whatever prejudice might accrue thereby to the Government as a result of the negligence of its officers.'" (quoting *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 8 (Fed. Cir. 1985))).

As to when a claim accrues, the Federal Circuit has recognized, "[a]s a general principle, . . . [that] '[u]nder federal law governing statutes of limitations, a cause of action accrues when *all events necessary* to state a claim have occurred.'" *United States v. Commodities Exp. Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992) (emphasis added) (quoting *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991)). So too have other circuits. *See, e.g.*, *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 861 (10th Cir. 1993) ("In other words, '[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred.'" (quoting *Chevron*, 923 F.2d at 834)); *Fed. Energy Regul. Comm'n v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 898 (4th Cir. 2020) ("[I]n common parlance a right accrues when it comes into existence." (quoting *United States v. Lindsay*, 346 U.S. 568, 569 (1954))).

Customs contends that the cause of action for breach of contract accrued against AHAC when the company failed to "[p]ay, as de-

manded by [Customs], all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by" the bonds. Pl.'s Br. at 14 (quoting 19 C.F.R. § 113.62(a)(1)(ii)); *see id.* at 15–16 ("When the bills to AHAC became delinquent on August 6, 2015 and March 5, 2016, respectively (*i.e.*, 30 days after the demands to AHAC), AHAC breached the terms of the bonds. It is these breaches that created our claims against the surety.").

In addition to stating that AHAC's failure to pay the duties constituted a breach of the terms of the bonds that provided it with its cause of action, Customs insists that the six-year statute of limitations on its cause of action started running on August 6, 2015, and March 5, 2016—thirty days after the date on which each 612 report was issued. For Customs, the dates that AHAC "became delinquent," i.e., failed to pay thirty days after Customs' demands, constituted a breach of its contracts of surety (i.e., the bonds), and it was that breach that started the clock running on the six-year statute of limitations for breach of contract. As a result of all of this, Customs maintains that it has brought its case within the six-year statute of limitations even though the summons was served more than sixteen years after the last entry was liquidated.

AHAC, on the other hand, argues that, in accordance with this Court's previous cases, the debt for duties owed by each of the importers was incurred at liquidation, and that the obligation to pay the debt at liquidation was AHAC's too because of the terms of the bonds.[16] According to AHAC, Customs' cause of action for payment of the debt owed for duties accrued both against the importers and against AHAC under the terms of AHAC's bonds, at liquidation, i.e., when the amounts of the importers' debts were fixed, and were not

[16] Each bond states:

> In order to secure payment of any duty, tax or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, *we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below*. . . . This bond includes the following agreements . . . Activity Name and Customs Regulations in which conditions codified . . . Importer . . . 113.62.

Pl.'s Br. Exs. 2 & 7, ECF No. 22–3 & 22–8 (emphasis added). Regulation § 113.62 provides:

> A bond for basic importation and entry shall contain the conditions listed in this section and may be either a single entry or a continuous bond. . . .
>
> (a) *Agreement to Pay Duties, Taxes, and Charges*. (1) If merchandise is imported and released from Customs custody or withdrawn from a Customs bonded warehouse into the commerce of, or for consumption in, the United States, . . . the obligors (principal and surety, jointly and severally) agree to:
>
> (i) Deposit, within the time prescribed by law or regulation, any duties, taxes, and charges imposed, or estimated to be due, at the time of release or withdrawal; and
>
> (ii) Pay, as demanded by Customs, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond.

19 C.F.R. § 113.62(a)(1) (2001).

paid. *See* Def.'s Br. at 18 ("The eight . . . entries at issue in this case were deemed liquidated on February 20, 2003 . . . and January 11, 2004 . . . . [Customs] could have initiated collection from both the principal/importers and surety after these dates," but failed to act for more than ten years). Thus, for AHAC, the six-year statute of limitations for breach of the bonds ran long ago.

AHAC is right that cases in this Court have long held that the cause of action on an entry bond accrues at liquidation. In *United States v. Great American Insurance Company of New York*, the Court stated:

> Customs' claim for antidumping duties from [the surety] is barred "unless the complaint is filed within six years after the right of action accrues." The Government's right of action accrues from the date of liquidation. The Government's right to collect additional duties attaches when the entry liquidates.

35 CIT 1130, 1140, 791 F. Supp. 2d 1337, 1350 (2011) (citations omitted), *aff'd* 738 F.3d 1320 (Fed. Cir. 2013); *see also AHAC 2016*, 39 CIT at __, 151 F. Supp. 3d at 1342–43 ("[T]hese entries were liquidated by operation of law at the entered rates, at which time the Government's cause of action on the bonds began to accrue."); *United States v. Int'l Fid. Ins. Co.*, 41 CIT __, __, 273 F. Supp. 3d 1170, 1176 (2017) ("In a collection action on a customs bond, '[t]he Government's right of action accrues from the date of liquidation.'" (quoting *Great Am. Ins. Co.*, 35 CIT at 1140, 791 F. Supp. 2d at 1350)).

There does not appear to be any support in the statutory or case law for Customs' claim that its cause of action accrued against the importers only after bills had been sent to them (about eleven years after liquidation) and they had failed to pay. Or for the proposition that Customs' cause of action accrued against AHAC only after it failed to pay the importers' debts for duties following issuance of the 612 reports. Rather, as noted, cases in this Court have identified liquidation as the starting date for the limitations period in which Customs must bring an action to collect against a surety under a bond.

The rationale for treating the date of liquidation as the date of accrual of a bond claim is straightforward. By law, an importer is liable for duties on the merchandise that it imports; this debt for duties attaches at the time of importation. *See* 19 C.F.R. §141.1(b)(1) ("The liability for duties, both regular and additional, attaching on

importation, constitutes a personal debt[17] due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation."). Thus, Panjee and Pan Pacific were liable for duties on their respective imports from the time of importation. The amount of the debt, however, is not known at importation. Only at *liquidation* is the amount of the debt for duties owed by the importer finally computed and legally fixed.[18] *Id.* § 159.1 ("*Liquidation* means the final computation or ascertainment of duties on entries for consumption . . . ."). So, the date of liquidation is when the final amount of duties owed by the importer is determined. *See* 19 U.S.C. § 1505(b) (emphasis added) ("[Customs] shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited,[19] together with interest thereon, *as determined on a liquidation* . . . ."). Only one more event is necessary for Customs to sue on the debt, and that is that it must be unpaid. "[W]hen one promises

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[17] The regulation's singular language could be the subject of misunderstanding. For instance, the "personal debt" language is there only to make it clear that the debt for Customs duties is that of the importer and is in addition to any right Customs might have to realize on the debt by a proceeding in rem to satisfy the government's lien on the merchandise or against a surety. *See United States v. Cobb*, 11 F. 76, 79 (C.C.D. Mass. 1882) ("It is well settled that the right of the government to the duties is not limited to the lien on the goods, or to the bond given for their payment. The act makes the duties a personal debt or charge upon the importer."). Moreover, since the importer's debt is statutory rather than the result of a contract, it is unclear whether there is a statute of limitations for its debt. *See United States v. Ataka Am., Inc.*, 17 CIT 598, 600, 826 F. Supp. 495, 498 (1993).

[18] Importantly, liquidation here occurred according to the time limits set out in 19 U.S.C. § 1504, and did not depend on any action by Customs. Rather, liquidation resulted from inaction. That is, Customs failed to timely liquidate the entries, and the statute provided for liquidation by operation of law ("deemed liquidation") under § 1504(d). *Koyo Corp. of U.S.A. v. United States*, 29 CIT 1354, 1358, 403 F. Supp. 2d 1305, 1309 (2005) ("The effect of a 'deemed liquidation' is therefore to fix the liability of the importer or surety and, once that liability is discharged, to terminate the government's cause of action for the entry in question."), *aff'd in part, vacated in part, and remanded*, 497 F.3d 1231 (Fed. Cir. 2007). As the Federal Circuit has noted, "[t]he primary purpose of section 1504 [which was enacted in 1978] [is] to 'increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction.'" *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002) (citation omitted); *see also United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997) (explaining that section 1504 "was designed to 'eliminate unanticipated requests for additional duties coming years after the original entry.'"). When subsection 1504(d) was amended in 1993, among Congress' objectives was to "ma[k]e clear that deemed liquidation was the consequence of Customs' failure to liquidate within that six-month period." *Int'l Trading Co.*, 281 F.3d at 1273. That is, "one of the primary objectives of the 1993 amendments was to remove the government's unilateral ability to extend indefinitely the time for liquidating entries." *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1310 (Fed. Cir. 2005).

[19] The idea of the "refund any excess moneys deposited" language is that the regulation anticipates a cash deposit for estimated duties at entry. As noted, for a period, under special circumstances, Customs could accept a customs bond in the place of cash. Such was the case here. Thus, any reference to excess moneys deposited in this case means any amount in excess of the estimated duties secured by the bond.

to pay, the right of action on that promise is complete and perfect the moment the debt to which the promise relates becomes due and remained unpaid." *In re H.L. Herbert & Co.*, 262 F. 682, 684 (2d Cir. 1919).

Therefore, under the facts presented here, Panjee's and Pan Pacific's debts were incurred on the date of liquidation because that was when the amount of the debt previously established at importation became fixed. In order to bring a lawsuit on a debt, all that is needed is that the debt exist and that it remain unpaid. *See Commodities*, 972 F.2d at 1270 ("'[U]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred.'" (quoting *Chevron*, 923 F.2d at 834)). This, of course, is the situation here— the debt was unpaid at liquidation and has not been paid since.

It is, in fact, the case that there must be a breach of the terms of the bonds for AHAC to become liable for payment. *United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 613 (Fed. Cir. 1993). Customs argues that, for there to be a breach, Customs must first make a demand for payment after the importer failed to pay the bills[20] sent by Customs.

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[20] Customs argues that for its cause of action to accrue on the importers' debt, a bill for payment must have been sent to them, and that the bill must have not been paid within thirty days. *See* Pl.'s Br. at 15 ("[W]hen a debt such as antidumping duties arises, [Customs] bills the principal and provides 30 days for payment."); *see also id.* at 19–20 (arguing that because "section 1505 requires issuance of a bill plus 30 days before payment is due, the Government's six-year limitations period does not begin prior to the end of that 30-day period."). Customs makes this claim even though it issued the bills about eleven years after liquidation.

The bill to which Customs refers is found in 19 U.S.C. § 1505(b): "Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment." *See also* 19 C.F.R. § 24.3(e).

These bills, however, even though provided for both in § 1505(b) and in the regulations, are not a condition precedent for the creation of an importer's debt for duties. Again, § 1505(b) provides that "[d]uties, fees, and interest determined to be due upon liquidation . . . are due 30 days after issuance of the bill for such payment." It is apparent that the first portion of this sentence ("Duties, fees, and interest determined to be due upon liquidation") provides that the amount of duties is "to be due" at liquidation. So, as has been discussed, an importer incurs the debt at importation, *see* 19 C.F.R. §141.1(b)(1) ("The liability for duties, both regular and additional, attaching on importation, constitutes a personal debt due from the importer to the United States."), and the amount of that debt is fixed at liquidation. *Id.* § 159.1 (emphasis added) ("*Liquidation means the final computation or ascertainment of duties* on entries for consumption."). The only thing further needed is that the debt remain unpaid. All of these things had happened by the time the imported goods had been liquidated. Also, because AHAC, by the terms of its bond, is simultaneously liable, its debt accrued at liquidation.

The second part of the sentence provides for notice to be given to the importers of the amount of the debt and also of the thirty-day grace period for payment ("Duties, fees, and interest . . . are due 30 days after issuance of the bill for such payment."). The bill, then, is a notice of the amount of the debt and notice of the statutorily directed thirty-day grace period before interest begins to run. *See* 19 U.S.C. § 1505(b); 19 C.F.R. § 24.3a(d)(1) (providing, under subheading (d) titled "Notice," that "[t]he principal will be notified at the time of the initial billing, and every 30 days after the due date until the bill is paid or

Thus, Customs would treat AHAC as backing up or guaranteeing the importers' debts. For Customs the bonds constituted a kind of insurance policy. This, however, is not the nature of the customs bonds issued by AHAC. Rather, AHAC's obligations under the terms of these bonds are more akin to those of a co-maker of a note; not of a guarantor. This is seen from two terms of the bonds themselves.

The first term states: "In order to secure payment of any duty, tax or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below." *See, e.g.*, Pl.'s Br. Ex. 2, ECF No. 22–3. The importers were the principal, and AHAC was the surety on each bond. This term establishes that AHAC's obligation to pay the debt owing for the duties runs in parallel with each importer's obligation. This being the case, AHAC incurred the debt for the duties

otherwise closed."); *see, e.g.*, Pl.'s Br. Ex. 4 (containing a line item for principal amount due upon receipt of the bill, and a separate line item for "Amount Due After [thirty days] (including interest)"). Thus, the second part of the § 1505(b) sentence directs that a bill or notice be sent to the importer of the debt owed at liquidation.

That Customs understands the bill as nothing more than a notice of the debt can be seen from the wording of the bills that it sent to Panjee and Pan Pacific. *See* Pl.'s Br. Exs. 4 & 8 (emphasis added) ("This Bill is a notice of debt *currently owed* to [Customs]."). In other words, Customs has always believed it was "collecting" a debt already incurred.

Customs finds it significant that Congress amended § 1505 in 1993 to state that duties are due "30 days after issuance of the bill for such payment." North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, § 642, 107 Stat. 2057, 2205 (1993). And the language in the amended statute does vary somewhat from the language in the previous version. Before the amendment, the statute read:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless *payment* of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered *delinquent and bear interest* from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988). The amendment, however, does not change the nature of the bill itself, and it remains no more than a notice of the amount of the debt. Indeed, neither § 1505(b) nor its legislative history makes any mention of claim accrual. *See, e.g.*, H.R. REP. NO. 103–361, at 140 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2690 ("The amendments made by section 642 will allow Customs to streamline entry procedures by authorizing periodic payments of entries covered by an import activity summary statement rather than require entry by entry payment, and will also provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally."); S. REP. NO. 103–189, at 90 (1993) (emphasis added) ("Section 505(b) provides that the appropriate Customs officer shall *collect* any increased or additional duties due or refund any excess duties deposited *as determined by liquidation* or reliquidation.").

Moreover, a brief look at the regulations Customs has promulgated in § 24.3a confirms that Customs has never treated the bill as a prerequisite, or condition precedent, to the creation of a debt. They are nothing more than instructions, i.e., ministerial procedures for the issuing of bills and receipts. *See* 19 C.F.R. § 24.3a(a)-(d). Thus, rather than a necessary event to state a claim, that is, a condition precedent to the accrual of a cause of action, the bill is best understood as a procedural step giving notice to Panjee and Pan Pacific of the amounts owed for duties (plus interest, if any), that was to be sent by Customs after liquidation (the final computation of duties owed), and after the debt for duties had been incurred.

at liquidation simultaneously with each importer because it had agreed to pay "any duty" owed "as a result of" importation, i.e., the activity covered by the conditions referenced in the bond. *Id.* (referencing 19 C.F.R. § 113.62 "Basic importation and entry bond conditions"). When Customs' cause of action accrued on the debts owed by the importers,[21] it accrued equally with respect to AHAC. That is, the debts were incurred at entry and were both fixed and became unpaid at liquidation. At liquidation, all events that were necessary for Customs to sue the importers and AHAC for the payment of the debts had occurred. *See Commodities*, 972 F.2d at 1270 ("[A] cause of action accrues when all events necessary to state a claim have occurred." (quoting *Chevron*, 923 F.2d at 834)). The bonds do not provide for any default by the importers followed by a demand on AHAC by Customs, or for any default by AHAC after the 612 report. Instead, AHAC's obligation to pay arose at liquidation and Customs' cause of action for payment accrued when the debt was unpaid. This first term of the bonds demonstrates that AHAC is not the guarantor of the importers' debts, but rather became a debtor at liquidation together with Panjee and Pan Pacific.

The second term found in the bonds incorporates by reference the bond conditions set out in 19 C.F.R. § 113.62, for basic importation and entry of merchandise. Customs' regulations impose the obligation on AHAC to pay amounts owing "jointly and severally" with the importers. 19 C.F.R. § 113.62(a)(1). As Customs notes, it could sue for "additional duties"[22] under the regulations. *See* Compl. ¶¶ 5, 24, 42; *id.* ¶¶ 10, 29, 47 ("AHAC agreed to be jointly and severally liable for all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on [each entry] up to the 'limit of liability' reflected on the bonds."). Customs is right that it could sue for duties when AHAC breached the terms of the bonds because of the joint and

[21] This term of the bond appears to have created a joint obligation to pay the customs duties. *See* 11 C.J.S. *Bonds* § 49 ("At law the presumption is that, where two or more persons enter into a bond without adding language disclosing a different intention, the undertaking is a joint and not a several one . . . ."); *see also Morrison v. Am. Surety Co. of N.Y.*, 73 A. 10, 11 (Pa. 1909) ("[T]he presumption of the law is that, when two or more enter into a contract or an obligation without adding language disclosing a different intention, the undertaking is a joint and not a several one."). Whether the debt is joint or joint and several has no effect on the accrual of the cause of action.

[22] It is not entirely clear what "additional duties" means in this context, but both parties agree that it means the duties owed at importation. It is worth again noting that the bonds at issue here took the place of cash deposits due on importation. The usual customs bond is security for amounts in excess of the cash deposit or "additional duties."

several liability language.[23] Customs is wrong as to when that breach took place.

Here, as with the first discussed bond provision, AHAC's bonds did not provide that the company was a guarantor, but rather that it was a co-obligor that was jointly and severally liable for the payment of the customs duties. This is consistent with what the courts have held. *See, e.g.*, *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 406 (3d Cir. 1993) ("If the Agreement in question can be construed or interpreted as a contract imposing joint and several liability on its co-obligors, . . . complete relief may be granted in a suit against only one of them."); *see also* 12 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 36:1, at 803 (4th ed. 2012) ("[A] joint and several contract is a contract made by the promisee with each promisor and a joint contract made with all the promisors, so that parties having a joint and several obligation are bound jointly as one party, and also severally as separate parties at the same time."). In such a case, each party is obligated for the full performance of the contract and thus the joint-promisors may be held jointly liable in the event of their non-performance. A party that agrees to be jointly and severally liable on a debt promises to pay the entire amount of the debt. No demand on any other party is required before a suit can be brought against a jointly and severally bound party. Likewise, because AHAC's contractual obligation was to be jointly and severally liable for payment of the debt, Customs' cause of action against AHAC accrued at the same moment as its cause of action against Panjee and Pan Pacific. In other words, a lawsuit by Customs to collect the amount of the duties owed might be thought of as a lawsuit to determine which pocket would satisfy the debt—money from the importers, or the bonds that took the place of cash deposits. The importers and AHAC were equally obligated on the debt, the only difference being that the importers' debt was imposed by law and AHAC's was contractual.

The foregoing discussion demonstrates that the statute of limitations on AHAC's bonds began to run at liquidation when all of the events necessary to bring suit for the duties owed had occurred. As agreed to by the parties, this action "is founded upon a[] contract express or implied in law or fact, [and therefore] shall be barred

[23] The applicable regulation provides: "[T]he obligors (principal and surety, jointly and severally) agree to":

> (i) Deposit, within the time prescribed by law or regulation, any duties, taxes, and charges imposed, or estimated to be due, at the time of release or withdrawal; and
>
> (ii) Pay, as demanded by Customs, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond.

19 C.F.R. § 113.62(a)(1).

unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2415(a). Thus, because deemed liquidation is when Customs' claims accrued, and the last entry was liquidated on January 11, 2004, the statute of limitations ran on January 11, 2010. Accordingly, Customs' suit is time-barred because it was commenced on September 16, 2020, more than ten years after the statute of limitations ran.

