

U.S. Customs and Border Protection



Slip Op. 13–32

KOYO CORPORATION OF U.S.A., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00147

[Dismissing all claims for failure to state a claim upon which relief can be granted; dismissing the action.]

Dated: March 13, 2013

John M. Gurley, Nancy A. Noonan, and Diana D. Quايا, Arent Fox, LLP, of Washington, DC, for Plaintiff Koyo Corporation of U.S.A.

Courtney S. McNamara and Jessica R. Toplin, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendants United States, U.S. Customs and Border Protection, David V. Aguilar, Acting Commissioner, U.S. Customs and Border of Protection, of Washington, DC. With them on the briefs were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director.

Patrick V. Gallagher, Jr., Attorney Advisor, United States International Trade Commission, Office of General Counsel, of Washington, DC, for Defendants U.S. International Trade Commission and Irving Williamson, Chairman, U.S. International Trade Commission. With him on the brief was *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Terence P. Stewart, Geert M. De Prest, and Patrick J. McDonough, Stewart and Stewart, of Washington, DC, for Defendant-Intervenors The Timken Company and MPB Corporation.

OPINION

Gordon, Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (“ITC”) and U.S. Customs and Border Protection (“Customs”) that denied Plaintiff Koyo Corporation of U.S.A. (“Koyo”) certain monetary Court No. 12–00147 Page 2 benefits under the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), 19 U.S.C § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).¹ The ITC did not include Koyo on a list of parties

¹ Congress repealed the CDSOA in 2006, but the repealing legislation provided that “[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the

potentially eligible for “affected domestic producer” (“ADP”) status, which would have qualified Koyo for distributions of antidumping duties collected under various antidumping duty orders on tapered roller bearings and ball bearings (“subject orders”). Pl.’s Compl. ¶¶ 16, 47, 51, ECF No. 2. Because Plaintiff was not on the ITC’s list of potential ADPs, Customs made no CDSOA distributions to Koyo.

Plaintiff brings facial and as-applied constitutional challenges to the CDSOA under the First Amendment and the equal protection and due process guarantees of the Fifth Amendment.

Before the court are the USCIT Rule 12(b)(5) motions of the ITC and the United States to dismiss for failure to state a claim upon which relief can be granted, and the Rule 12(c) motion of The Timken Company and MPB Corporation for judgment on the pleadings. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(i) (2006). *See Furniture Brands Int’l, Inc. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1301, 1307–10 (2011). For the reasons set forth below, the court concludes that Plaintiff has failed to state a claim upon which relief can be granted. The court will grant Defendants’ and Defendant-Intervenors’ motions and dismiss this action.

I. Background

Plaintiff was a domestic manufacturer of tapered roller bearings and ball bearings at the time of the original antidumping duty investigations that resulted in the subject orders.² Compl. ¶ 13. Koyo did not support the underlying antidumping duty investigations. Compl.

legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . .” Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were “(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce.” Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

² *See Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof from Sweden*, 54 Fed. Reg. 20,907 (Dep’t of Commerce May 1, 1989) (antidumping duty order); *Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof from the United Kingdom*, 54 Fed. Reg. 20,910, (Dep’t of Commerce May 15, 2009) (antidumping duty orders and amendments to determinations of sales at less than fair value); *Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from France*, 54 Fed. Reg. 20,902 (Dep’t of Commerce May 15, 1989) (antidumping duty orders); *Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (Dep’t of Commerce May 15, 1989) (antidumping duty orders); *Tapered Roller Bearings, and Parts Thereof, Finished or Unfinished, from the Hungarian People’s Republic*, 52 Fed. Reg. 23,319 (Dep’t of Commerce June 19, 1987) (antidumping duty order); *Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof from Italy*, 54 Fed. Reg. 20,903 (Dep’t of Commerce May 15, 1989) (antidumping duty orders); *Ball Bearings and Parts Thereof from Romania*, 54 Fed. Reg. 20,906 (Dep’t of Commerce May 15, 1989) (antidumping duty order); *Ball Bearings and Parts Thereof from Singapore*, 54 Fed. Reg. 20,907 (Dep’t of Commerce May 15, 1989) (antidumping duty

¶ 15. Plaintiff submitted multiple requests and certifications with the ITC and Customs seeking to be included on the list of ADPs. Compl. ¶¶ 16, 44, 45, 48, 53. To date, the ITC has not included Koyo on its list of ADPs eligible for disbursements of antidumping duties under the CDSOA for the subject orders for any fiscal year, including Fiscal Years 2010 and 2011. Compl. ¶¶ 16, 47, 51. Neither has Customs made any CDSOA distributions to Koyo for those fiscal years. Koyo commenced this action on May 30, 2012, contesting the denial of CDSOA distributions for the fiscal years in question. Defendants subsequently filed their motions to dismiss, and Defendant-Intervenors moved for judgment on the pleadings.