Finally, even if the court were to credit Customs' claim that its action for breach of contract accrued thirty days after AHAC failed to pay on Customs' demands, the court would still find Customs' claims time-barred. The courts have long disfavored rewarding a party for taking advantage of a delay in the commencement of a statute of limitations when the delay is caused by that party's unilateral act. In the context of the bonds here, issuing a demand—a unilateral administrative act solely within Customs control—is not much different from the "internal procedures" that the Federal Circuit considered in *Commodities*. *See Commodities*, 972 F.2d at 1270–71 (discussing that "internal procedures" established by regulation included, *inter alia*, giving notice to an importer (and surety) of the claim for liquidated damages and demanding payment); *see also id.* at 1271 (finding that the Court could not "permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations" and thereby infringe on the defendants' "right to repose").

In addition, the *Commodities* Court noted:

> The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident."
>
> The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

Id. at 1271 n.3 (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 & n.14 (1967)). Put another way, Customs must act, and act reasonably, in pursuing its claims under a bond, like any prudent

litigant. *See Nyhus v. Travel Mgmt. Corp.*, 466 F.2d 440, 452–53 (D.C. Cir. 1972) (noting that "a party is not at liberty to stave off operation of the statute [of limitations] inordinately by failing to make demand; when statutorily unstipulated, the time for demand is ordinarily a reasonable time"); *United States v. Rollinson*, 629 F. Supp. 581, 584 n.2 (D.D.C. 1986) ("It is true, as defendants note, that 'a party is not at liberty to stave off operation of the statute [of limitations] inordinately by failing to make demand.'" (quoting *Nyhus*, 466 F.2d at 452–53)); *Cont'l Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 21 (2d Cir. 1996) ("We of course recognize that a plaintiff should not 'have the power to put off the running of the Statute of Limitations indefinitely.' Thus, once [the plaintiff insurance company] suffered losses on the underlying policies it could not unreasonably delay reporting those losses to the reinsurers." (quoting *Snyder v. Town Insulation, Inc.*, 615 N.E.2d 999, 1002 (N.Y. 1993)); *see also* 18 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 2021A, at 697 (3d ed. 1978) ("[W]here the plaintiff's right of action depends upon a preliminary act to be performed by himself he cannot suspend indefinitely the running of the Statute of Limitations by delaying performance of this act.")); *Cawley-Bruso v. Ray Klein Inc.*, No. C19–478, 2020 WL 13470930, at *2 (W.D. Wash. 2020) ("[T]he business creditor cannot extend the life of the debt indefinitely by a unilateral decision regarding when the obligation is due."); *In re Maxima Corp.*, 277 B.R. 244, 251 (D. Md. 2002) ("To allow Appellants to stretch the accrual date beyond November 1993 and February 1994, or allow Appellant unilaterally to mold its own accrual date by extending the thirty-day requirement for payment, would be to circumvent the goal of providing defendants and courts a degree of protection from stale claims."); *Leedom v. Spano*, 647 A.2d 221, 226 (Pa. Super. Ct. 1994) ("Postponement of the commencement of the limitation until the creditor elects to make demand on the surety places exclusive control of the statutory period in the hands of the creditor. By refusing to make a demand, he can defer the running of the statute of limitations indefinitely. This contravenes the underlying purpose for statutes of limitations and nullifies the benefits therefrom."). So much more when a lawsuit merely "slips through the cracks." Thus, the court further finds that Customs' suit was untimely based on its failure to act in a reasonable time.

CONCLUSION

For the foregoing reasons, the court finds that Customs' claims are time-barred and thus denies Plaintiff's motion for summary judg-

ment, and grants Defendant's cross-motion for summary judgment. Each party shall bear its own costs and expenses. Judgment shall be entered accordingly.

Dated: August 18, 2023
New York, NY

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–120

BONNEY FORGE CORPORATION AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Plaintiffs, v. UNITED STATES, Defendant, and SHAKTI FORGE INDUSTRIES PVT. LTD., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-03837

[Remanding to Commerce to consider reliance interests and alternatives.]

Dated: August 21, 2023

William Fennell, Schagrin Associates, of Washington, DC, for Plaintiffs. With him on the brief was *Roger B. Schagrin.*

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Brian M. Boynton,* Principal Deputy Assistant Attorney General, *Jeanne E. Davidson,* Director, Commercial Litigation Branch, *Claudia Burke,* Assistant Director, Commercial Litigation Branch, and *JonZachary Forbes,* Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Aqmar Rahman, Trade Pacific PLLC, of Washington, DC, for Defendant-Intervenor. With him on the brief was *Robert G. Gosselink.*

OPINION

Vaden, Judge:

Following this Court's remand order, *see Bonney Forge Corporation v. United States,* 560 F. Supp. 3d 1303 (CIT 2022) *(Bonney Forge I),* the Department of Commerce (Commerce) reconsidered its actions in the underlying proceeding. Commerce attempted to heed this Court's remand order and follow one of the two paths offered by the Supreme Court in *Department of Homeland Security v. Regents of the University of California (Regents).* 140 S. Ct. 1891, 1907–08 (2020). Commerce chose the second path and sought to " 'deal with the problem afresh' by taking *new* agency action." *Id.* at 1908; Final Results of Redetermination Pursuant to Court Remand (Remand Results) at 2, ECF No. 61. The new agency action Commerce took was determining "that the post-preliminary questionnaires issued by Commerce satisfy Commerce's verification requirements under section 782(i) of the Act." Remand Results at 2, ECF No. 61. Unfortunately, Commerce fell short of fulfilling all of *Regents'* requirements. Specifically, the agency failed to consider (1) the reliance interests implicated by its change of policy regarding verification and (2) alternative options to further verify the information on the record under current conditions. Therefore, the determination is **REMANDED** to Commerce for it to again

reconsider its decision. *See Regents,* 140 S. Ct. at 1912–15.

BACKGROUND

The Court presumes familiarity with *Bonney Forge I* but briefly summarizes the relevant facts. *See* 560 F. Supp. 3d at 1305–09. Commerce chose not to perform any kind of verification because of the constraints of the COVID-19 pandemic. *Id.* at 1307. Bonney Forge had suggested that Commerce perform a "virtual verification" in place of a traditional on-site verification. *Id.* Commerce did not respond to this suggestion. *Id.* at 1312. Instead, Commerce issued a series of supplemental questionnaires to respondent Shakti Forge. *Id.* at 1308. Commerce then determined that, although it could not verify Shakti's information, it would use the information Shakti provided as "facts available." *Id.;* see 19 U.S.C. § 1677e. Commerce relied on this unverified information in its determination. *Bonney Forge I,* 560 F. Supp. 3d at 1308. The Court remanded the decision to Commerce with instructions:

> On remand, Commerce may assess the current state of the COVID-19 pandemic, consider whether a virtual verification is possible, and act accordingly. Should Commerce determine that no verification method — virtual or otherwise — is possible, it must at a bare minimum explain on the record why it is not an abuse of discretion for the Government to determine that senior officials may galivant around the globe in-person but civil servants cannot even perform their statutory responsibilities virtually.

Id. at 1316.

Commerce returned its Remand Results to the Court on June 30, 2022. Remand Results, ECF No. 61. In the Remand Results, Commerce stated it took new agency action: It found that the questionnaires it issued and the responses it received sufficiently verified Shakti's information. *Id.* at 2. Commerce additionally offered a "fuller explanation as to the option of a remote, real-time verification, and why a verification conducted in real time was not plausible during the investigation." *Id.*

After recounting the situation in India and the United States in the summer of 2020, Commerce responded to Bonney Forge's objections. First, Commerce argued that Plaintiffs raised the option of a virtual verification on August 11, 2020, which was too late for Commerce to acquiesce, *id.* at 13, and that Plaintiffs did not explain what a virtual

verification was. *Id.* at 14. Second, Commerce noted that "alternative means of conducting verification under exceptional circumstances" have been approved by prior opinions of the Court of International Trade. *Id.* at 19. Commerce concluded that "the Post-Preliminary Questionnaires and responses thereto were a reasonable alternative to in-person, on-site verification or real-time, remote verification given the unique conditions caused by the COVID-19 pandemic, as well as other barriers specific to the case which impeded such means of virtual verification." *Id.* at 21. The agency explained that India had internal and international travel restrictions in 2020, making an on-site verification impossible. *Id.* at 13. With respect to virtual verification, Commerce noted that, during the investigation, (1) many employees of Shakti were confined to their homes without reliable internet access; (2) Shakti's accounting consultant could not travel to the company's facilities because of Indian COVID restrictions; (3) most of Shakti's records were only in paper form; and (4) the significant time difference between India and the United States made scheduling a real-time teleconference difficult. *Id.* at 15.

Plaintiffs filed comments on the Remand Results with the Court on August 5, 2022, arguing that (1) Commerce's refusal to conduct on-site or virtual verification is contrary to law and the remand order; (2) Commerce's determination that it verified Shakti's information is unsupported by substantial evidence; and (3) Commerce's determination that Shakti's submitted cost information is accurate is unsupported by substantial evidence. Pls.' Br. on Remaining Issues (Pls.' Br.) at 2–14, ECF No. 78. Defendant Commerce and Defendant-Intervenor Shakti Forge responded to Plaintiffs' comments on September 6, 2022. Def.'s Resp. to Pls.' Br. on Remaining Issues, ECF No. 73; Def.-Int.'s Resp. to Pls.' Comments on Remand Results, ECF No. 72. In its response, Commerce argues that it complied with the remand order and that its decision is supported by substantial evidence. Def.'s Resp. at 7–12, ECF No. 73. Shakti Forge argues that Commerce complied with the remand order and that Commerce's actions in other investigations are not relevant to its actions here. Def.-Int.'s Resp. at 2–10, ECF No. 72.

The Court held oral argument on October 25, 2022, *see* ECF No. 80, and asked the Government where Commerce considered Plaintiffs' reliance interests in its decision. Oral Arg. Tr. (Tr.) at 43: 12–16, ECF No. 82. Counsel pointed to the agency's discussion of why the record information was sufficient to constitute verification. *Id.* at 43:17–48:8. The Court also inquired whether the agency considered alternatives in the Remand Results, as required by *Regents*. *Id.* at 35: 17–36:5. The Government explained that doing a virtual or on-site verification

"would be superfluous or that would be almost like a second verification because again what it had already done and considered constituted verification." *Id.* at 37:18–20. Thus, Commerce's answer to whether it had followed the necessary procedures on remand was to highlight its determination on the merits.

STANDARD OF REVIEW

Although the scope of issues Commerce may reconsider on remand is broad, Supreme Court precedent limits the range of available actions it may take. An agency has two options on remand:

> First, the agency can offer a "fuller explanation of the agency's reasoning *at the time of the agency action*"…. This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. Alternatively, the agency can "deal with the problem afresh" by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

Regents, 140 S. Ct. at 1907–08 (internal citations omitted); *accord SKF USA Inc. v. United States,* 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("In the second situation, in which the agency seeks to defend its decision on grounds not previously articulated by the agency …. we generally decline to consider the agency's new justification for the agency action[.]"); *Timken Co. v. United States,* 894 F.2d 385, 389 (Fed. Cir. 1990) ("[A]gency action cannot be sustained on *post hoc* rationalizations supplied during judicial review.") (citations omitted).

"The court reviews remand determinations for compliance with the court's order." *Nahornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 1272, 1274 (2008) (citations omitted); *accord Ad Hoc Shrimp Trade Action Comm. v. United States*, 992 F. Supp. 2d 1285, 1290 (CIT 2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015). "Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989). The Court may also issue a further remand order when the remand results are not supported by substantial evidence or otherwise in accord with the law. *See Nippon Steel Corp. v. ITC*, 494 F.3d 1371, 1379 (Fed. Cir. 2007).

DISCUSSION

Commerce Failed to Comply with the Procedural Requirements of New Agency Action

Commerce acknowledges that it has a consistent past practice of performing in-person, on-site verification whenever possible. *See Remand Results* at 20, ECF No. 61 (noting that "Commerce has a documented history of verifying information to the fullest extent possible"); *see also id.* at 19 (detailing Commerce's actions in three other cases with substantial verification hurdles where Commerce arranged in-person verification at alternative locations); *id.* at 7 nn.35–36 (citing instances in which in-person, on-site verification was impossible so that substitute procedures were used but none in which in-person, on-site verification was possible but was not done). In the Remand Results, Commerce explained its view of why in-person, on-site verification in India was not possible during the original investigation in 2020. *Id.* at 3–4. Commerce has also now explained its view of why a virtual verification was not possible in 2020, filling the gap identified by this Court in its prior decision. *Id.* at 13–15; *see Bonney Forge I,* 560 F. Supp. 3d at 1316 ("Record review requires a record. Because Commerce has failed to make one concerning its decision not to engage in verification, virtual or otherwise, its decision may not stand."). Commerce did a thorough job explaining the conditions in the United States and India in 2020 and how those conditions made on-site verification as well as an alternative virtual verification impractical. *See* Remand Results at 3–11, 14–15, ECF No. 61. Unlike the previous examples Plaintiffs cite — where world events impacted only travel to the foreign company and Commerce could designate an alternative in-person verification site — pandemic travel restrictions made travel difficult regardless of location. *Id.* at 19–21. There was no clear alternative location where both parties could meet. *Compare Polyethylene Terephthalate Resin from Pakistan: Final Determination of Sales at Less Than Fair Value,* 83 Fed. Reg. 48,281, 48,282 (Sept. 24, 2018) (conducting a verification with representatives of a Pakistani company in Washington, DC, when Commerce determined that travel in Pakistan was not possible because of a State Department travel advisory), *with* Remand Results at 20, ECF No. 61 (explaining that "in 2020, there were global travel bans in place, including a ban on travel to India by U.S. citizens and travel to the United States by Indian nationals"). Shakti faced many hardships from India's lockdown policies, which prevented its employees from accessing its facilities and left them with irregular online access, making virtual verification difficult. *Id.* at 15.

Despite this explanation, two flaws mar Commerce's redetermination. First, Commerce denied the legitimacy of Bonney Forge's reliance interests, which are rooted in Commerce's consistent past practice of performing on-site or in-person verifications. *See id.* at 26 (claiming that all that mattered was whether Commerce was satisfied that the information was accurate). Second, the agency refused to address whether any additional steps were warranted to verify the information on the record given current conditions. *See id.* at 22 ("We disagree with the petitioners that an analysis of verification possibilities under current conditions is required to comply with the *Remand Order.")*. *Regents* gives an agency two paths on remand: (1) the agency can offer a fuller explanation of its reasoning at the time it made the decision in question; or (2) the agency can take new agency action and provide new reasoning for that action. 140 S. Ct. at 1907–08. When taking new agency action, an agency "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* at 1908. For example, "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Id.* at 1913 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)) (alterations in original). And when deviating from a consistent past practice or policy, an agency "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* (quoting *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009))).

Given its admitted past practice of on-site or in-person verification and the deviation from that practice in the Remand Results, Commerce was obligated to acknowledge Bonney Forge's reliance interests and explain why this departure from past practice would not unduly harm those interests. No such discussion can be found. The agency never uses the term "reliance interests" once. When pressed at oral argument to show where in the Remand Results the agency considered reliance interests, the Government pointed to the Remand Results' discussion of why the questionnaire was sufficient to fulfill Commerce's statutory mandate to gather accurate and reliable information. *See* Tr. at 43:17–48:8, ECF No. 82; Remand Results at 26–28, ECF No. 61. However, Commerce's discussion effectively denied the existence of Bonney Forge's reliance interests. According to Commerce, "the purpose of verification is to corroborate information reported by the respondents earlier in the proceeding, and establish, *to Commerce's satisfaction,* that such information is accurate and reli-

able for purposes of making a final determination." Remand Results at 26, ECF No. 61 (emphasis in original). Bonney Forge's reliance interests are irrelevant because the agency's satisfaction with the verification procedure is all that matters.

But Commerce may not ignore Bonney Forge's legitimate reliance interests engendered by Commerce's consistent policy of conducting on-site or in-person verifications. *See Regents,* 140 S. Ct. at 1913 (holding that reliance interests "must be taken into account") (citations omitted). The agency tries to dodge this responsibility by explaining that its Remand Results are in line with a two-year policy during the pandemic of using questionnaires in lieu of on-site verification. Remand Results at 23–24, ECF No. 61. Citing an expired pandemic policy is insufficient to avoid Commerce's obligation to acknowledge Bonney Forge's reliance interests in the prior policy of on-site or in-person verification. Although agencies have flexibility to change policy, they "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Regents,* 140 S. Ct. at 1913 (quoting *Encino Motorcars,* 136 S. Ct. at 2126) (quoting *Fox Television,* 556 U.S. at 515). Commerce's Remand Results claim that it is only Commerce's interests that matter. *See* Remand Results at 26, ECF No. 61 (stating that "the purpose of verification is to corroborate information reported by the respondents earlier in the proceeding, and establish, *to Commerce's satisfaction,* that such information is accurate and reliable"). Because ignoring Plaintiffs' reliance interests ignores Supreme Court precedent, Commerce's determination must again return to the agency.

The Remand Results also fall short in their consideration of alternatives during the remand period. The agency explained why it could not perform on-site verification in 2020 and why virtual verification might not have been feasible during the pandemic. Remand Results at 3–4, 13–21, ECF No. 61. This was helpful; but there is no discussion of why the agency refused to take further steps to verify the information during the remand period — when the agency took "*new* agency action." *Regents,* 140 S. Ct. at 1908. The agency insisted that it need not consider doing anything further at all during the remand period, stating "{a}n attempt by Commerce to conduct additional verification of Shakti's responses via a virtual web conference or other methodology the petitioners might have suggested would be unnecessary as the information had already been verified under section 782(i)(l) of the Act." Remand Results at 23, ECF No. 61 (alteration in original). Commerce's explanation is essentially that, because what the agency did in 2020 was sufficient, the agency need not consider

doing anything further. *Id.; see also id.* at 28 (explaining that using the questionnaire fulfilled many of the same functions as on-site verification). *But see id.* at 7 nn.35–36 (citing instances in which in-person, on-site verification was impossible so that substitute procedures were used but none in which in-person, on-site verification was possible but was not done). Again, the agency conflates the merits question with a procedural question. Commerce must explain what other steps closer to an on-site or in-person verification it has considered — now and in 2020 — and why it rejected those alternatives in favor of questionnaires. *See Regents,* 140 S. Ct. at 1913 (requiring that an agency analyze the alternatives within the scope of the existing policy when changing longstanding practices).

As the *Regents* Court noted, Commerce has two options on remand. 140 S. Ct. at 1907–08. It may offer a fuller explanation of its reasoning at the time of the action it defends, or it may take new agency action. *Id.* Commerce here correctly decided to take new agency action but failed to acknowledge Bonney Forge's reliance interests. *See id.* at 1913. The agency also refused to explain why no alternative actions to verify Shakti's information were needed either in 2020 or during the remand period. To rectify these deficiencies, the case is **REMANDED** to Commerce for further explanation.

CONCLUSION

Past practice is not an inescapable straitjacket. Commerce may deviate from it, provided that it places a reasoned explanation on the record in compliance with *Regents.* Because it has not done so, the Court must remand for further reconsideration. Accordingly:

The Court **REMANDS** the case for up to 150 days for Commerce to reconsider its decision on verification, consistent with this opinion, and place its reasons supporting its decision on the record; and it is

ORDERED that, at the conclusion of 150 days, Commerce should file its Second Remand Redetermination with the Court. It is also

ORDERED that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Second Remand Redetermination; and it is further

ORDERED that Plaintiffs shall have 30 days from the filing of the Second Remand Redetermination to submit comments to the Court;

ORDERED that Defendant shall have 15 days from the date of Plaintiffs' filing of comments to submit a response; and

ORDERED that Defendant-Intervenor shall have 15 days from the date of Defendant's filing of comments to submit a response.

Dated: August 21, 2023
New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 23–121

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, SSAB ENTERPRISES, LLC, and STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00536

[Sustaining the U.S. Department of Commerce's remand results in the 2018 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea.]

Dated: August 21, 2023

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Tara K. Hogan, Assistant Director, and *Sosun Bae*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, *Christopher B. Weld*, and *Theodore P. Brackemyre*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

Roger B. Schagrin and *Jeffrey D. Gerrish*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors SSAB Enterprises, LLC and Steel Dynamics, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai Steel") filed this action challenging the final results in the 2018 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea ("Korea"). *Certain Hot-Rolled Steel Flat Products from the Republic of Korea* ("*Final Results*"), 86 Fed. Reg. 47,621 (Dep't of Commerce Aug. 26, 2021) (final results of countervailing duty admin. review; 2018); *see also* Issues and Decision Mem. for the Final Results of the 2018 Admin. Review of the Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea ("Final IDM"), ECF No. 21–5.

Before the Court are the Final Results of Redetermination Pursuant to Court Remand of the U.S. Department of Commerce ("Commerce") on Certain Hot-Rolled Steel Flat Products from the Republic of Korea, filed pursuant to the Court's remand order in *Hyundai Steel Co. v. United States*, 47 CIT __, 615 F. Supp. 3d 1351 (2023) ("*Hyundai Steel*" or "Remand Order"). *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 48–1 ("*Remand Results*"). This

opinion presumes familiarity with the facts as outlined in *Hyundai Steel*, in which the Court remanded Commerce's determination that the free provision of port usage rights associated with the Port of Incheon Program conferred a benefit and Commerce's benefit and financial contribution determinations related to the Sewerage Usage Fees Program. *Hyundai Steel*, 47 CIT at __, 615 F. Supp. 3d at 1353.

On remand, Commerce reexamined the Reduction for Sewerage Fees program, determined that the program was not countervailable, and provided further explanation for its determination that the provision of port usage rights at the Port of Incheon conferred a benefit. *Remand Results* at 39. Commerce changed the final subsidy rate calculation from the previous rate of 0.51% for Hyundai Steel to a new subsidy rate of 0.50%. *Id.*

Plaintiff Hyundai Steel Company filed comments supporting Commerce's determination of the Reduction for Sewerage Fees program and opposing Commerce's port usage rights determination. Pl. Hyundai Steel Co.'s Cmts. Commerce's Redetermination Pursuant Court Remand, ECF Nos. 50, 51 ("Pl.'s Br."). Defendant United States ("Defendant") filed comments in support of Commerce's *Remand Results*. Def.'s Cmts. Supp. Remand Redetermination, ECF No. 56 ("Def.'s Br."). Defendant-Intervenors Nucor Corporation, SSAB Enterprises, LLC, and Steel Dynamics, Inc. filed comments in support of Commerce's *Remand Results*. Def.-Intervs.' Cmts. Supp. Final Results Redetermination Pursuant Court Remand ("Def.-Intervs.' Br."), ECF No. 55.

For the following reasons, the Court sustains the *Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of a countervailing duty order. The Court will hold unlawful any determination 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). The Court also reviews determinations made on remand for compliance with the Court's Remand Order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

A countervailable subsidy is a financial contribution provided by an authority (a foreign government or public entity) to a specific industry when a recipient within the industry receives a benefit as a result of

that contribution. *See* 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014). Section 1677(5) defines a financial contribution, in relevant part, to mean "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income," "providing goods or services, other than general infrastructure," and "purchasing goods." 19 U.S.C. § 1677(5)(D).

The statute provides that "[a] benefit shall normally be treated as conferred . . . if [] goods or services are provided for less than adequate remuneration." *Id.*§ 1677(5)(E), (E)(iv); *see POSCO v. United States*, 977 F.3d 1369, 1371 (Fed. Cir. 2020). "For purposes of clause (iv), the adequacy of remuneration [is] determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

I. Commerce's Determination that the Provision of Port Usage Rights Without Fee Constituted a Benefit

In the *Final Results*, Commerce determined that the free provision of port usage rights associated with the Port of Incheon Program conferred a countervailable subsidy to Hyundai Steel. Final IDM at 19–23. The Court remanded this issue for Commerce to reconsider Commerce's benefit determination relating to the provision of port usage rights at the Port of Incheon. *Hyundai Steel*, 47 CIT at __, 615 F. Supp. 3d at 1356.

On remand, Commerce provided additional reasoning for its determination that the provision of port usage rights at the Port of Incheon constituted a countervailable benefit. Commerce explained at the outset that it does not view the provision of port usage rights at the Port of Incheon as a subsidy to be analyzed for less than adequate remuneration ("LTAR"). *Remand Results* at 12. Commerce specified that it examined the agreement between Hyundai Steel and the Government of Korea as focusing on the narrow issue of the Government of Korea's assignment to Hyundai Steel of the right to collect certain port fees, *id.* at 12–13, and that Commerce regarded the financial contribution received by Hyundai Steel to be revenue foregone. *Id.* at 13. Commerce noted on remand that Hyundai Steel obtained the right to collect berthing income and other fees associated with port activity during the period of review pursuant to the agreement with the Government of Korea, and determined that "[t]he ability to collect such fees (*i.e.*, fees otherwise payable to the government) cannot be construed as the provision of a good or service but is

instead revenue forgone." *Id.* at 17.

Hyundai Steel argues that Commerce's determination that the prevailing market conditions clause of section 771(5)(E) only applies to LTAR financial contributions is not supported by the plain language of the statute. Pl.'s Br. at 6. Hyundai Steel contends that Commerce should have analyzed the Port Rights Program to determine if Hyundai Steel paid less for the port rights than it otherwise would earn by considering the prevailing market conditions, including other conditions of purchase or sale. *Id.* at 7. Defendant and Defendant-Intervenor assert that Commerce's determination is in accordance with law because Commerce determined the provision of port usage rights to be revenue foregone, not LTAR, and conducted a proper revenue foregone analysis without examining the prevailing market conditions. Def.'s Br. at 5–9; Def.-Intervs.' Br. at 3–8. Both Defendant and Defendant-Intervenor contend that the LTAR standards do not apply to the revenue foregone situation. Def.'s Br. at 5–6; Def.-Intervs.' Br. at 5.

The statute provides that when Commerce reviews whether a benefit is conferred, "adequacy of remuneration [is] determined in relation to prevailing market conditions." 19 U.S.C. § 1677(5)(E), (E)(iv). 19 U.S.C. § 1677(5)(E) states that:

> For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

19 U.S.C. § 1677(5)(E).

19 U.S.C. § 1677(5)(D) states that:

Financial contribution. The term "financial contribution" means

(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income. . . .

19 U.S.C. § 1677(5)(D).

On remand, Commerce noted that Hyundai Steel and the Government of Korea's Ministry of Oceans and Fisheries entered into agree-

ments regarding the construction of the Port of Incheon. *Remand Results* at 12. As part of the agreements, the Government of Korea granted to Hyundai Steel the right to collect fees from third-party users of the Port of Incheon. *Id.* at 12–13 (citing Hyundai Steel's Initial Questionnaire Resp. (Apr. 10, 2020) at 43, PR 61[1]). Commerce noted that no third party has used the harbor. *Id.* at 13 (citing Hyundai Steel's Initial Questionnaire Resp. at 43). Commerce clarified on remand that its countervailing duty analysis focused on the narrow aspect of the Port Usage Rights program involving the Government of Korea's assignment to Hyundai Steel the right to collect certain port fees. *Id.* Commerce explained that it "considered the financial contribution that Hyundai Steel received pursuant to this program to be revenue foregone. . . . [in that] the fees that the [Government of Korea] gave Hyundai Steel the right to collect—the berthing income and the harbor facility usage fees—which would otherwise have been collected by the [Government of Korea] absent the agreement between the parties, represent revenue foregone by the [Government of Korea] within the meaning of section 771(5)(D)(ii) of the Act." *Id.* (internal quotation omitted). Commerce explained on remand that it conducted its analysis pursuant to section 771(5)(D)(ii) because the subsidy program was revenue foregone, not the provision of goods or services applicable under section 771(5)(E). *Id.* at 14–15.

The Court concludes that Commerce reasonably determined that it should conduct a revenue foregone analysis rather than an LTAR analysis because Hyundai Steel's non-payment of port usage fees did not involve the provision of goods or services, but rather involved a type of financial contribution from revenue foregone when the Government of Korea conferred the right to Hyundai Steel to collect revenue from third parties at the port. The Court also concludes that Commerce reasonably determined that the Government of Korea's provision of rights under the Port of Incheon Program, specifically the right to collect revenues from third parties using the port, conferred a benefit to Hyundai Steel. The Court observes that Commerce cited substantial evidence, including Hyundai Steel's April 10, 2020 Initial Questionnaire Response at 43, to support its determination that the Government of Korea conferred the right to Hyundai Steel to collect revenue from third-party users of the port. *See Remand Results* at 13 (citing Hyundai Steel's Initial Questionnaire Resp. at 43). Because Commerce's *Remand Results* with respect to the Port of Incheon Program are in accordance with law and supported by substantial

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") document numbers filed in this case, ECF Nos. 44, 58, 61, 64.

evidence, the Court sustains Commerce's *Remand Results* on this issue.

II. Partial Remand of Commerce's Determination that Hyundai Steel's Reduced Fees Pursuant to the Sewerage Usage Fees Program Constituted a Countervailable Subsidy

In the *Final Results*, Commerce determined that the Sewerage Usage Fees Program was countervailable. Final IDM at 25–27. The Court granted Commerce's request for remand to reconsider the Sewerage Usage Fees Program. *Hyundai Steel*, 47 CIT at __, 615 F. Supp. 3d at 1356. On remand, Commerce explained that it gained an increased understanding of how companies could receive a reduction in sewerage fees pursuant to the Sewerage Usage Fees Program and changed its determination to conclude that the program did not constitute a countervailable subsidy. *Remand Results* at 5. Commerce reviewed relevant provisions of Korean law that govern the reduction of sewerage usage fees, including Article 65(1) of Korea's Sewerage Act, Article 36(2) of Korea's Enforcement Decree of the Sewerage Act, and Articles 12, 14, and 21 of the Incheon Metropolitan City Ordinance on Sewerage System Use. *Id.* at 5–10. Commerce determined on remand that these Korean federal and municipal laws and regulations "state that sewerage fees shall be based on the volume of sewage discharged into the public sewerage system." *Id.* at 7. Commerce determined based on these Korean laws and regulations that a sewerage fee reduction based on the volume of water discharged by a participating company would not be excluded. *Id.* at 8.

In examining the amount of the sewerage fee reduction that Hyundai Steel received on its overall water bill, Commerce determined that the rate adjustments specified in Appendix 4 of the Incheon Metropolis City Ordinance on Sewerage System Use ("Ordinance") apply to narrow categories of users located in disaster zones or users that utilize reuse water and are not attempting to demonstrate that the amount of water discharged into the sewerage system is different than the amount of water supplied. *Id.* at 9–10 (citing Government of Korea's First Supp. Questionnaire Resp. (July 16, 2020) at Exhibit SEWER-1 (Revised), PR 95–101). Commerce reasoned that Appendix 4 applies only to subparagraphs (1)–(6) of Article 21 (Reduction and Exception) of the Ordinance and not subparagraph (7), which covers "[o]ther instances where the public sewerage management authority acknowledges public interest or any other special conditions." *Id.* at 10; *see* Government of Korea's First Supp. Questionnaire Resp. at Exhibit SEWER-1 (Revised) at 8–10. For Hyundai Steel, the reduc-

tion was based on a study Hyundai Steel submitted to the Government of Korea that demonstrated the amount of water that Hyundai Steel discharged into the public sewerage system. *Remand Results* at 9. Commerce determined that "[t]his reduction percentage, therefore, reflects the intent of the federal and municipal regulations that Hyundai Steel be billed based on the amount of water discharged into the sewerage system." *Id.* Commerce noted that on remand it reopened the record and received new information demonstrating that Hyundai Steel was not unique in receiving a sewerage fee reduction, and that many companies qualified for a similar fee reduction under Korean law. *Id.* at 10 (citing Government of Korea's Resp. Suppl. Questionnaire (Mar. 8, 2023) at 3, PRR 3. Commerce concluded that:

> Therefore, after a reevaluation of the record, we find that the record does not support a finding that this program is countervailable. Specifically, we determine that the record does not support a finding that the reduction in Hyundai Steel's sewerage fee in Incheon represents revenue foregone, in accordance with section 771(5)(D)(ii) of the Act. . . . Accordingly, there is no revenue foregone to the [Korean] government because Hyundai Steel is simply billed for the service which it has used, according to the regulations that govern the applicable fees.

Id. at 10–11.

No party challenges Commerce's *Remand Results* regarding the sewerage fees program. Hyundai Steel and Defendant contend that Commerce's *Remand Results* are supported by substantial evidence and should be sustained. Pl.'s Br. at 3; Def.'s Br. at 4. The Court observes that the document provided by the Government of Korea on March 8, 2023 confirms Commerce's determination that numerous companies qualified for sewerage fee reductions similar to that received by Hyundai Steel. *See* Government of Korea's Resp. Suppl. Questionnaire at 3. The Court concludes that Commerce reevaluated applicable Korean laws, reopened the record to consider new information, and cited to sufficient record evidence to support Commerce's remand determination that Hyundai Steel did not receive a unique Sewerage Usage Fees reduction constituting a financial contribution and countervailable benefit to Hyundai Steel. Because Commerce's *Remand Results* with respect to the Sewerage Usage Fees Program are in accordance with law and supported by substantial evidence, the Court sustains Commerce's *Remand Results* on this issue.

CONCLUSION

For the aforementioned reasons, the Court sustains Commerce's determinations that the free provision of port usage rights associated with the Port of Incheon Program conferred a countervailable benefit and Commerce's determination that the Sewerage Usage Fees Program did not constitute a countervailable benefit.

Accordingly, it is hereby

ORDERED that the *Remand Results* are sustained; and it is further

ORDERED that judgment will issue accordingly.

Dated: August 21, 2023,
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 23–122

FAR EAST AMERICAN, INC., AND LIBERTY WOODS INTERNATIONAL, INC., Plaintiffs, and INTERGLOBAL FOREST, LLC, Consolidated-Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 22–00049

[Sustaining the U.S. Department of Commerce's scope redetermination on remand for the antidumping duty and countervailing duty orders on certain hardwood plywood from the People's Republic of China.]

Dated: August 22, 2023

Gregory S. Menegaz, *Vivien J. Wang*, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiffs.

Thomas H. Cadden and *Kevin E. Mueller*, Cadden & Fuller LLP, of Irvine, CA, for Consolidated Plaintiff.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Savannah R. Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, *Stephanie M. Bell*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor.

OPINION

Barnett, Chief Judge:

Plaintiffs Far East American, Inc. ("FEA") and Liberty Woods International, Inc. and Consolidated Plaintiff InterGlobal Forest, LLC ("IGF") (collectively, "Plaintiffs") commenced actions challenging the U.S. Department of Commerce's ("Commerce") scope determination for the antidumping duty ("AD") and countervailing duty ("CVD") orders on certain hardwood plywood from the People's Republic of China ("China"). *See* Confid. Final Scope Ruling, ECF No. 34–1; *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at less than fair value, and antidumping duty order) ("*Plywood AD Order*"); *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (CVD order) ("*Plywood CVD Order*") (together, "the *Plywood Orders*"). The *Plywood Orders* cover, *inter alia*,

> hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilay-

> ered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.

Plywood AD Order, 83 Fed. Reg. at 512; *Plywood CVD Order*, 83 Fed. Reg. at 515.

Plaintiffs, U.S. importers of hardwood plywood, challenged Commerce's interpretation of the scope of the *Plywood Orders* to include two-ply panels imported from China into Vietnam and Commerce's determination that hardwood plywood manufactured by Vietnam Finewood Company Limited ("Finewood") in Vietnam using such Chinese two-ply remains in-scope based on the absence of a substantial transformation. Confid. Pls. Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R., ECF No. 31–1; Confid. Consol. Pl. [IGF] Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R., ECF No. 30–1.

In *Vietnam Finewood*, the court found in favor of Plaintiffs with respect to the scope of the *Plywood Orders* and, therefore, did not address substantial transformation. *See Viet. Finewood Co. v. United States*, 46 CIT __, __, 633 F. Supp. 3d 1243,1262 (2023).[1] The court disagreed with Commerce that the phrase "certain veneered panels" covered merchandise distinct from "hardwood plywood" and could include two-ply panels. *Id.* at 1255–62. The court held that the scope is unambiguous insofar as it "covers hardwood plywood and certain veneered panels that, for purposes of the underlying proceeding, and from the second scope sentence onward, are collectively described as hardwood plywood 'consisting of two or more layers or plies of wood veneers and a core,' i.e., at least three plies." *Id.* at 1262. The court remanded the matter "for Commerce to issue a scope ruling concerning Finewood's two-ply panels that is consistent with the unambiguous meaning of the *Plywood Orders* discussed [in the opinion]." *Id.* at 1265.

On June 16, 2023, Commerce issued its redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Ct. Remand ("Scope Redetermination"), ECF No. 62–1.[2] Therein, under protest,[3] Commerce reconsidered its scope ruling and con-

[1] The court's opinion in *Vietnam Finewood* presents background information on this case, familiarity with which is presumed. In addition to ruling on additional procedural matters, the court dismissed Finewood from the action for lack of standing and directed the clerk to amend the caption accordingly. *Viet. Finewood*, 633 F. Supp. at 1265–66.

[2] The administrative record associated with Commerce's Remand Results is contained in a Public Remand Record, ECF Nos. 63–1 (AD), 63–2 (CVD).

[3] By making the determination under protest, Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

cluded that hardwood plywood produced by Finewood in Vietnam using Chinese two-ply and subsequently exported to the United States is not subject to the scope of the *Plywood Orders*. *Id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2018), 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

Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood ("the Coalition") filed comments in which it agreed with Commerce's decision to issue the Scope Redetermination under protest based on the Coalition's view that Commerce's original scope decision was correct. Def.-Int.'s Cmts. on Remand Redetermination, ECF No. 64. Plaintiffs and Defendant filed comments in which they agreed that Commerce had complied with the remand order and judgment should be entered. Pls.' Responsive Cmts. on Remand Redetermination, ECF No. 65; Def.'s Request to Sustain the Results of the Remand Redetermination, ECF No. 67; [Consol. Pl.'s] Responsive Cmts. on Remand Redetermination, ECF No. 68.

Commerce's Scope Redetermination complies with the court's order in *Finewood* to issue a scope ruling consistent with the unambiguous terms of the scope of the *Plywood Orders* and there are no further issues for the court to adjudicate.

CONCLUSION

There being no substantive challenge to the Scope Redetermination, and that decision being otherwise lawful and supported by substantial evidence, the court will sustain Commerce's Scope Redetermination. Judgment will be entered accordingly.

Dated: August 22, 2023
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 23–123

ASPECTS FURNITURE INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 20–03824

[Sustaining U.S. Customs and Border Protection's Final Remand Redetermination, following an evasion determination under the Enforce and Protect Act.]

Dated: August 22, 2023

Robert W. Snyder and *Laura A. Moya*, Law Offices of Robert W. Snyder, of Irvine, CA, for Plaintiff Aspects Furniture International, Inc.

Claudia Burke, Deputy Director, and *Douglas G. Edelschick*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Tamari Lagvilava*, Attorney, Office of Chief Counsel, U.S. Customs and Border Protection.