II. Standard of Review

In deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in the plaintiff's favor. *Nan Ya Plastics Corp., Am. v. United States*, 36 CIT ___, ___, 853 F. Supp. 2d 1300, 1305 (2012) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993)). A USCIT Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under Rule 12(b)(5) for failure to state a claim. *Forest Labs., Inc. v. United States*, 29 CIT 1401, 1402–03, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007).

A plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, 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 *Twombly*, 550 U.S. at 570).

III. Discussion

In 2000, Congress amended the Tariff Act of 1930 to add Section 754, the CDSOA, which provides distributions of assessed antidumping and countervailing duties to ADPs on a fiscal year basis. 19 U.S.C.

order); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667 (Dep't of Commerce June 15, 1987) (antidumping duty order); *Tapered Roller Bearings and Certain Components from Japan*, 41 Fed. Reg. 34,974 (Dep't of Treasury Aug. 18, 1976) (antidumping duty order); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Japan*, 52 Fed. Reg. 37,352 (Dep't of Commerce Oct. 6, 1987) (antidumping duty order); *Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan*, 54 Fed. Reg. 20,904 (Dep't of Commerce May 15, 1989) (antidumping duty orders).

§ 1675c(d)(1). To be an ADP, a party must meet several criteria, including the requirement that it have been a petitioner, or an interested party in support of a petition with respect to which an antidumping duty or countervailing duty order was entered. *Id.* § 1675c(b)(1) (“petition support requirement”). The CDSOA directed the ITC to forward to Customs, within 60 days of the issuance of an antidumping or countervailing duty order, lists of persons potentially eligible for ADP status, *i.e.*, “petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response.” *Id.* § 1675c(d)(1). Customs then publishes the lists of potential ADPs in the Federal Register annually, prior to each distribution. *Id.* § 1675c(d)(2). Customs distributes assessed duties to parties on the list of potential ADPs that certify that they met the remaining eligibility criteria. *Id.* § 1675c(d)(2).

In this action, the ITC compiled lists of potential ADPs with respect to the subject orders. Compl. ¶ 40. Customs published the lists of potential ADPs for Fiscal Year 2010 on June 1, 2010, *id.* ¶ 46, and for Fiscal Year 2011 on May 27, 2011, *id.* ¶ 50. Plaintiff did not appear on either list. *Id.* ¶¶ 47, 51. Nevertheless, Plaintiff certified to Customs its eligibility for both fiscal years. *Id.* ¶¶ 48, 52. Customs responded by confirming receipt of Koyo’s claims for Fiscal Years 2010 and 2011 but did not indicate the validity of those claims. *Id.* ¶¶ 49, 54.

In Count 1, Plaintiff challenges the petition support requirement, as applied to Koyo, on First Amendment grounds. Compl. ¶¶ 59–61. In Count 2, Plaintiff claims the petition support requirement facially violates the First Amendment guarantees of freedom of speech and belief, and the right to petition the government for redress of grievances. *Id.* ¶ 63. Plaintiff also claims that the petition support requirement facially violates the First Amendment because it engages in impermissible viewpoint discrimination by conditioning receipt of a government benefit on a private speaker’s specific viewpoint, *i.e.*, expression of support for an antidumping duty petition, and is overbroad because it compels speech. *Id.* ¶¶ 64–65.

In Count 3, Plaintiff challenges the application of the petition support requirement to it on Fifth Amendment equal protection grounds. *Id.* ¶¶ 67–69. In Count 4, Plaintiff claims that the petition support requirement violates the equal protection guarantees of the Fifth Amendment because it impermissibly creates classifications that implicate Plaintiff’s fundamental speech rights, and because there is no legitimate governmental purpose for differentiating between similarly situated domestic producers. *Id.* ¶¶ 71–73.