OPINION

Choe-Groves, Judge:

This action arises out of U.S. Customs and Border Protection's ("Customs") final determination of evasion of the *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China* ("Order"), 70 Fed. Reg. 329 (Dep't of Commerce Jan. 4, 2005), by Plaintiff Aspects Furniture International, Inc. ("Plaintiff" or "Aspects"). Customs' Final Determination Aspects Furniture International, Inc. Enforce and Protect Act ("EAPA") Case No. 7189 (Sept. 24, 2020) ("Final Administrative Determination" or "Final Admin. Determination"), PR 429.[1] Before the Court is the Final Remand Redetermination ("*Remand Redetermination*"), Final Remand Redetermination EAPA Investigation No. 7189, ECF No. 36, which the Court ordered in *Aspects Furniture Int'l, Inc. v. United States* ("*Aspects I*"), 46 CIT __, 607 F. Supp. 3d 1246 (2022). For the following reasons, the Court sustains Customs' *Remand Redetermination*.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the

[1] Citations to the administrative record reflect the public record ("PR"), confidential record ("CR"), and public remand record ("PRR") document numbers filed in this case, ECF Nos. 16, 17, 36–3, 39, 40.

Court's review of the *Remand Redetermination*. *See Aspects I*, 46 CIT at __, 607 F. Supp. 3d. at 1251–53.

In *Aspects I*, the Court held in relevant part that Customs could not include in its evasion investigation merchandise that entered prior to entry into force of the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517, or entries of non-covered merchandise. *Id.* at __, 607 F. Supp. 3d. at 1257, 1269. The Court also held that Customs failed to provide the parties to the investigation with required public summaries of redacted information. *Id.* at __, 607 F. Supp. 3d. at 1273. The evasion determination was remanded to Customs to address these issues. *Id.* at __, 607 F. Supp. 3d. at 1257, 1269, 1273, 1275. The Court suggested that Customs might consider providing on remand a further explanation regarding the truthfulness, reasonableness, or credibility of disputed evidence of document destruction. *Id.* at __, 607 F. Supp. 3d. at 1260.

Subsequent to the Court's issuance of *Aspects I*, Aspects moved to withdraw and waive its arguments regarding the lack of public summaries and requested that the Court partially vacate the portion of *Aspects I* regarding Customs' failure to provide public summaries. Pl.'s Unopposed Mot. Partially Vacate Court's Nov. 28, 2022 Remand Order, ECF No. 32. The Court granted the motion in part to permit Plaintiff to withdraw and waive Plaintiff's claims but denied the motion in part with respect to Plaintiff's request to vacate portions of *Aspects I*. Order (Dec. 23, 2022), ECF No. 33. The Court directed that Customs was not required to address the lack of public summaries on remand. Order (Dec. 23, 2022), ECF No. 35.

Customs filed its *Remand Redetermination* with the Court on March 27, 2023, in which Customs clarified that its evasion determination did not apply to entries made prior to the EAPA coming into force and expressly drew an adverse inference that all of Aspects' entries made during the period of investigation contained covered merchandise. *Remand Redetermination*. Aspects filed Plaintiff's Comments in Opposition to Agency Final Remand Redetermination Pursuant to Court Order. Pl.'s Cmts. Opp'n Agency Final Remand Redetermination Pursuant Court Order ("Pl.'s Br."), ECF No. 37. Defendant United States ("Defendant") filed Defendant's Comments in Support of Agency Remand Redetermination. Def.'s Cmts. Supp. Agency Remand Redetermination ("Def.'s Br."), ECF No. 38.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 517 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g),[2] and 28 U.S.C. § 1581(c), which grant the Court jurisdiction over actions contesting determinations of evasion pursuant to the EAPA statute. The Court reviews Customs' evasion determination for compliance with all procedures under 19 U.S.C. §§ 1517(c) and (f) and will hold unlawful "any determination, finding, or conclusion [that] is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(c)(1)(A), (g)(2). The Court reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Public Summaries

19 C.F.R. § 165.4 requires that confidential information placed on the administrative record be accompanied by either a public summary of the redacted information or an explanation of why public summarization of the information is not possible. 19 C.F.R. § 165.4. During the EAPA investigation, Customs failed to place on the administrative record a public summary of redacted information in the On-Site Verification Report ("Verification Report"), which was cited in both the Notice of Final Determination as to Evasion ("May 18 Determination") and the Final Administrative Determination. *See Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1271–73; *see also* On-Site Verification Report Enforce and Protect Act (EAPA) Case 7189 (Dec. 13, 2019) ("Verification Report"), PR 373, CR 295; Notice of Final Determination as to Evasion (May 18, 2020) ("May 18 Determination"), PR 419, CR 310. The Court remanded the Final Administrative Determination to Customs to address and remedy the lack of public summaries. *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1273.

Following *Aspects I*, Customs reopened the administrative record to permit the parties to the investigation an opportunity to submit public versions of certain documents previously placed on the administrative record. Customs' Letter (Dec. 7, 2022), PRR 2. In response to Customs' letter, Aspects notified Customs that it did not intend to submit public summaries because:

[2] Congress amended 28 U.S.C. § 1581(c) to encompass EAPA cases via § 421(b) of Title IV of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 154, 168 (2016). All statutory citations herein are to the 2018 edition of the United States Code and all citations to regulations are to the 2020 edition of the Code of Federal Regulations.

> [Aspects'] prior submissions of its public version documents were not the subject of the Court's Remand Order, and because such resubmission, as requested in [Customs'] Letter, would be futile and result in substantial costs for [Aspects], given the extent of the information requested, [Aspects'] position is that it is not required to comply with [Customs'] letter.

Aspects' Email (Dec. 9, 2022) at 1, PRR 3. In response, Customs advised that it was enforcing the requirements of 19 C.F.R. § 165.4 on remand and had identified business confidential documents submitted by Aspects that did not comply with the requirements of the regulation. Customs' Email Resp. (Dec. 13, 2022), PRR 5. Customs reiterated its request that Aspects provide public summaries of the identified documents. *Id*.

Aspects filed an unopposed motion to partially vacate the Court's remand order requesting the Court's permission to "withdraw and waive its arguments based on 19 C.F.R. § 165.4 and the lack of public summaries" of confidential documents placed on the administrative record by Customs in the EAPA investigation. Pl.'s Unopposed Mot. Partially Vacate Court's Nov. 28, 2022 Remand Order at 1–2. Plaintiff also requested that the Court vacate the portion of the *Aspects I* opinion concluding that the failure of Customs to provide sufficient public summaries of confidential documents was not in accordance with law and remanding the issue to Customs for further consideration. *Id.* The Court granted the motion in part with respect to Plaintiff's request to withdraw and waive its claims and arguments and denied the motion in part with respect to Plaintiff's request to vacate because Plaintiff did not demonstrate any defect with the Court's prior findings of fact or conclusions of law. Order (Dec. 23, 2022), ECF No. 33. The Court directed that the Parties were not required to address the lack of public summaries on remand because the argument was waived. Order (Dec. 23, 2022), ECF No. 35.

II. Pre-EAPA Entries

The Court held that Customs' EAPA investigation could not include merchandise entered prior to the EAPA entering into force on August 22, 2016 and remanded the Final Administrative Determination to Customs to clarify whether pre-EAPA entries were subject to the evasion determination. *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1257. On remand, Customs determined upon review of the administrative record "that the May 18 Determination and the [Final Administrative Determination did] not apply to Aspects' entries made prior

to August 22, 2016." *Remand Redetermination* at 4. In a Joint Status Report of September 16, 2021, the Parties agreed that all of Aspects' pre-EAPA entries were liquidated on or before August 21, 2018 and prior to the issuance of the May 18 Determination and Final Administrative Determination. Joint Status Report (Sept. 16, 2021), ECF No. 30; *see also Remand Redetermination* at 5. Customs determined that because all pre-EAPA entries reviewed during the EAPA investigation were liquidated, the pre-EAPA entries were not subject to the evasion determination. *Remand Redetermination* at 5–6. Neither Party contests this determination. Pl.' Br. at 2; Def.'s Br. at 13. The Court concludes that the exclusion of Aspects' entries prior to the entry into force of the EAPA statute on August 22, 2016 is in accordance with law.

III. Truthfulness, Reasonableness, and Credibility of Statements

Aspects argued that statements relied upon by Customs regarding observations of document destruction constituted inadmissible hearsay. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 13–14, ECF No. 20. The Court held that hearsay evidence is admissible in administrative proceedings "up to the point of relevancy." *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1259 (quoting *Richardson v. Perales*, 402 U.S. 389, 410 (1971)). "If evidence meets this standard, it may be considered 'in light of its truthfulness, reasonableness, and credibility.'" *Id.* (quoting *Anderson v. United States*, 16 CIT 324, 327, 799 F. Supp. 1198, 1202 (1992)). No Party challenged the relevancy of the statements, but "[t]he Court observe[d] that Customs did not provide any analysis about the truthfulness, reasonableness, or credibility of the disputed evidence in weighing the accounts of the Verification Report, though Customs asserted that the evidence was not needed to establish substantial evidence of evasion." *Id.* at __, 607 F. Supp. 3d at 1260. The Court suggested that Customs might consider providing further explanation regarding the truthfulness, reasonableness, and credibility of the evidence in dispute on remand. *Id.*

On remand, Customs explained that during the verification process, Customs' employees visited the facilities of Aspects Nantong and two of Aspects' Chinese suppliers, Nantong Fuhuang Furniture Co., Ltd. ("Nantong Fuhuang") and Wuxi Yushea Furniture Co., Ltd. ("Wuxi Yushea") to verify information placed on the administrative record. *Remand Redetermination* at 6; *see also* Verification Report at 3–4. The on-site verification was conducted by Customs' employees, including individuals from the Center of Excellence and Expertise for Consumer Products and Mass Merchandising, Regulatory Audit and Agency Advisory Services ("RAAAS"), National Threat Analysis Cen-

ter, and Trade Remedy Law Enforcement Directorate. *Remand Redetermination* at 7; *see also* Verification Report at 2. The Verification Report was prepared by RAAAS in coordination with the other Customs offices involved in the verification. *Remand Redetermination* at 7–8; *see also* Verification Report at 2. Customs noted that the international trade specialist who prepared the May 18 Determination was among the verification team members who observed the alleged document destruction. *Remand Redetermination* at 8.

Customs also explained that Customs' employees are subject to a set of standards of conduct that require Customs employees to "demonstrate the highest standards of ethical and professional conduct to ensure efficient performance of government services." *Id.*; *see* U.S. Customs Directive No 51735–013B (Jan. 29, 2021) ("Customs' Standards of Conduct") at 1. Under these standards, "employees who knowingly make false, misleading, incomplete, or ambiguous statements, whether oral or written, in connection with any matter of official interest may be subject to disciplinary action." *Remand Redetermination* at 8; *see also* Customs' Standards of Conduct § 7.4. Customs asserted that it was "reasonable to rely on the statements and observations of its employees who are tasked with validating the information placed by interested parties on the administrative record." *Remand Redetermination* at 8–9. Customs indicated that it had no reason to doubt the truthfulness, reasonableness, or credibility of its employees or the employees' interpretation of the evidence. *Id.* at 7–8.

In an administrative proceeding, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. Aspects argued before Customs and now argues before the Court that the evidence of document destruction was immaterial to the statutory elements of evasion and should be excluded as irrelevant. Pl.'s Br. at 5–9; Aspects' Cmts. Draft Remand Redetermination at 3–5, PRR 11. Aspects contends that the only type of documents identified among those allegedly destroyed were container loading plans. Pl.'s Br. at 7. Aspects notes that loading plans are not among the types of documents that importers are required to maintain and present to Customs upon request. *Id.* (citing 19 C.F.R.§ 142.3). Aspects asserts that the information contained in the loading plans was ascertainable from other documents available to Customs. *Id.* at 7–8.

Aspects is incorrect in its assertion that the only documents that Customs' employees observed being destroyed were container loading plans. The Verification Report also references a Customs' employee observing an Aspects Nantong employee deleting a chat record with an employee of Wuxi Yushea after being asked to produce a sample container loading spreadsheet. Verification Report at 16. Because Customs' theory of evasion includes allegations that Wuxi Yushea commingled merchandise from multiple manufacturers while masking the actual manufacturer of the commingled goods and altering the descriptions of goods on entry documents, container loading plans and the conversations between the Aspects employee responsible for creating container loading plans and Wuxi Yushea are relevant to both the issue of whether entries contained covered goods and whether Aspects made materially false assertions in its entries. The evidence is also relevant to the question of whether Aspects cooperated in the verification process to the best of its ability. *See* 19 U.S.C. § 1517(c)(3)(A). The fact that this information might have been ascertained from other sources on the record does not render the destroyed documents irrelevant.

In the *Remand Redetermination*, Customs explained that it "found that Aspects failed to cooperate to the best of its ability in responding to [Customs'] requests for information during the verification when Aspects' employees deleted electronic files in response to [Customs'] questions." *Remand Redetermination* at 21. Customs stated that:

> the destruction of evidence was significant because such actions prevented [Customs] from fully understanding the scope of Aspects' Nantong operations and which products from which manufacturers were exported to the United States. In addition, given that dozens of files were deleted, [Customs] simply does not know the contents of those files and what impact they would have on a determination as to evasion. [Customs] only observed that Aspects' employees withheld that evidence from [Customs].

Id. at 22. Although Aspects was not required to maintain and provide container loading plans under 19 C.F.R.§ 142.3, the Court concludes that Customs' request was reasonable and within its authority to collect additional information necessary to make an evasion determination. 19 U.S.C. § 1517(c)(2). During the on-site verification, Customs requested that an Aspects employee provide information within Aspects' records. Because Customs observed the Aspects employee not cooperating and instead deleting files, *see* Verification Report at 16–17, the Court concludes that the evidence of document destruction

was relevant to Customs' determination of evasion and the question of whether Aspects cooperated to the best of its ability during the verification process.

If evidence is relevant, it must be weighed "in light of its truthfulness, reasonableness, and credibility." *Anderson*, 16 CIT at 327, 799 F. Supp. at 1202. Aspects does not argue that Customs' employees intentionally fabricated the evidence of document destruction, but asserts that the factors call Customs' claims into question. Pl.'s Br. at 4. Aspects contends that the evidence lacks credibility because Customs took eight months after the on-site verification to prepare the Verification Report. *Id.* at 4–5. Aspects asserts that Customs did not share the Verification Report, including the allegations of document destruction, for more than one year after it was completed, and argues that Customs "hid" the evidence of document destruction from Aspects and its counsel for almost two years, impairing Aspects' ability to provide new factual information to rebut the allegation. *Id.* at 5. Aspects also argues that Customs did not raise the matter with its counsel during the on-site verification visit, at which time the allegedly deleted files might have been recovered. *Id.*

Aspects cites no authority that would require Customs to issue the Verification Report more promptly or to extend to Aspects an opportunity to correct the alleged destructive conduct during verification. The Court concludes that Customs' delay in providing information about the destruction was not arbitrary or capricious. The Court observes that Customs explained on remand which employees were involved in the verification process, that the international trade specialist who observed the alleged document destruction was involved in preparing the Verification Report, and the ethical obligations imposed on the employees involved in the verification process. *Remand Redetermination* at 7–8; *see also* Customs' Standards of Conduct. Customs has complied with the Court's suggestion to address the truthfulness, reasonableness, and credibility of the statements considered in the evasion determination on remand. The Court concludes, therefore, that Customs' consideration of evidence concerning the destruction of documents during on-site verification was reasonable and in accordance with law.

IV. Evasion Determination

Customs has authority under the EAPA to investigate and determine whether covered merchandise was entered into the customs territory of the United States through evasion. 19 U.S.C. § 1517(c)(1)(A). "Evasion" is defined as:

> [E]ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted 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).

In *Aspects I*, the Court deferred substantive consideration of Customs' evasion determination until Customs provided clarification on remand of which entries were included in the EAPA investigation and evasion determination. *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1269. On remand, Customs did not engage in an entry-by-entry analysis of specific entries and merchandise, but incorporated by reference the May 18 Determination and Final Administrative Determination. *Remand Redetermination* at 17; *see also id.* at 13–17 (discussing Aspects' alleged actions in the context of drawing an adverse inference). Both the May 18 Determination and Final Administrative Determination discussed the elements of evasion based on observations during on-site verification and examples from a review of documents from sample entries. *See* May 18 Determination at 4–10; Final Admin. Determination at 8–10. On remand, Customs applied an adverse inference and determined that all of Aspects' entries during the period of investigation contained subject merchandise. *Remand Redetermination* at 9–17. Customs concluded that Aspects' actions resulted in an avoidance or reduction of duties on all of Aspects' entries. *Id.* at 17, 26–27.

Aspects objects to Customs' application of wholesale adverse inferences against all of its entries, contending that Aspects cooperated during the administrative investigation, and argues that sufficient facts were available on the administrative record for Customs to determine which specific entries contained covered merchandise. Pl.'s Br. at 9–14. Aspects also asserts that Customs failed to demonstrate that Aspects avoided any applicable duties. *Id.* at 14–16. Defendant disagrees with Aspects and asserts that the adoption of an adverse inference was consistent with the Court's remand instructions and the EAPA and that Aspects' challenges to Customs' evasion determination are without merit. Def.'s Br. at 19–25.

A. Covered Merchandise and Adverse Inference

Commerce determined that four of the six product categories included in Customs' Scope Referral were not covered by the Order.

Final Scope Ruling at 1, 34, PR 387, CR 303; *see also* Scope Referral Request Mem., PR 294, CR 235. Despite Commerce's scope ruling that only two product categories were within the scope of the Order, Customs decided to include the non-covered merchandise in its EAPA review because it determined that Aspects had provided unreliable product descriptions. May 18 Determination at 8–10; Final Admin. Determination at 8–11. This Court in *Aspects I* concluded that the inclusion of merchandise determined by Commerce to be non-covered merchandise in the EAPA investigation was contrary to law and remanded the Final Administrative Determination to Customs with instructions to only include merchandise within the scope of the Order in the EAPA investigation. *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1267–69. On remand, Customs explained:

> As an initial matter, [Customs] has not disregarded Commerce's findings in the May 18 Determination and the [Final Administrative Determination]. Under 19 U.S.C. § 1517(a)(3)(A), the term "evasion" is defined as entry of covered merchandise into the United States by means of material false statements. [Customs] does not purport to find evasion with respect to any entries that it finds do not contain covered merchandise. That said, [Customs] finds, after making inferences that are adverse to Aspects' interests from the facts otherwise available on the record, that all of Aspects' entries subject to the EAPA investigation contained covered merchandise.

Remand Redetermination at 10–11.

Under the EAPA, when the party "has failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information," Customs may adopt an inference that is adverse to the interests of the party in selecting from facts otherwise available on the record. 19 U.S.C. § 1517(c)(3)(A); 19 C.F.R. § 165.6. On remand, Customs determined that Aspects failed to cooperate to the best of its ability with respect to Customs' request for information during the on-site verification because on two occasions Aspects' employees were observed deleting dozens of files in response to inquiries from Customs' verifiers about what merchandise was shipped and by which manufacturer. *Remand Redetermination* at 11–12. Customs reasoned that the intentional withholding of information by Aspects prevented Customs from obtaining "critical information" regarding Aspects' imports. *Id.* at 12. In addition, Customs noted that discrepancies existed in many of the entry documents when compared to other record evidence, causing Customs to determine that it was unable to identify the manufacturer of some merchandise, merchan-

dise descriptions on entry documents were inaccurate, errors existed in the valuation of merchandise, and inconsistencies existed in the reported gross weights and values between sales and shipping documents. *Id.* Customs asserted that "[f]acts otherwise available on the record indicate that Aspects systematically misrepresented the descriptions of merchandise in the entry documents, such that [Customs] cannot trust the veracity of any description of imported merchandise, and specifically, which particular entries include covered merchandise." *Id.* at 13. Customs observed multiple instances of reporting discrepancies that called into question the actual manufacturer of Aspects' merchandise, including misdescribed merchandise, discrepancies in gross weight and value, and the commingling of merchandise from multiple manufacturers. *Id.* at 13–16; *see* Verification Report at 4–6 (discussing Aspects' practice of providing containers to Nantong Fuhuang and Wuxi Yushea partially loaded with merchandise produced by other manufacturers but declaring Wuxi Yushea or Nantong Fuhuang as exclusive manufacturers at entry), 6–10 (discussing examples of inconsistent documents reflecting discrepancies in quantity of cartons, gross weight, and value), 10–11 (discussing examples of misdescribed covered merchandise), 13–15 (discussing examples of altered unit prices). Relying on these otherwise available facts, Customs observed that Aspects' misrepresentations on its submitted documents were pervasive. *Remand Redetermination* at 16. Customs argues essentially that because numerous and pervasive discrepancies existed in the entry paperwork, it was reasonable for Customs to apply an adverse inference to assume that all of the entry documents were incorrect and that all of Aspects' entries contained covered merchandise. The Court agrees that it was reasonable and supported by substantial evidence for Customs to determine that the numerous and pervasive discrepancies in entry paperwork, in addition to the destruction of evidence during verification, justified the application of an adverse inference against Aspects.

B. Customs' Evasion Determination

The EAPA defines "enter" as a singular "entry, or withdrawal from warehouse for consumption, of merchandise into the customs territory of the United States." *Id.* § 1517(a)(4). Customs is tasked with determining whether "covered merchandise was entered into the customs territory of the United States through evasion." *Id.* § 1517(c)(1). If Customs determines that evasion has occurred, it shall suspend the liquidation of entries of such covered merchandise, identify and apply applicable antidumping rates, require the posting of

cash deposits and take additional enforcement measures. *Id.* § 1517(d)(1).

In *Aspects I*, the Court deferred its substantive analysis of Customs' evasion determination until after Customs clarified which entries were included in the EAPA investigation. *Aspects I*, 46 CIT at __, 607 F. Supp. 3d at 1269.

During verification, Customs considered 28 sample entries. Verification Report at 3. The *Remand Redetermination* did not include an entry-by-entry analysis, but incorporated determinations from the May 18 Determination and Final Administrative Determination by reference. *Remand Redetermination* at 17. In the May 18 Determination and Final Determination, Customs determined that record evidence showed that more than half of the shipments could not be verified due to discrepancies of the manufacturers, merchandise being described inaccurately, and errors in valuation. *See* May 18 Determination; Final Admin. Determination. In the following discussion, the Court includes examples of many of the entries that Customs considered. Based upon a review of the record evidence considered by Customs, the Court concludes that Customs supported its evasion determination with substantial evidence.

a. Entry Ending in 5073

Customs reviewed documentation for the entry ending in 5073 identifying Nantong Fuhuang as the manufacturer of the imported merchandise. *See* Aspects' Entry Package Sub. Sample 35 ("Aspects' Entry 35"), PR 56, CR 42. Customs noted, however, that the verification team reported that a Nantong Fuhuang representative advised that Nantong Fuhuang was not the manufacturer of certain items included on Aspects' entry invoice. Verification Report at 4; *see also* Final Admin. Determination at 9. The representative explained that "Aspects shipped [the items], produced by an unknown manufacturer, to Nantong Fuhuang and that Aspects asked [Nantong Fuhuang] to consolidate and export those items with its merchandise, because Aspects [did] not have an export license from the Chinese government." Verification Report at 4. Despite the commingled merchandise having been manufactured by different manufacturers, Aspects declared Nantong Fuhuang as the sole manufacturer of the merchandise at the time of entry. *Id.* at 4–5; Aspects' Entry 35 at 1. During the investigation, Customs compared entry documents and photographs, and Customs observed that headboards (covered merchandise) were misdescribed as wall panels (not covered merchandise). Final Admin. Determination at 9; *see* Aspects' Entry 35 at 2–4, 8, 12, 15–16.

Customs reviewed three sets of documents related to the entry ending in 5073—Aspects' entry documents; the invoice, packing list, and export forms provided by Nantong Fuhuang; and copies of entry documents included with Aspects' Value Follow-up Submission.[3] Verification Report at 8–9, 14; *see* Aspects' Entry 35; Nantong Fuhuang's Request for Info. Resp. (Feb. 11, 2018) at Att. at 19–30 ("Nantong Fuhuang's Entry 35"), PR 319; Aspects' Value Follow-up Part 2 (May 17, 2017) at 38–46, PR 102, CR 83. Customs observed that gross weight and quantity values differed between export forms and bills of lading included in the three sets of documents. Final Admin. Determination at 9; Verification Report at 8–9. Specifically, Customs noted that the verification team identified that the bill of lading provided by Aspects reflected a greater number of cartons and greater gross weight than the export declaration form prepared by Nantong Fuhuang. Verification Report at 8–9. Customs ascertained that the discrepancy related to an item that was listed on the commercial invoice and packing list prepared by Aspects but was not listed on Nantong Fuhuang's invoice for payment to Aspects. Verification Report at 8–9; *compare* Aspects' Entry 35, *with* Nantong Fuhuang's Entry 35.

Customs explained that during verification, a Nantong Fuhuang representative confirmed that "Nantong Fuhuang added lines to the invoice for the merchandise supplied by Aspects and manipulated the unit price calculated to match the total sales price of the merchandise manufactured by Nantong Fuhuang and sold to Aspects." Verification Report at 14. Customs noted discrepancies between the unit prices and descriptions of merchandise in the three sets of documents considered by Customs. *Id.*; *compare* Aspects' Entry 35 at 2, *with* Nantong Fuhuang's Entry 35 at 1 *and* Aspects' Value Follow-up Part 2 at 38.

The Court concludes that Aspects entered covered merchandise in the entry ending in 5073 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 5073 was supported by substantial evidence.

[3] The Verification Report cites to Aspects' October 27, 2017 resubmission of the Value Follow-up data. *See* Verification Report at 8. The administrative record before the Court does not include the resubmission of this data but does include the May 17, 2017 submission of Aspects' Value Follow-up. The discrepancy referenced by Customs is present in the earlier document.

b. Entry Ending in 1238

The entry ending in 1238 included merchandise from Nantong Fuhuang and Wuxi Yushea. *See* Aspects' Entry Package Sub. Sample 36 ("Aspects' Entry 36"), PR 57–58, CR 43. For the merchandise that Aspects claimed was manufactured by Nantong Fuhuang, Customs compared the entry documents provided by Aspects to the invoice, packing list, export documents, and purchase orders provided by Nantong Fuhuang. Aspects' Entry 36; Nantong Fuhuang's Request for Info. Resp. at Att. at 31–41 ("Nantong Fuhuang's Entry 36"). Customs determined that the documents provided by Nantong Fuhuang and Aspects contained discrepancies in weight, quantity, and value. Final Admin. Determination at 10; Verification Report at 9; *compare* Aspects' Entry 36 at 5, *with* Nantong Fuhuang's Entry 36 at 2 (packing lists reflecting different gross weight and quantity of cartons). Customs also determined that unit prices were reduced for one of the items. Final Admin. Determination at 10; Verification Report at 14; *compare* Aspects' Entry 36 at 4, *with* Nantong Fuhuang's Entry 36 at 1 (invoices reflecting different unit costs for merchandise). Customs observed that "if the goods are undervalued and [antidumping] duties are deposited and assessed on an ad valorem basis (as is the case with [wooden bedroom furniture]), the full amount of [antidumping duties] owed was not paid and evasion has occurred." Final Admin. Determination at 10.

For the merchandise that Aspects represented as having been manufactured by Wuxi Yushea, Customs observed that the record included three sets of documents that contained discrepancies—Aspects' entry documents; an invoice and packing list provided by Wuxi Yushea in response to Customs' request for information; and documents provided by Wuxi Yushea during verification. Verification Report at 8; *see* Aspects' Entry 36; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 (Feb. 6, 2018) at Ex. C-3 at 61–62, PR 315, CR 247; Wuxi Yushea's Verification Exhibits (May 11, 2018) at Ex. 4 at 1–20, PR 368–71, CR 291–94.

The Court concludes that Aspects entered covered merchandise in the entry ending in 1238 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 1238 was supported by substantial evidence.

c. Entry Ending in 8671

The entry ending in 8671 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Package Sub. Sample 38 ("Aspects' Entry 38") (Apr. 22, 2017) at 2–10, PR 61, CR 45. Customs compared

entry documents provided by Aspects and documents provided by Wuxi Yushea. Verification Report at 10, 12; Aspects' Entry 38; Wuxi Yushea's Verification Exhibits at Ex. 2 at 19–27 ("Wuxi Yushea's Verification Entry 38"). Customs determined that Aspects misdescribed merchandise on its entry documents for the entry ending 8671. Final Admin. Determination at 9; Verification Report at 10. Merchandise described as "headboard" and "nightstands" (covered merchandise) on invoices provided by Wuxi Yushea were described as "wall panel," "side table," and "end table" (non-covered merchandise) on documents provided by Aspects. *Compare* Aspects' Entry 38 at 2–3, *with* Wuxi Yushea's Verification Entry 38 at 1–2. The Court concludes that Aspects entered covered merchandise in the entry ending in 8671 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 8671 was supported by substantial evidence.

d. Entry Ending in 8944

The entry ending in 8944 included merchandise manufactured by Wuxi Yushea. Aspects' Entry Package Sub. Sample 39 ("Aspects' Entry 39") (Apr. 22, 2017) at 1, PR 62, CR 46. Customs compared Aspects' entry documents with documents provided by Wuxi Yushea during verification. Verification Report at 10; Aspects' Entry 39 at 3–6; Wuxi Yushea's Verification Exhibits at Ex. 2 at 1–4 ("Wuxi Yushea's Verification Entry 39"). Customs observed that items described as 'king headboard" or "double headboard" (covered merchandise) in the Wuxi Yushea documents were described as "wall panels" (non-covered merchandise) on the Aspects invoice. Verification Report at 10; *compare* Aspects' Entry 39 at 3–5, *with* Wuxi Yushea's Verification Entry 39 at 1–4.

Customs observed other discrepancies in the documents provided by Aspects and Wuxi Yushea, such as the quantity of cartons and gross weight reported on invoices, packing lists, and bills of lading. Verification Report at 9, 12, 15; *compare* Aspects' Entry 39 at 3–6, *with* Wuxi Yushea's Verification Entry 39 at 1–4. Customs noted that unit prices for merchandise differed between the Aspects and Wuxi Yushea invoices. Verification Report at 15; *compare* Aspects' Entry 39 at 3, *with* Wuxi Yushea's Verification Entry 39 at 1. The invoices also suggested that unreported assists were provided by Aspects to Wuxi Yushea. Verification Report at 12; *compare* Aspects' Entry 39 at 3, *with* Wuxi Yushea's Verification Entry 39 at 1 (merchandise were listed and included in the total price on Aspects' invoice but were not included on Wuxi Yushea's invoice).

The Court concludes that Aspects entered covered merchandise in the entry ending in 8944 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 8944 was supported by substantial evidence.

e. Entry Ending in 9253

The entry ending in 9253 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Package Sub. Sample 41 ("Aspects' Entry 41") (Apr. 22, 2017) at 3–6, PR 65, CR 49. Customs reviewed entry documents provided by Aspects and invoices, packing lists, bills of lading, and export documents provided by Wuxi Yushea during verification. Verification Report at 9, 10, 12; *see* Aspects' Entry 41; Wuxi Yushea's Verification Exhibits at Ex. 3 at 1–22 ("Wuxi Yushea's Verification Entry 41"). Customs observed differences in merchandise descriptions between the manufacturer and importer invoices. Verification Report at 10. Customs stated that merchandise described by Aspects as "end tables" and "credenzas" (non-covered merchandise) were identified on Wuxi Yushea's documents as "nightstands," "dressers," and "armoires" (covered merchandise). *Id.*; *compare* Aspects' Entry 41 at 3–5, *with* Wuxi Yushea's Verification Entry 41 at 1–3. Customs also noted that Wuxi Yushea described the merchandise as bedroom furniture (covered merchandise) on a freight company invoice and bill of lading. Verification Report at 10; Wuxi Yushea's Verification Entry 41 at 5–7.

Customs included the entry ending in 9253 among examples of entries with discrepancies between the weights and values reported by Aspects and those reported by the manufacturer. Verification Report at 9. Customs observed that Aspects' packing list reflects a greater gross weight and number of cartons than the packing list provided by Wuxi Yushea. *Compare* Aspects' Entry 41 at 4–5, *with* Wuxi Yushea's Verification Entry 41 at 2–3. The discrepancy appears to relate to additional items included on Aspects' packing list.

The Court concludes that Aspects entered covered merchandise in the entry ending in 9253 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 9253 was supported by substantial evidence.

f. Entry Ending in 5559

The entry ending in 5559 contained merchandise manufactured by Wuxi Yushea and Nantong Fuhuang. Aspects' Entry Package Sub. Sample 55 ("Aspects' Entry 55") (Apr. 22, 2017) at 3, PR 80, CR 64. Customs compared invoices provided by Aspects and Wuxi Yushea.

Verification Report at 14–15; Aspects' Entry 55 at 3; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 106–107 ("Wuxi Yushea's Entry 55"). Customs observed that the two invoices each reflected the same three items, but the invoice provided by Aspects reflected lower unit prices and total value than the invoice provided by Wuxi Yushea. *Compare* Aspects' Entry 55 at 3, *with* Wuxi Yushea's Entry 55 at 1.

The Court concludes that Aspects entered covered merchandise in the entry ending in 5559 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 5559 was supported by substantial evidence.

g. Entry Ending in 9783

The entry ending in 9783 contained merchandise manufactured by Wuxi Yushea. *See* Aspects' Entry Package Sub. Sample 56 ("Aspects' Entry 56") (Apr. 22, 2017), PR 81, CR 65. Customs reviewed entry documents provided by Aspects and documents provided by Wuxi Yushea during verification. Verification Report at 9, 12–13; Aspects' Entry 56; Wuxi Yushea's Verification Exhibits at Ex. 3 at 55–116 ("Wuxi Yushea's Verification Entry 56"). Customs observed that the bill of lading and packing list provided by Aspects reflected greater gross weights, number of cartons, and total values than the export form and packing list provided by Wuxi Yushea. Verification Report at 9; *compare* Aspects' Entry 56 at 3–5, *with* Wuxi Yushea's Verification Entry 56 at 22, 26–28. Customs also observed that merchandise descriptions and other items were changed to non-covered merchandise on the invoice provided by Aspects in lieu of covered merchandise included on Wuxi Yushea's invoice. Verification Report at 11; *compare* Aspects' Entry 56 at 2, *with* Wuxi Yushea's Verification Entry 56 at 21. The Court concludes that Aspects entered covered merchandise in the entry ending in 9783 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 9783 was supported by substantial evidence.

h. Entry Ending in 9546

The entry ending in 9546 contained merchandise manufactured by Wuxi Yushea. *See* Aspects' Entry Packets 19, 20, 31, 34, and 36 Part 1 at 2–7 ("Aspects' Entry 84"), PR 110, CR 90. In the Verification Report, Customs observed that the administrative record included discrepancies with three sets of documents for the entry—Aspects' entry documents, an invoice and packing list provided by Wuxi

Yushea in response to Customs' request for information, and documents provided by Wuxi Yushea during verification. Verification Report at 7; *see also* Aspects' Entry 84; Wuxi Yushea's Verification Exhibits (May 11, 2018) at Ex. 5 at 1–7 ("Wuxi Yushea's Verification Entry 84"), PR 368–71, CR 291–94; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 158–59 ("Wuxi Yushea's Entry 84"). In comparing the documents, Customs determined that three additional products appeared on the invoice submitted as part of Aspects' entry package. Verification Report at 7; *compare* Aspects' Entry 84 at 4–5, *with* Wuxi Yushea's Verification Entry 84 at 1–2, *and* Wuxi Yushea's Entry 84 at 1–2. Customs also observed that purchase orders provided by Aspects reflected different manufacturers for two of the items despite those products appearing on the Wuxi Yushea invoice without indication of other manufacturers. Verification Report at 7; *compare* Aspects' Entry 84 at 4–5, *with* Wuxi Yushea's Verification Entry 84 at 1–2, *and* Wuxi Yushea's Entry 84 at 1–2. The description of merchandise differed between versions of the invoices. Verification Report at 7; *compare* Aspects' Entry 84 at 4–5, *with* Wuxi Yushea's Verification Entry 84 at 1–2, *and* Wuxi Yushea's Entry 84 at 1–2. The Court concludes that Aspects entered covered merchandise in the entry ending in 9546 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 9546 was supported by substantial evidence.

i. Entry Ending in 9793

The entry ending in 9793 contained merchandise produced by Wuxi Yushea. *See* Aspects' Entry Packet Sub. Entry 21, 24, and 35 (June 23, 2017) at 2–7 ("Aspects' Entry 86"), PR 124, CR 99. Customs reviewed entry documents provided by Aspects and corresponding documents provided by Wuxi Yushea. Verification Report at 9, 13; *see* Aspects' Entry 86; Wuxi Yushea's Verification Exhibits at Ex. 5 at 15–21 ("Wuxi Yushea's Verification Entry 86"). Customs included the entry ending in 9793 among those entries with weight and value discrepancies between importer and manufacturer documents. Verification Report at 9. Customs compared the documents provided by Aspects and those provided by Wuxi Yushea and determined that discrepancies showed that the gross weight reflected on the packing list provided by Aspects did not match the gross weight on the bill of lading provided by Wuxi Yushea. *Compare* Aspects' Entry 86 at 4–5, *with* Wuxi Yushea's Verification Entry 86 at 2–4. The Court observes that the packing lists provided by Aspects and Wuxi Yushea included several items that were not included on accompanying invoices pro-

vided by Aspects and Wuxi Yushea. Verification Report at 9; *compare* Aspects' Entry 86 at 3–4, *with* Wuxi Yushea's Verification Entry 86 at 1–3. The Court further observes that the invoice provided by Wuxi Yushea also reflected a greater total value than the invoice provided by Aspects. Verification Report at 9; *compare* Aspects' Entry 86 at 3, *with* Wuxi Yushea's Verification Entry 86 at 1.

The Court concludes that Aspects entered covered merchandise in the entry ending in 9793 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 9793 was supported by substantial evidence.

j. Entry Ending in 0346

The entry ending in 0346 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Packet Sub. Entry 21, 24, and 35 at 7–11 ("Aspects' Entry 89"). Customs reviewed entry documents provided by Aspects, an invoice and packing list provided by Wuxi Yushea in response to Customs' request for information, and documents provided by Wuxi Yushea during verification and included the entry on the list of entries that had multiple versions of invoices on the administrative record. Verification Report at 8; Aspects' Entry 89; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 195–96 ("Wuxi Yushea's Entry 89"); Wuxi Yushea's Verification Exhibits at Ex. 5 at 103–09 ("Wuxi Yushea's Verification Entry 89"). The Court observes that the record includes three versions of Wuxi Yushea's invoice for the entry ending in 0346. Aspects' Entry 89 at 3; Wuxi Yushea's Entry 89 at 1; Wuxi Yushea's Verification Entry 89 at 1. The invoice provided by Wuxi Yushea during verification reflected a greater quantity of merchandise and total value than the other invoices. *Compare* Wuxi Yushea's Verification Entry 89 at 1, *with* Aspects' Entry 89 at 3,*and* Wuxi Yushea's Entry 89 at 1. The Court concludes that Aspects entered covered merchandise in the entry ending in 0346 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 0346 was supported by substantial evidence.

k. Entry Ending in 2576

The entry ending in 2576 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Package Sub. Entry 3 and 32 (June 23, 2017) ("Aspects' Entry 97"), PR 117, CR 103–04. Customs included the entry ending in 2576 among the entries for which multiple versions of invoices were placed on the administrative record. Verification Report at 8. Customs reviewed three sets of documents for this entry—Aspects' entry documents, an invoice and packing list pro-

vided by Wuxi Yushea in response to Customs' request for information, and Wuxi Yushea's documents provided during verification. Verification Report at 8; *see* Aspects' Entry 97; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 198–200 ("Wuxi Yushea's Entry 97"); Wuxi Yushea's Verification Exhibits at Ex. 5 at 122–33 ("Wuxi Yushea's Verification Entry 97"). The Court observes that the invoice and packing list provided by Wuxi Yushea in response to Customs' request for information reflected a greater quantity of merchandise but a lesser total value than the invoices and packing lists provided by Aspects at entry or Wuxi Yushea during verification. *Compare* Wuxi Yushea's Entry 97 at 1–3, *with* Aspects' Entry 97 at 4–6, *and* Wuxi Yushea's Verification Entry 97 at 1–3. The Court concludes that Aspects entered covered merchandise in the entry ending in 2576 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 2576 was supported by substantial evidence.

l. Entry Ending in 1580

The entry ending in 1580 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Packets 19, 20, 31, 34, and 36 Part 2 (Jun. 23, 2017) at 1–7 ("Aspects' Entry 99"), PR 110–12, CR 90–91. Customs included the entry ending in 1580 among the entries for which multiple versions of invoices were placed on the administrative record. Verification Report at 8. Customs reviewed three sets of documents for this entry—Aspects' entry documents, an invoice and packing list provided by Wuxi Yushea in response to Customs' request for information, and Wuxi Yushea's documents provided during verification. Verification Report at 8; *see* Aspects' Entry 99; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 193–95 ("Wuxi Yushea's Entry 99"); Wuxi Yushea's Verification Exhibits at Ex. 5 at 110–21 ("Wuxi Yushea's Verification Entry 99"). The invoice and packing list provided by Wuxi Yushea in response to Customs' request for information reflected fewer cartons and a lower total price than the invoices and packing lists provided by Aspects or Wuxi Yushea during verification, but the gross weight was consistent across all of the documents. *Compare* Wuxi Yushea's Entry 99, *with* Aspects' Entry 99 at 4–6, *and* Wuxi Yushea's Verification Entry at 1–5. The Court concludes that Aspects entered covered merchandise in the entry ending in 1580 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 1580 was supported by substantial evidence.

m. Entry Ending in 4523

The entry ending in 4523 contained merchandise manufactured by Wuxi Yushea. Aspects' Entry Packets 19, 20, 31, 34, and 36 Part 2 at 8–33 ("Aspects' Entry 101"). Customs reviewed entry documents provided by Aspects, an invoice and packing list provided by Wuxi Yushea in response to Customs' request for information, and documents provided by Wuxi Yushea during verification. Verification Report at 9–10; Aspects' Entry 101; Wuxi Yushea's Request Info. Resp. Ex. C-1–C-3 at Ex. C-3 at 184–85 ("Wuxi Yushea's Entry 101"); Wuxi Yushea's Verification Exhibits at Ex. 5 at 183–91 ("Wuxi Yushea's Verification Entry 101"). Customs identified the entry ending in 4523 as having weight and value discrepancies between Aspects' documents and the manufacturer's documents. Verification Report at 9. The Court observes that the three packing lists reflected different quantities of cartons and gross weights. *Compare* Aspects' Entry 101 at 5, *with* Wuxi Yushea's Entry 101 at 2, *and* Wuxi Yushea's Verification Entry 101 at 2. The three invoices reflected different quantities of merchandise and total values and the invoice provided by Aspects included several additional items. *Compare* Aspects' Entry 101 at 4, *with* Wuxi Yushea's Entry 101 at 1, *and* Wuxi Yushea's Verification Entry 101 at 1. The Court concludes that Aspects entered covered merchandise in the entry ending in 4523 through material misrepresentations on entry documents that resulted in an avoidance of antidumping duties. Customs' determination of evasion for the entry ending in 4523 was supported by substantial evidence.

n. Remaining Entries

The entries ending in 0030, 8454, 0296, 9063, 7208, 0944, 1322, and 1355 each contained merchandise produced by Wuxi Yushea according to Aspects' entry paperwork. *See* Aspects' Entry Package Sub. Sample 64 (Apr. 22, 2017) at 23–25 ("Aspects' Entry 64"), PR 90, CR 72; Aspects' Entry Packet Sub. 22, 28, 29, and 30 Part 1 (June 23, 2017) at 5 ("Aspects' Entry 87"), PR 113, CR 92; Aspects' Entry Package Sub. Entry 23 and 26 (June 23, 2017) at 2–12 ("Aspects' Entry 88"), PR 125, CR 100; Aspects' Entry Package Sub. Entry 27 (June 23, 2017) ("Aspects' Entry 92"), PR 48, CR 102; Aspects' Entry Packet Sub. 22, 28, 29, and 30 Part 1 at 10–16 ("Aspects' Entry 93"); Aspects' Entry Packet Sub. 22, 28, 29, and 30 Part 2 (June 23, 2017) at 1–7 ("Aspects' Entry 94"), PR 114–16, CR 93; Aspects' Entry Packet Sub. 22, 28, 29, and 30 Part 2 at 8–62 ("Aspects' Entry 95"); Aspects' Entry Packets 19, 20, 31, 34, and 36 Part 1 at 13–18 ("Aspects' Entry 86"). Customs identified misrepresentations for these entries as unreported assists allegedly provided by Aspects to Wuxi Yushea. Veri-

fication Report at 13. The Court concludes that due to the pervasive discrepancies in the entry paperwork, as well as the document destruction observed during verification, it was reasonable for Customs to determine that the remaining entries, including those ending in 0030, 8454, 0296, 9063, 7208, 0944, 1322, and 1355, contained covered merchandise that were misrepresented in order to evade paying duties. The Court sustains Customs' evasion determination with respect to these remaining entries.

CONCLUSION

It is clear to the Court that Customs examined the relevant record evidence and articulated a satisfactory explanation for its evasion determination. The Court concludes that Customs was reasonable in determining that there was substantial evidence of evasion by Aspects given that covered merchandise was imported into the United States, evidence was destroyed to avoid providing information to Customs, and material misrepresentations resulted in lower duties being paid. For the foregoing reasons, the Court sustains Customs' *Remand Redetermination*. Judgment will enter accordingly.

Dated: August 22, 2023
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 23–124

ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI A.S., and KAPTAN DEMIR CELIK ENDUSTRISI VE TICARET A.S., Plaintiffs, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, ET AL, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 21–00306

[Antidumping Duty Determination in Review of Order on Steel Concrete Reinforcing Bar from Turkey Sustained.]

Dated: August 23, 2023

Leah N. Scarpelli and *Jessica R. DiPietro*, ArentFox Schiff LLP, of Washington, D.C., argued for Plaintiffs Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. and Kaptan Demir Celik Endustrisi ve Ticaret A.S. With them on brief was *Matthew M. Nolan*.

Daniel Francis Roland, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the Defendant. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen Elizabeth Thorson, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenors Rebar Trade Action Coalition, et al. With her on the brief were *Alan Hayden Price* and *John R. Shane*.

OPINION

Restani, Judge:

Before the court is a motion for judgment on the agency record pursuant to United States Court of International Trade ("USCIT") Rule 56.2, in an action challenging a final determination of the United States Department of Commerce ("Commerce"). The final determination at issue resulted from Commerce's findings during an administrative review of the antidumping ("AD") order covering steel concrete reinforcing bar ("rebar") products from Turkey. Plaintiffs Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") and Kaptan Demir Celik Endustrisi ve Ticaret A.S. ("Kaptan") (collectively, "Respondents") challenge the calculation.

BACKGROUND

a. Antidumping Administrative Review and Determination

On September 9, 2019, Commerce initiated an antidumping duty administrative review of rebar products from Turkey for the period of

July 1, 2018, through June 30, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 47,242, 47,250–51 (Dep't Commerce Sept. 9, 2019). On February 20, 2020, Commerce selected Icdas and Kaptan as mandatory respondents. *Commerce Respondent Selection Memorandum*, P.R. 27 (Feb. 20, 2020).

On November 24, 2020, Commerce issued its preliminary results and accompanying Preliminary Decision Memorandum, and published the results in the Federal Register. *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019*, 85 Fed. Reg. 74,983 (Dep't Commerce Nov. 14, 2020); *Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2018–2019*, POR 7/1/2018–6/30/2019 (Dep't Commerce Nov. 17, 2020) ("*PDM*"). Commerce issued the final results on May 27, 2021. *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results on Antidumping Duty Administrative Review; 2018–2019*, 86 Fed. Reg. 28,574 (Dep't Commerce May 27, 2021), and accompanying *Issues and Decision Memorandum for the Final Results of the 2018–2019 Administrative Review of the Antidumping Duty Order on Steel Concrete Reinforcing Bar from Turkey*, A-489–829, POR 7/1/2018–6/30/2019 (Dep't Commerce May 21, 2021) ("*IDM*").

b. Background of Section 232 Duties

On March 8, 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1962, as amended, and mandated the imposition of a global tariff of 25 percent on imports of steel articles from all countries, except Canada and Mexico. *Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) ("*Proclamation 9705*"). The Section 232 duties went into effect on March 23, 2018, and applied "in addition to any other dut[y]." *Id.* at 11,627–28. By its terms, Proclamation 9705 was issued in order to "enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production" and to "ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense." *Id.* at 11,625–26; *see also* 19 U.S.C. § 1862(d).

On August 10, 2018, the President issued another proclamation, increasing the tariff on Turkish steel imports from 25 percent to 50 percent, effective August 13, 2018. *Proclamation No. 9772 of August*

10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("*Proclamation 9772*").[1] In the proclamation, the President stated that he increased the tariffs because Turkey was a major exporter of steel, and the increased tariff would "be a significant step toward ensuring the viability of the domestic steel industry." *Id.* at 40,429. On May 16, 2019, the President issued a proclamation ending the increased Section 232 tariff on Turkish steel imports. *Proclamation No. 9886 of May 16, 2019*, 84 Fed. Reg. 23,421 (May 16, 2019).

In the final results, Commerce treated the Section 232 duties paid by Respondents as "United States import duties" under 19 U.S.C. § 1677a(c)(2)(A) and therefore deducted the Section 232 duties on the United States price side of the dumping comparison from export ("EP") and constructed export price ("CEP"). *IDM* at 26–27. Commerce determined that Section 232 duties were more akin to normal customs duties than to antidumping or countervailing duties or Section 201 duties, codified as 19 U.S.C. § 2251, which are not deducted. *Id.* Commerce reasoned that the President indicated national security was the concern when issuing *Proclamation 9705* and stated that the duties were to be imposed in addition to other duties. *Id.* at 27–28. Commerce also concluded that the temporarily increased Section 232 duties under *Proclamation 9772* did not warrant any adjustment and therefore deducted the additional duties as well. *Id.* at 28.

c. Challenge to AD Review Determination

On June 28, 2021, Respondents commenced the instant action against the United States pursuant to 19 U.S.C. § 1516a(a)(1). Compl., ECF No. 5 (June 28, 2021). Respondents claim that the AD determination is unsupported by substantial evidence or is otherwise contrary to law because Commerce incorrectly treated Section 232 duties as normal U.S. customs duties, denied an adjustment based on inflation, and denied a duty-drawback adjustment. Compl. ¶¶ 19–26; Pl. R. 56.2 Mot. For J. on the Agency R., ECF Nos. 25–26 (Oct. 15, 2021) ("Pl. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce's results of an administrative review of an AD duty order 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).

[1] The lawfulness of the *Proclamation 9772* increased tariffs on Turkey has been affirmed by the U.S. Court of Appeals for the Federal Circuit. *See Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022).

DISCUSSION

I. Section 232 Duties May Be Deducted From United States Price

Respondents raise two issues related to whether Section 232 duties may be deducted from United States price. First, they argue that Commerce erred by treating the Proclamation 9705 Section 232 duties as a United States import duty under § 1677a(c)(2)(A) and deducting it from the United States price side of the less-than-fair-value comparison. Pl. Br. at 23–39. This argument is foreclosed, however, by binding precedent from the U.S. Court of Appeals for the Federal Circuit. *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 37 (Fed. Cir. 2023) ("*Borusan Mannesmann II*") ("[W]e conclude that the specific duty imposed by the President in Proclamation 9705 was properly treated by the President's subordinate, the Secretary of Commerce, as a 'United States import dut[y]' under § 1677a(c)(2)(A)."). Respondents' remaining argument is that Proclamation 9772's temporary increase of Section 232 duties on Turkey is sufficiently distinct, and thus, that those increased duties cannot be treated as a United States import duty under § 1677a(c)(2)(A) because the increase was temporary and remedial. Pl. Br. at 40–41.

Antidumping duties depend on the "dumping margin," 19 U.S.C. § 1677(35)(A), which is the difference between "the normal value," (or home country value) and the EP or CEP[2] for the merchandise, *id.* § 1673. The adjustments of EP and CEP are set forth in section 772(c) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677a(c). EP and CEP are to be reduced by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . ." 19 U.S.C. § 1677a(c)(2)(A) (emphasis added). These adjustments are made "in an attempt to get back to an ex-factory price that is comparable to the price of goods in the home market." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 46 CIT __, __, 494 F. Supp. 3d 1365, 1373 (2021) ("*Borusan Mannesmann I*"), *aff'd on other grounds*, *Borusan Mannesmann II*, 63 F.4th at 33; *see also* S. Rep. No. 67–16,

[2] EP and CEP can be referred to as the "U.S. price" in the dumping margin comparison. *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1353 & n.1 (Fed. Cir. 2010).

at 12 (1921); H.R. Rep. No. 67–1, at 23–24 (1921); H.R. Rep. No. 67–79, at 2–3 (1921).[3]

Regarding Section 201 safeguard duties, Commerce has previously concluded that they should not be deducted as import duties under § 1677a(c)(2)(A). *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153, 19,157–61 (Dep't Commerce Apr. 12, 2004) ("*SSWR from Korea*"). Commerce reached this because Section 201 duties were remedial and temporary in nature, and deducting from EP and CEP would result in an inappropriate double remedy. *Id.* at 19,160–61. In *Wheatland Tube Co. v. United States*, the Federal Circuit held that Commerce's construction of "United States import duty" statute was reasonable in the light of the specific Section 201 duties. 495 F.3d 1355, 1359–66 (Fed. Cir. 2007); *but see Borusan Mannesmann II*, 63 F.4th at 36–37 (declining to decide whether intervening developments in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[4] affect *Wheatland Tube*).

More recently, in *Borusan Mannesmann II*, the Federal Circuit stated that "[n]othing in § 1677a(c)(2)(A) requires the uniform treatment of all duties prescribed under a particular statutory authorization," and more specifically, there is nothing "in the § 232 framework that requires the uniform treatment of all duties imposed by the President under § 232." 63 F.4th at 33. The Federal Circuit, accordingly, declined to "make a statute-wide categorical determination regarding all duties imposed on imports by presidential action under § 232." *Id.* at 34. Instead, *Borusan Mannesmann II* requires courts to use a "proclamation-specific approach" that focuses "on the character" of the proclamation to determine if the President intended a specific duty to qualify as a United States import duty. *Id.*

The Federal Circuit proceeded to analyze the text of Proclamation 9705, emphasizing that the text made "clear that the duty newly being imposed was to add to, not partly or wholly offset, the anti-dumping duties[.]" *Id.* (referring to *Proclamation 9705*, 83 Fed. Reg. at 11,627 ("This rate of duty, which is in addition to any other duties . . . .")); *see also Proclamation 9705*, 83 Fed. Reg. at 11,629, Annex ("All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed."). Based on this,

[3] "Antidumping duties cannot be subtracted in the calculation of dumping margins (and hence antidumping duties), because doing so would produce a spiraling circularity." *Borusan Mannesmann II*, 64 F.4th at 35; *see also Borusan Mannesmann I*, 494 F. Supp. 3d at 1372–73 (citing S. Rep. No. 67–16, at 4 (1921)) ("[S]uch duties were 'special duties,' not the import duties that were to be deducted from price in the United States market.").

[4] 467 U.S. 837 (1984).

the Federal Circuit concluded that the specific Proclamation 9705 duty was properly treated as a United States import duty under § 1677a(c)(2)(A). *Borusan Mannesmann II*, 63 F.4th at 37.

Now, the court is tasked with following this "proclamation-specific approach" and analyzing the character of Proclamation 9772. *See id.* at 34. Similar to Proclamation 9705, Proclamation 9772 provides:

> Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey specified in the Annex shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018. *These rates of duty, which are in addition to any other duties*, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding two sentences."

Proclamation 9772, 158 Fed. Reg. at 40,430 (emphasis added). And the President tied these increased tariffs to the same indicated national security concern present in *Proclamation 9705*. *Compare id.* at 40,429 ("[I]t is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.") *with Proclamation 9705*, 83 Fed. Reg. at 11,626 ("[T]his tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security."). Thus, the President stated in essence that these increased tariffs had the same purpose, function, and character as the original § 232 steel tariffs, and were to be imposed in addition to the antidumping duties that had been in place for decades prior to the proclamations.[5] Accordingly, under the *Borusan Manessman II* proclamation-specific test, the Proclamation 9772 tariffs must be considered the same as the Proclamation 9705 tariffs: as United States import duties.[6] Accordingly, Commerce's treatment of the Section 232 duties is sustained.

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[5] *See, e.g.*, *Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 51 Fed. Reg. 17,784 (May 15, 1986).

[6] The court also notes that Section 232 lacks the clear statutory interplay that the courts have concluded exists between Section 201 duties and antidumping duties. *See Borusan Mannesmann I*, 494 F. Supp. 3d. at 1375 ("There is a clear statutory interplay between Section 201 duties and antidumping duties, while Section 232 does not reveal any such coordination concerns."). This statutory distinction between Section 232 and Section 201 exists regardless of presidential proclamations, and potentially warrants distinct treatment by Commerce, because Section 232 duties are quite unrelated to antidumping duties. *Compare* 19 U.S.C. § 2252(b), (c)(5) (requiring injury determinations attributable to dumping or subsidization, similar to antidumping and countervailing duty law) *with* 19 U.S.C. § 1862 (requiring a presidential determination of a threat to national security); *see also Borusan Mannesmann I*, 494 F. Supp. 3d. at 1375. The court does not perceive the more

II. Duty Drawback Adjustment

Another adjustment Commerce must make to calculate the dumping margin, known as the duty drawback adjustment, calls for U.S. price to be increased by the amount of any "import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). In determining whether a duty drawback adjustment is warranted, Commerce applies a two-pronged test in which respondent must demonstrate 1) that the rebate and import duties, or exemption from import duties, are directly linked to, and dependent upon, the exportation of the subject merchandise; and 2) that there are sufficient imports of the raw material to account for the drawback upon exportation of subject goods. *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback*, 71 Fed. Reg. 61,716, 61,723 (Dep't Commerce Oct. 19, 2006); *see also Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1340 (Fed. Cir. 2011).

The government of Turkey's ("GOT") duty drawback program, the Inward Processing Regime ("IPR") involves exemptions from duties, rather than rebates. *Response of Icdas Celik Enerji Tersane Ve Ulasim Sanayi A.S. and its Affiliates to Section C of the U.S. Department of Commerce Antidumping Duty Questionnaire* at C-38, P.R. 56, C.R. 45–46 (Apr. 15, 2020) ("*Icdas CQR*"). Under the program, a company that imports raw materials and exports finished goods made from such raw materials may obtain an inward processing certificate ("IPC") (also known by its Turkish acronym, "DIIB"), which sets forth the quantity of raw material allowed to be imported duty-free and the quantity of export required to close the IPC. *Response of Kaptan Demir Celik Endustrive Ticaret A.S. to Section C of the U.S. Department of Commerce Antidumping Questionnaire* at C-35–C-36, P.R. 58, C.R. 78 (Apr. 15, 2020) ("*Kaptan CQR*"). "After confirming that all inputs imported with IPR exceptions are used in the production of the exported goods, the Ministry of Trade of the Turkish Government closes out the certificates." *Icdas CQR* at C-39. "When an IPC has been closed, and the closure is approved by Turkish Ministry of Trade, the IPC holder is released of any liability for import duties otherwise payable on the entries under the IPC." *Kaptan CQR* at C-36.

On April 15, 2020, during the administrative review, Icdas timely provided Commerce its IPCs and applications for closure of the IPCs, but it did not provide documentation from the GOT that indicated

temporary existence of the additional 25 percent duty on Turkish goods to alter the analysis under either a purely statutory approach or a proclamation-based approach.

that the IPCs were closed or approved. *Icdas CQR* at C-39, Ex. C-19. On September 17, 2020, Icdas submitted additional factual information to update its Section C questionnaire, which Commerce rejected as an untimely addition. *Letter from Commerce to Icdas Rejecting New Factual Information*, P.R. 91 (Sept. 25, 2020) ("*Commerce Rejection of New Information*").[7] Commerce stated that the deadline for information regarding duty drawbacks was April 15, 2020, which was the date for responses to questionnaires. *Commerce Rejection of New Information* at 1. Although Icdas claimed that the submission should be accepted as timely under 19 C.F.R. § 351.301(c)(3)(ii), Commerce explained that provision only applied to information for "value factors under 19 C.F.R. § 351.408(c) or to measure the adequacy of remuneration under 19 C.F.R. § 351.511(a)(2)," neither of which were applicable. *Commerce Rejection of New Information* at 2. But in a memorandum to the case file, Commerce stated that it rejected Icdas's factual submission "because it was untimely filed under 19 CFR 351.301(c)(5)." *Commerce Memorandum Removing Rejected Submission*, P.R. 92 (Sept. 28, 2020). This indicated that Commerce understood Icdas was not attempting to submit irrelevant information normally required in non-market economy questionnaires because 19 C.F.R. § 351.301(c)(5) does not seem to apply to deficient responses to questionnaires.

Subsequently, in the preliminary results Commerce found that the GOT's duty drawback program satisfied the traditional two-prong test for a duty drawback adjustment. *PDM* at 14. Commerce proceeded to explain that its current practice for the IPR was to use only closed IPCs[8] to calculate the adjustment. *PDM* at 15. Following that practice, Commerce provided Kaptan Demir an adjustment for the IPCs that the GOT had determined were closed, but Commerce declined to provide Icdas any adjustment because Icdas did not provide evidence that demonstrated that any of the IPCs were closed. *PDM* at 15; *see also Icdas CQR* at Ex. C-19.

In the final results, Commerce continued to deny Icdas's request for the adjustment. *IDM* at 19. Further, Commerce explained that Icdas did not follow instructions to request an extension to file the additional factual information, which requires a party to "notify the official in charge and submit a request for an extension" when filing

[7] At oral argument, Icdas proffered that the rejected factual information was a certificate from GOT stating that one of Icdas's IPCs had been approved.

[8] Commerce stated that requiring closed IPCs meant that "the company was no longer permitted by the [GOT] to add import or export information." *PDM* at 15.

factual information in response to a questionnaire. *IDM* at 17. Commerce also cited 19 C.F.R. § 351.301(c)(1)(iii), which requires that parties provide Commerce a notification within 14 days of the questionnaire for submitting further responsive information. *IDM* at 18. Commerce stated that it cannot know what information a party has, so it cannot issue supplemental questionnaires to obtain additional information for a voluntary claim such as duty drawbacks and that providing such information is a respondent's burden. *IDM* at 18. Commerce stated that it would have considered the factual submission had Icdas refiled it under 19 C.F.R. § 351.301(c)(5) with the necessary written explanation under the regulation. *IDM* at 18–19. Why this regulation might apply has not been explained by either party.

Putting aside the procedural ambiguities, Icdas argues that Commerce has unlawfully modified its long-standing practice for Turkish duty drawback adjustments by requiring proof that the GOT officially closed an IPC, which Icdas suggests adds a third prong to the established two-prong test.[9] Pl. Br. at 8–11. Icdas asserts that it provided sufficient record evidence of a letter guaranteeing duties owed to the GOT, a report linking the exported finished goods with the imported inputs, and the IPCs closing applications along with the IPCs and a report certifying the imports and exports. Pl. Br. at 16–17. Icdas contends that it has completed all steps within its control, but official liquidation of the IPCs by the GOT may take several years. Pl. Br. at 18. Alternatively, Icdas argues that, even if final closure is required, Commerce erred in rejecting the new factual submission regarding the IPCs as untimely. Pl. Br. at 20–22. Icdas asserts that it never would have known it could have refiled the information under 19 C.F.R. § 351.301(c)(5) because the file memorandum stated it was untimely under that specific regulation. Pl. Br. at 22.

The court has long relied on the duty drawback adjustment's two-prong test, and has rejected attempts to "add a new hurdle to the drawback test that is not required by the statute." *Chang Tieh Industry Co. v. United States*, 17 CIT 1314, 1320, 840 F. Supp. 141, 147 (1993); *see also Arcelormittal USA Inc. v. United States*, 32 CIT 440, 463 n.23 (2008) (declining plaintiff's "invitation to alter Commerce's reasonable interpretation of 19 U.S.C. § 1667a(c)(1)(B)"). Commerce's requirement of IPC closure is not new, but Commerce's evaluation of

[9] In support of its argument, Icdas relies on a verification report from a previous administrative review to illustrate Commerce's past practice of accepting that the closed date is the date the IPC expires. Pl. Br. at 12. The government contends that the verification report is not part of the administrative record, and thus the court should not consider it. The verification report is being cited only as an illustration of Commerce's past practice, not as a fact or evidence of a fact. Thus, the court will consider the verification report along with Commerce's other previous administrative statements.

when an IPC is closed has evolved. *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1321, 1328 n.1 (2018); *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, 44 CIT __, __, 439 F. Supp. 3d 1342, 1349 (2020).

In *Toscelik*, for a period of investigation ("POI") of October 1, 2013, through September 30, 2014, Commerce considered an IPC closed after it "expired" because then the company "could no longer apply any additional imports or exports to the DIIB," regardless of whether the GOT may have officially closed the IPC. *Toscelik*, 348 F. Supp. 3d at 1328 n.1.[10] At some point after the *Toscelik* investigation, Commerce defined closure as when "the DIIB holder applies for closure of the DIIB with the Turkish Government." *Id.* Subsequently, during a POI of July 1, 2015, through June 30, 2016,[11] Commerce stated its practice was to provide a duty drawback adjustment only "upon evidence that the subject country's government has forgiven those duties." *Habas*, 429 F. Supp. 3d at 1347.[12] The court sustained Commerce's rationale as reasonable because duty drawback eligibility required record evidence that showed the GOT had "forgiven the duty liability." *Id.* at 1349.

As indicated, Commerce has not been consistent in how it defines closure of IPCs. In one proceeding, Commerce considered an IPC closed "[f]or practical purposes . . . when the exporting company has applied to the Turkish government for closure." *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 47355 (Dep't Commerce July 21, 2016) ("*HWRP from Turkey*"), and accompanying *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey* at Comment 4, A-489–824, POI 7/1/2014–6/30/2015 (Dep't Commerce July 14, 2016). But in a later pro-

[10] In *Toscelik*, the Turkish plaintiffs argued that Commerce's requirement that IPCs must be closed during the POI was unreasonable. 348 F. Supp. 3d at 1325. The court agreed, holding that limiting the acceptance of IPCs to those closed during the POI ignored "verified record information" when plaintiffs had IPCs that Commerce considered closed but only after the conclusion of the POI. *Id.* at 1327–28.

[11] The investigation at issue was for steel concrete reinforcing bar from Turkey. *Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,192 (Dep't Commerce May 22, 2017).

[12] As Commerce explained in its remand results in the *Habas* case, Commerce needed more record evidence than that "Habas had exports under these IPCs during POI." Redetermination Pursuant to Court Remand Order, *Habas Sinai Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, Consol. Ct. No. 17–00204, ECF No. 83 (Jan. 15, 2020). Instead, Commerce required record evidence that the GOT "actually refund[ed] any paid duties or ha[d] forgiven the imputed duties." *Id.* at 8–9.

ceeding, Commerce explained that applying for IPC closure is insufficient because "a company's application to close a DIIB may be modified or suspended." *Light-Walled Rectangular Pipe and Tube from the Republic of Turkey*, 82 Fed. Reg. 47,477 (Dep't Commerce Oct. 12, 2017) ("*LWRPT from Turkey*"), and accompanying *2015–2016 Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Turkey: Issues and Decision Memorandum for the Final Results* at Comment 9, A-489–815, POR 5/1/2015–4/30/2016 (Dep't Commerce Oct. 12, 2017) ("*LWRPT from Turkey IDM*"). Further, Commerce noted in *LWRPT from Turkey* that, in *HWRPT from Turkey*, Commerce actually "disallowed two of the three DIIBs under which the respondent requested a duty drawback adjustment because one DIIB remained open and the other DIIB was suspended after the respondent had applied for closure." *LWRPT from Turkey IDM* at Comment 9. In this proceeding, Commerce acknowledged its conflicting statements, and clarified that "an IPC may be modified or suspended even after it has been submitted," and thus an IPC cannot be closed without sufficient documentation establishing that GOT had forgiven the liability. *IDM* at 16.

Here, the court recognizes that Commerce has not always been clear as to when it will consider an IPC closed. In two recent instances, however, *LWRPT from Turkey* and *Habas*, Commerce clearly stated that it required more than closure application and instead required "evidence that the subject country's government has forgiven those duties." *See Habas*, 439 F. Supp. 3d at 1347; *LWRPT from Turkey IDM* at Comment 9 ("Thus the Department is not satisfied that a DIIB has been closed until a respondent can provide sufficient documentation establishing its closure by the GOT."). Thus, it appears to the court that in recent years Commerce's practice has been to require some indication from the GOT that the IPC was approved, and Icdas should have been on notice that this was likely the requirement.[13]

In this review, Commerce addressed its past practice and reasoned that it needed more definite information to grant the § 1677a(c)(1)(B) adjustment under the statute. *IDM* at 16. There are factual differences and inconsistencies in Commerce's past practice, but the most recent cases make Commerce's current practice clear. Because Commerce has long required some evidence of finality for the drawback

[13] Icdas relies on *Toscelik* to suggest that the court has scrutinized Commerce's attempts to change the definition of a closed IPC. Pl. Br. at 14. *Toscelik* is one example of Commerce's lack of clarity regarding the definition of closure because it is an earlier administrative review where Commerce considered IPCs closed when the applications "expired." 348 F. Supp. 3d at 1325–26 n.1. Its holding, however, is limited to the rejection of Commerce's then-requirement that an IPC must be closed during the POI in order to be accepted. *Id.* at 1327. Thus, it is inapposite to this case.

adjustment, this is not adding a third prong to the § 1677a(c)(1)(B) test. Rather it is clarification of the level of proof required. Commerce can seek better proof than it has in the past cases. *See Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009) ("Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology"). This is not unreasonable. The questions remaining are whether Icdas did all it reasonably could under Commerce's procedures given the lack of clarity of such procedures, whether it was harmed by this lack of clarity and thus should be given an opportunity to comply, and whether Commerce's substantive requirements for a drawback adjustment are fair.

The court sees two scenarios under which Icdas's and Commerce's actions in the administrative proceedings can be explained. In the first scenario, Icdas's original duty drawback submissions were a questionnaire response. If so, Commerce should have found Icdas's response unsatisfactory, and Commerce would have needed to send a deficiency notice under 19 U.S.C. § 1677m(d) and provide Icdas an opportunity to correct its filing within 30 days. *See* 19 U.S.C. § 1677m(d); 19 C.F.R. § 351.301(c)(1). Icdas likely could not have complied because, here, it did not attempt to submit its new factual information until five months after its Section C questionnaire response. *See Icdas CQR* at C-39; *Commerce Rejection of New Information* at 1. In the second scenario, Icdas's submission was not a questionnaire response. Thus, Icdas likely could have filed its supplemental information later under 19 C.F.R. § 351.301(c)(5). Here, though, Icdas's new factual information submission, allegedly applicable to one drawback request, failed to comply with the requirements for such late filed information of "clearly explain[ing] why the information [] does not meet the definition of factual information described in § 351.102(b)(21)(i)–(iv)" as well as providing a detailed narrative of the information. 19 C.F.R. § 351.301(c)(5); *IDM* at 18–19. Likely such a narrative would describe the proper purpose and not refer to irrelevant non-market economy provisions.[14] Regardless, Icdas did not fully describe the rejected factual information to the court and make a clear case for finding Commerce's decision erroneous. Further, when a party asks the court to rule on information Commerce rejected from the record, the party should proffer the rejected information to the court for examination so that the court can properly determine if the record should be corrected on remand.

[14] Icdas appears to believe that its proposed information is not governed by rules regarding questionnaire responses because Icdas argues that the new factual submission was timely under 19 C.F.R. § 351.301(c)(5) and does not argue before the court that it was owed a deficiency notice under 19 U.S.C. § 1677m(d).

Finally, the record in this case does not show that the GOT fails to process IPCs and grant duty drawbacks in a timely fashion, so as to make Commerce's requirements unfair. Kaptan was able to provide a certificate from the GOT approving an IPC, which Commerce accepted as sufficient proof under this closure standard. *See Kaptan CQR* at Ex. C-15; *PDM* at 15. Thus, there is nothing in this record that shows that the evidence that Commerce seeks ordinarily cannot be obtained in a timely manner. Nonetheless, the court is concerned that Commerce is not being clear about what procedures apply for drawback information. Commerce refers to both strict questionnaire response time limits but seems to believe there is a category of adjustments that are "voluntary," to which other more lenient rules may apply. The court does not find a clear path in the regulations themselves. The court, however, cannot conclude that Icdas was harmed by this lack of clarity. Icdas neither applied for an extension of time to file nor followed the requirements for the regulations that might have allowed it to otherwise submit information late in the proceeding. Accordingly, Commerce reasonably rejected Icdas's request for a duty drawback adjustment.

III. Inflation Adjustment

At issue here is Commerce's denial of Icdas's request for a monthly indexation methodology to account for the effects of high inflation in Turkey during the POR. *See* Pl. Br. at 41–43; *IDM* at 21–23. Commerce calculates the normal value of the subject merchandise based on home market sales that are made "in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce, therefore, disregards sales at prices that are less than the cost of production, *id.* § 1677b(b)(1)(B), because those sales are not made within the ordinary course of trade, *id.* § 1677(15)(A). The cost of production "equal[s] of the sum of . . . the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business." *Id.* § 1677b(b)(3)(A).

Section 1677b(b)(3)(A) does not define the "period" to be used or the method Commerce must use to calculate the costs of production. *See id.*; *see also Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, 43 CIT __, __, 361 F. Supp. 3d 1314, 1324 (2019). Commerce's normal methodology requires respondents to report costs using "a POR annual average basis." *IDM* at 22. Commerce may depart from its usual methodology and rely on quarterly cost-averages when "significant cost changes are evident [and] . . . sales

can be accurately linked with the concurrent quarterly costs." *Pastificio Lucio Garofalo, S.p.A. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1230, 1235–36 (2011), *aff'd* 469 F. App'x 901 (Fed. Cir. 2012). These significant situations include periods of high inflation. *See IDM* at 22; *Certain Steel Concrete Reinforcing Bars from Turkey*, 66 Fed. Reg. 56,274 (Dep't Commerce Nov. 7, 2001). One significant change is inflation greater than 25 percent during the POR. *IDM* at 21–22; *Habas*, 361 F. Supp. 3d at 1324.

During the administrative proceeding, Respondents reported that, based on Turkish Statistical Institute data and the producer price index ("PPI"), inflation exceeded 25 percent during the POR, which was July 1, 2018, to June 30, 2019. *See Icdas and Kaptan Notice of Inflation Rate Above 25 Percent* at 1–2 P.R. 37 (Mar. 6, 2020); *Icdas Section D Questionnaire Response* at D22–D-23 and Ex. D-11, C.R. 112, P.R. 60 (Apr. 20, 2020); *Kaptan Section D Questionnaire Response* at D-14 and Ex. D-8, C.R. 97, P.R. 59 (Apr. 20, 2020). The PPI data depicts the index price for each month on an annual basis. *Kaptan Section D Questionnaire Response* at Ex. D-8. Notably, the June 2018 PPI was 365.60, July 2018 was 372.06, June 2019 was 457.16, and July 2019 was 452.63. *Kaptan Section D Questionnaire Response* at Ex. D-8. Respondents calculated inflation to be 25.04 percent by subtracting June 2018 data from June 2019 data and dividing the difference by June 2018 data. *Kaptan Section D Questionnaire Response* at Ex. D-8. Defendant-Intervenor Rebar Trade Action Coalition ("RTAC") submitted information explaining that Respondents' inflation calculations included data from June 2018, the month before the POR, and that the POR-only data of July 2018 to June 2019 resulted in an inflation calculation of 22.87 percent, less than 25 percent. *RTAC Comments on High Inflation*, C.R. 156, P.R. 63 at 3–5.

In the final results, Commerce determined that there was not sufficiently high inflation during the POR. *IDM* at 21. Commerce explained that it relied on the PPI numbers from July 2018 and June 2019, representing the POR, and found that inflation was 22.87 percent. *IDM* at 22. Although Commerce acknowledged that Respondents' data from June 2018 to June 2019 showed inflation of 25.04 percent, Commerce stated that using the full 12-month POR was its long-established practice, and it saw no need to use the June 2018 data for a 13-month review. *IDM* at 22. Commerce found that the monthly indexes in the PPI data reflected data for the entire month, based on collected prices on the 5th, 15th, and 25th of each month. *IDM* at 22. Thus, Commerce concluded that the June 2018 data was from outside the POR and accordingly should not be considered. *IDM* at 22–23.

Now, Respondents argue that Commerce should have included the June 2018 data in its analysis. Pl. Br. at 41. Respondents assert that, by not considering the June 2018 data, Commerce has only measured inflation for an 11-month period and "improperly exclude[d] July 2018 from the analysis." Pl. Br. at 42.[15] Respondents contend that June 2018 to June 2019 is a review of the full 12-month period and shows that inflation was greater than 25 percent during the POR. Pl. Br. at 43.

Here, Commerce's decision that high inflation did not exist in the Turkey during the POR is supported by substantial evidence. Commerce's methodology, comparing the July 2018 data to June 2019 data, is a reasonable choice to measure inflation over the POR and on an annual basis. *IDM* at 22. That comparison, showing inflation to be 22.87 percent, fails to rise to the 25 percent change that Commerce has required for quarterly-cost averages. *See Kaptan Section D Questionnaire Response* at Ex. D-8; *see also Habas*, 361 F. Supp. 3d at 1324. The court sees no reason for Commerce to include June 2018 data for comparing the change in price from the beginning of the POR when the June 2018 data predates the POR.[16] Accordingly, Commerce's decision is sustained.

CONCLUSION

The court sustains Commerce's determination regarding the AD order for rebar products from Turkey.

Dated: August 23, 2023
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI. JUDGE

[15] Respondents also appear to argue that, because PPI data is published on the third business day of the following month, there is a one-month lag in the data. Pl. Br. at 42. There is no evidence that, because June 2018 data would be published in July 2018, that data would be reported as the July 2018 data. Commerce already considered this argument and determined that the data is correctly identified based on the month from which it is collected, not the month in which it is published. *IDM* at 22. Further, the International Monetary Fund record evidence explained that the inflation data was collected on the 5th, 15th, and 25th of each month and then only published on the third day of the next month. *See Commerce Memorandum: New Factual Information* at 17, P.R. 116 (Nov. 18, 2020). Thus, this argument fails.

[16] If there is any potential problem with Commerce's methodology, it may be in not using July 2019 as part of the calculation in order to fully capture one year after the July 1, 2018, beginning of the POR. Nevertheless, the July 2018 to July 2019 rate of inflation is only 21.66 percent, also below Commerce's required amount. Thus, the court need not weigh in on the methodology further.

Slip Op. 23–125

NOKSEL CELIK BORU SANAYI A.S., Plaintiff, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 21–00140

[Antidumping Duty Determination in Review of Order on Light-Walled Rectangular Pipe and Tube from Turkey Sustained.]

Dated: August 23, 2023

Leah N. Scarpelli and *Jessica R. DiPietro*, ArentFox Schiff LLP, of Washington, DC, argued for Plaintiff Noksel Celik Boru Sanayi A.S. With them on brief was *Matthew M. Nolan*.

Eric J. Singley, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the Defendant. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Staff Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Maureen Elizabeth Thorson, Wiley Rein LLP, of Washington, DC, argued for Defendant-Intervenor Nucor Tubular Products Inc. With her on the brief were *Alan H. Price*, *Robert E. DeFrancesco, III*, and *Theodore P. Brackemyre*.

OPINION

Restani, Judge:

Before the court is a motion for judgment on the agency record pursuant to United States Court of International Trade ("USCIT") Rule 56.2, in an action challenging a final determination of the United States Department of Commerce ("Commerce"). The final determination at issue resulted from Commerce's findings during an administrative review of the antidumping ("AD") order covering steel light-walled rectangular pipe and tube from Turkey. Plaintiff Noksel Celik Boru Sanayi A.S. ("Noksel") challenges the calculation.

BACKGROUND

a. Antidumping Administrative Review and Determination

On July 15, 2019, Commerce initiated an antidumping duty administrative review of light-walled rectangular pipe and tube products from Turkey for the period of May 1, 2018, through April 30, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 33,739, 33,748 (Dep't Commerce July 15, 2019).

On July 24, 2020, Commerce issued its preliminary results and accompanying Preliminary Decision Memorandum, and published the results in the Federal Register. *Light-Walled Rectangular Pipe and Tube From Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019*, 85 Fed. Reg. 44,861 (Dep't Commerce July 24, 2020) ("Preliminary Results"); *Decision Memorandum for Preliminary Results of the Antidumping Duty Administrative Review: Light-Walled Rectangular Pipe and Tube from Turkey; 2018–2019*, A-489–815, POR 5/1/2018–4/30/2019 (Dep't Commerce July 20, 2020). Commerce issued the final results on May 27, 2021. *Light-Walled Rectangular Pipe and Tube from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019*, 86 Fed. Reg. 11,230 (Dep't Commerce Feb. 24, 2021), and accompanying *2018–2019 Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Turkey: Issues and Decision Memorandum for the Final Results*, A-489–815, POR 5/1/2018–4/30/2019 (Dep't Commerce Feb. 16, 2021) ("*IDM*").

b. Background of Section 232 Duties

On March 8, 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1962, as amended, and mandated the imposition of a global tariff of 25 percent on imports of steel articles from all countries, except Canada and Mexico. *Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) ("*Proclamation 9705*"). The Section 232 duties went into effect on March 23, 2018, and applied "in addition to any other dut[y]." *Id.* at 11,627–28. By its terms, Proclamation 9705 was issued in order to "enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production" and to "ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense." *Id.* at 11,625–26; *see also* 19 U.S.C. § 1862(d).

On August 10, 2018, the President issued another proclamation, increasing the tariff on Turkish steel imports from 25 percent to 50 percent, effective August 13, 2018. *Proclamation No. 9772 of August 10, 2018*, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("*Proclamation 9772*").[1] In the proclamation, the President stated that he increased

[1] The lawfulness of the *Proclamation 9772* increased tariffs on Turkey has been affirmed by the U.S. Court of Appeals for the Federal Circuit. *See Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022).

the tariffs because Turkey was a major exporter of steel, and the increased tariff would "be a significant step toward ensuring the viability of the domestic steel industry." *Id.* at 40,429. On May 16, 2019, the President issued a proclamation ending the increased Section 232 tariff on Turkish steel imports. *Proclamation No. 9886 of May 16, 2019*, 84 Fed. Reg. 23,421 (May 16, 2019).

In the final results, Commerce treated the Section 232 duties paid by Noksel as "United States import duties" under 19 U.S.C. § 1677a(c)(2)(A) and therefore deducted the Section 232 duties on the United States price side of the dumping comparison from export ("EP") and constructed export price ("CEP"). *IDM* at 4–5. Commerce determined that Section 232 duties were more akin to normal customs duties than to antidumping or countervailing duties or Section 201 duties, codified as 19 U.S.C. § 2251, which are not deducted. *Id.* Commerce reasoned that the President indicated that national security was the concern when issuing *Proclamation 9705* and stated that the duties were to be imposed in addition to other duties. *Id.* at 4.

c. Challenge to AD Review Determination

On March 26, 2021, Noksel commenced the instant action against the United States pursuant to 19 U.S.C. § 1516a(a)(2). Compl., ECF No. 4 (Mar. 26, 2021). Noksel claims that the AD determination is unsupported by substantial evidence or is otherwise contrary to law because Commerce incorrectly treated Section 232 duties as normal U.S. customs duties and denied a duty-drawback adjustment. Compl. ¶¶ 19–24; Pl. R. 56.2 Mot. For J. on the Agency R., ECF Nos. 24–25 (Sept. 3, 2021) ("Pl. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce's results of an administrative review of an AD duty order 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).

DISCUSSION

I. Section 232 Duties May Be Deducted From United States Price

Noksel raises two issues related to whether Section 232 duties may be deducted from United States price. First, Noksel argues that Commerce erred by treating the Proclamation 9705 Section 232 duties as a United States import duty under § 1677a(c)(2)(A). Pl. Br. at 19–37. This argument is foreclosed, however, by binding precedent

from the U.S. Court of Appeals for the Federal Circuit. *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 37 (Fed. Cir. 2023) ("*Borusan Mannesmann II*") ("[W]e conclude that the specific duty imposed by the President in Proclamation 9705 was properly treated by the President's subordinate, the Secretary of Commerce, as a 'United States import dut[y]' under § 1677a(c)(2)(A)."). Noksel's remaining argument is that Proclamation 9772's temporary increase of Section 232 duties on Turkey is sufficiently distinct, and thus, that those increased duties cannot be treated as a United States import duty under § 1677a(c)(2)(A) because the increase was temporary and remedial. Pl. Br. at 37–39.[2]

Antidumping duties depend on the "dumping margin," 19 U.S.C. § 1677(35)(A), which is the difference between "the normal value," (or home country value) and the EP or CEP[3] for the merchandise, *id.* § 1673. The adjustments of EP and CEP are set forth in section 772(c) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677a(c). EP and CEP are to be reduced by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . ." 19 U.S.C. § 1677a(c)(2)(A) (emphasis added). These adjustments are made "in an attempt to get back to an ex-factory price that is comparable to the price of goods in the home market." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 45 CIT __, __, 494 F. Supp. 3d 1365, 1373 (2021) ("*Borusan Mannesmann I*"), *aff'd on other grounds*, *Borusan Mannesmann II*, 63 F.4th at 33; *see also* S. Rep. No. 67–16, at 12 (1921); H.R. Rep. No. 67–1, at 23–24 (1921); H.R. Rep. No. 67–79, at 2–3 (1921).[4]

Regarding Section 201 safeguard duties, Commerce has previously concluded that they should not be deducted as import duties under §

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[2] The government and Defendant-Intervenor argue that Noksel did not exhaust administrative remedies for the temporarily increased duties, and, thus, the court should not consider the issue. Gov't Resp. Br. at 22, ECF Nos. 30–31 (Dec. 3, 2021); Defendant-Intervenor Resp. Br. at 29, ECF Nos. 27–28 (Dec. 3, 2021). During the administrative proceeding, Noksel asserted that Commerce should "at the very least" not deduct the additional 25 percent. *Noksel's Case Brief* at 16, P.R. 109 (Aug. 24, 2020). Noksel sufficiently raised the issue by presenting it to Commerce, and the court will consider it. *See Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340 (CIT 2002).

[3] EP and CEP may be referred to as the "U.S. price" in the dumping margin comparison. *See* United States Steel Corp. v. United States, 621 F.3d 1351, 1353 & n.1 (Fed. Cir. 2010).

[4] "Antidumping duties cannot be subtracted in the calculation of dumping margins (and hence antidumping duties), because doing so would produce a spiraling circularity." *Borusan Mannesmann II*, 64 F.4th at 35; *see also Borusan Mannesmann I*, 494 F. Supp. 3d at 1372–73 (citing S. Rep. No. 67–16, at 4 (1921)) ("[S]uch duties were 'special duties,' not the import duties that were to be deducted from price in the United States market.").

1677a(c)(2)(A). *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153, 19,157–61 (Dep't Commerce Apr. 12, 2004) ("*SSWR from Korea*"). Commerce reached this because Section 201 duties were remedial and temporary in nature, and deducting from EP and CEP would result in an inappropriate double remedy. *Id.* at 19,160–61. In *Wheatland Tube Co. v. United States*, the Federal Circuit held that Commerce's construction of "United States import duty" statute was reasonable in the light of the specific Section 201 duties. 495 F.3d 1355, 1359–66 (Fed. Cir. 2007); *but see Borusan Mannesmann II*, 63 F.4th at 36–37 (declining to decide whether intervening developments in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[5] affect *Wheatland Tube*).

More recently, in *Borusan Mannesmann II*, the Federal Circuit stated that "[n]othing in § 1677a(c)(2)(A) requires the uniform treatment of all duties prescribed under a particular statutory authorization," and more specifically, there is nothing "in the § 232 framework that requires the uniform treatment of all duties imposed by the President under § 232." 63 F.4th at 33. The Federal Circuit, accordingly, declined to "make a statute-wide categorical determination regarding all duties imposed on imports by presidential action under § 232." *Id.* at 34. Instead, *Borusan Mannesmann II* requires courts to use a "proclamation-specific approach" that focuses "on the character" of the proclamation to determine if the President intended a specific duty to qualify as a United States import duty. *Id.*

The Federal Circuit proceeded to analyze the text of Proclamation 9705, emphasizing that the text made "clear that the duty newly being imposed was to add to, not partly or wholly offset, the anti-dumping duties[.]" *Id.* (referring to *Proclamation 9705*, 83 Fed. Reg. at 11,627 ("This rate of duty, which is in addition to any other duties . . . .")); *see also Proclamation 9705*, 83 Fed. Reg. at 11,629, Annex ("All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed."). Based on this, the Federal Circuit concluded that the specific Proclamation 9705 duty was properly treated as a United States import duty under § 1677a(c)(2)(A). *Borusan Mannesmann II*, 63 F.4th at 37.

Now, the court is tasked with following this "proclamation-specific approach" and analyzing the character of Proclamation 9772. *See id.* at 34. Similar to Proclamation 9705, Proclamation 9772 provides:

> Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey specified in the Annex shall be subject to a 50

[5] 467 U.S. 837 (1984).

> percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018. *These rates of duty, which are in addition to any other duties*, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding two sentences."

Proclamation 9772, 158 Fed. Reg. at 40,430 (emphasis added). As the court explained in *Icdas Celik Enerji Tersane ve Ulsasim Sanayi A.S. v. United States*, the same language that the Federal Circuit emphasized is present in Proclamation 9772. For a more complete analysis, *see Icdas Celik Enerji Tersane ve Ulsasim Sanayi A.S. v. United States*, No. 21–00140, Slip Op. No. 23–124, at *8–9 (CIT Aug. 23, 2023), issued simultaneously with this opinion. There is no reason to vary here. Accordingly, Commerce's treatment of the Section 232 duties is sustained.

II. Duty Drawback Adjustment

Another adjustment Commerce must make to calculate the dumping margin, known as the duty drawback adjustment, calls for U.S. price to be increased by the amount of any "import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). In determining whether a duty drawback adjustment is warranted, Commerce applies a two-pronged test in which respondent must demonstrate 1) that the rebate and import duties, or exemption from import duties, are directly linked to, and dependent upon, the exportation of the subject merchandise; and 2) that there are sufficient imports of the raw material to account for the drawback upon exportation of subject goods. *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback*, 71 Fed. Reg. 61,716, 61,723 (Dep't Commerce Oct. 19, 2006); *see also Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1340 (Fed. Cir. 2011).

The government of Turkey's ("GOT") duty drawback program, the Inward Processing Regime ("IPR") involves exemptions from duties, rather than rebates. *Noksel Section B-D Questionnaire Response* at C-35, P.R. 42, C.R. 15, 19 (Sept. 20, 2019) ("*Noksel QR*"). Under the program, a company that imports raw materials and exports finished goods made from such raw materials may obtain an inward process-

ing certificate ("IPC") (also known by its Turkish acronym, "DIIB"), which sets forth the quantity of raw material allowed to be imported duty-free and the quantity of export required to close the IPC. *Noksel QR* at C-35, Ex. C-15. Noksel submitted an application to the GOT to close an IPC, which the GOT was then reviewing. *Noksel QR* at C-35. Noksel stated that it would "submit documentation substantiating the IPR completion" when the closing was approved. *Noksel QR* at C-35.

In the final results, Commerce found that it should not grant Noksel a duty drawback adjustment. *IDM* at 6. Commerce proceeded to explain that its current practice for the IPR was to require "sufficient documentation establishing [the IPC's] closure by the GOT." *IDM* at 7. Commerce reasoned that an application for closure is not sufficient because "an IPC may be modified or suspended even after it has been submitted to the GOT." *IDM* at 7. Following that practice, Commerce declined to grant Noksel the duty drawback adjustment because there was no record documentation that Noksel could not suspend or modify its IPC application. *IDM* at 7–8.

The court has long relied on the duty drawback adjustment's two-prong test, and has rejected attempts to "add a new hurdle to the drawback test that is not required by the statute." *Chang Tieh Industry Co. v. United States*, 17 CIT 1314, 1320, 840 F. Supp. 141, 147 (1993); *see also Arcelormittal USA Inc. v. United States*, 32 CIT 440, 463 n.23 (2008) (declining plaintiff's "invitation to alter Commerce's reasonable interpretation of 19 U.S.C. § 1667a(c)(1)(B)"). Commerce's requirement of IPC closure is not new, but Commerce's evaluation of when an IPC is closed has evolved. *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1321, 1328 n.1 (2018); *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, 44 CIT __, __, 439 F. Supp. 3d 1342, 1349 (2020).

In *Toscelik*, for a period of investigation ("POI") of October 1, 2013, through September 30, 2014, Commerce considered an IPC closed after it "expired" because then the company "could no longer apply any additional imports or exports to the DIIB," regardless of whether the GOT may have officially closed the IPC. *Toscelik*, 348 F. Supp. 3d at 1328 n.1.[6] At some point after the *Toscelik* investigation, Commerce defined closure as when "the DIIB holder applies for closure of

[6] In *Toscelik*, the Turkish plaintiffs argued that Commerce's requirement that IPCs must be closed during the POI was unreasonable. 348 F. Supp. 3d at 1325. The court agreed, holding that limiting the acceptance of IPCs to those closed during the POI ignored "verified record information" when plaintiffs had IPCs that Commerce considered closed but only after the conclusion of the POI. *Id.* at 1327–28.

the DIIB with the Turkish Government." *Id.* Subsequently, during a POI of July 1, 2015, through June 30, 2016,[7] Commerce stated its practice was to provide a duty drawback adjustment only "upon evidence that the subject country's government has forgiven those duties." *Habas*, 429 F. Supp. 3d at 1347.[8] The court sustained Commerce's rationale as reasonable because duty drawback eligibility required record evidence that showed the GOT had "forgiven the duty liability." *Id.* at 1349.

As indicated, Commerce has not been consistent in how it defines closure of IPCs. In one proceeding, Commerce considered an IPC closed "[f]or practical purposes . . . when the exporting company has applied to the Turkish government for closure." *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 47355 (Dep't Commerce July 21, 2016) ("*HWRP from Turkey*"), and accompanying *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey* at Comment 4, A-489–824, POI 7/1/2014–6/30/2015 (Dep't Commerce July 14, 2016). But in a later proceeding, Commerce explained that applying for IPC closure is insufficient because "a company's application to close a DIIB may be modified or suspended." *Light-Walled Rectangular Pipe and Tube from the Republic of Turkey*, 82 Fed. Reg. 47,477 (Dep't Commerce Oct. 12, 2017) ("*LWRPT from Turkey*"), and accompanying *2015–2016 Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Turkey: Issues and Decision Memorandum for the Final Results* at Comment 9, A-489–815, POR 5/1/2015–4/30/2016 (Dep't Commerce Oct. 12, 2017) ("*LWRPT from Turkey IDM*"). Further, Commerce noted in *LWRPT from Turkey* that, in *HWRPT from Turkey*, Commerce actually "disallowed two of the three DIIBs under which the respondent requested a duty drawback adjustment because one DIIB remained open and the other DIIB was suspended after the respondent had applied for closure." *LWRPT from Turkey IDM* at Comment 9.

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[7] The investigation at issue was for steel concrete reinforcing bar from Turkey. *Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,192 (Dep't Commerce May 22, 2017).

[8] As Commerce explained in its remand results in the *Habas* case, Commerce needed more record evidence than that "Habas had exports under these IPCs during POI." Redetermination Pursuant to Court Remand Order, *Habas Sinai Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, Consol. Ct. No. 17–00204, ECF No. 83 (Jan. 15, 2020). Instead, Commerce required record evidence that the GOT "actually refund[ed] any paid duties or ha[d] forgiven the imputed duties." *Id.* at 8–9.

Here, the court recognizes that Commerce has not always been clear as to when it will consider an IPC closed. In two recent instances though, *LWRPT from Turkey* and *Habas*, Commerce clearly stated that it required more than closure application and instead required "evidence that the subject country's government has forgiven those duties." *See Habas*, 429 F. Supp. 3d at 1347; *LWRPT from Turkey IDM* at Comment 9 ("Thus the Department is not satisfied that a DIIB has been closed until a respondent can provide sufficient documentation establishing its closure by the GOT."). As the court explained in *Icdas*, it appears that in recent years Commerce's practice has been to require some indication from the GOT that the IPC was approved, and Noksel should have been on notice that this was likely the requirement. *See Icdas*, No. 21–00140, Slip Op. No. 23–124, at *16. It is not unreasonable for Commerce to require more proof than it has in the past cases. *See Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009) ("Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology."). Noksel's statement that it would "submit the documentation substantiating the IPR completion" indicates that Noksel likely was aware Commerce required the GOT's approval. *See Noksel QR* at C-35. Accordingly, Commerce's rejection of Noksel's request for a duty drawback adjustment is sustained.

CONCLUSION

The court sustains Commerce's determination regarding the AD order for light-walled rectangular pipe and tube from Turkey.

Dated: August 23, 2023
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

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