Lastly, in Count 5, Plaintiff challenges the petition support requirement as impermissibly retroactive in violation of the Fifth Amendment due process guarantee because eligibility for ADP status and disbursements is based on past conduct, *i.e.*, support for the petition, and because the retroactive aspect of those eligibility determinations is not rationally related to a legitimate government purpose. *Id.* ¶¶ 75–16.³

Plaintiff's First Amendment and Fifth Amendment equal protection facial challenges to the CDSOA are identical to previous claims that the court rejected in a companion case involving prior fiscal years.⁴ See *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 36 CIT ___, 823 F. Supp. 2d 1365 (2012) ("*Pat Huval*"). In *Pat Huval*, the court determined that Plaintiff's facial claims were precluded by the holding in *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009) ("*SKF USA II*"). *Id.*, 36 CIT at ___, 823 F. Supp. 2d at 1375. The court noted that the Court of Appeals for the Federal Circuit upheld the CDSOA against constitutional challenges brought on First Amendment and Fifth Amendment equal protection grounds. *Id.* (citing *SKF USA II*, 556 F.3d at 1360 ("[T]he Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment."); *id.* ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.")).⁵

Plaintiff argues that *SKF USA II* is no longer binding in light of Supreme Court decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), *Snyder v. Phelps*, 562 U.S. ___ (2011), and *Sorrell v. IMS Health Inc.*, 564 U.S. ___ (2011). Those cases, which dealt with restrictions on electioneering speech, state-law tort claims, and state-law regulation of confidentiality of pharmaceutical prescriptions, respectively, do not implicitly overturn *SKF USA II* or otherwise require the application of a level of scrutiny on restrictions of commercial speech that differs from that applied to the CDSOA in *SKF*

³ In Counts 6 and 7, Koyo alleges that, because the CDSOA is unconstitutional, it is void *ab initio*, and that the unconstitutional provisions are severable from the CDSOA as a whole. These counts speak to remedy should Plaintiff prevail on the merits. Accordingly, the court construes them as part of the Prayer for Relief and not as part of Plaintiff's substantive claims.

⁴ Koyo raised its constitutional challenges regarding all fiscal years prior to Fiscal Year 2006 in Court No. 06–00324, Fiscal Years 2006 and 2007 in Court No. 08–00340, and Fiscal Years 2008 and 2009 in Court No. 10–00001.

⁵ *SKF USA II* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

USA II. See, e.g., *Standard Furniture Mfg. Co. v. United States*, 36 CIT ___, ___- ___, 823 F. Supp. 2d 1327, 1338–42 (2012).

As to its as-applied challenges, Plaintiff is no differently situated than the plaintiff in *Pat Huval*. Here too, Koyo has failed to plead facts that permit the court to conclude that these challenges differ from those brought and rejected in *SKF USA II*. See *Pat Huval*, 36 CIT at ___, 823 F. Supp. 2d at 1376–77. Plaintiff’s complaint does not contain any allegations that the CDSOA was applied to Koyo in a manner that differs from its application to other domestic producers who did not support a petition. Koyo admits that it did not express support for the petition. Compl. ¶ 15. This places Koyo “on the same footing as other potential claimants who did not support the petition, such as SKF in *SKF USA II*.” *Pat Huval*, 36 CIT at ___, 823 F. Supp. 2d at 1377 (citing *SKF USA II*, 556 F.3d at 1343).

Because Koyo’s constitutional facial and as-applied challenges here are indistinguishable from those claims in *Pat Huval* and indistinguishable from those claims rejected by the Court of Appeals in *SKF USA II*, those challenges are foreclosed by the holding in *SKF USA II*. Accordingly, Counts 1 through 4 of Plaintiff’s complaint must be dismissed for failure to state a claim on which relief can be granted.

Plaintiff claims that the petition support requirement is impermissibly retroactive in violation of the Fifth Amendment due process guarantee because eligibility for CDSOA benefits is based on past conduct, *i.e.*, petition support. In the companion case, the court rejected the identical claim. See *Pat Huval*, 36 CIT at ___, 823 F. Supp. 2d at 1377 (quoting *New Hampshire Ball Bearing v. United States*, 36 CIT ___, ___ - ___, 815 F. Supp. 2d 1301, 1309 (2012) (“the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds.”); *id.* (internal quote omitted) (“It was not arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions . . . would be ‘more fully effectuated’ if the petition support requirement were applied both prospectively and retroactively.”)). Because Plaintiff’s claim is indistinguishable from that in *Pat Huval*, Count 5 of Plaintiff’s complaint must be dismissed.

IV. Conclusion

For the foregoing reasons, Defendants’ motions to dismiss Plaintiff’s complaint under Rule 12(b)(5) for failure to state a claim and

Defendant-Intervenors' motion for judgment on the pleadings under Rule 12(c) are hereby granted. Judgment dismissing this action will be entered accordingly.

Dated: March 13, 2013

New York, New York

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



Slip Op. 13–33

UNION STEEL MANUFACTURING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Court No. 07–00125

[Staying action pending appeal in *Union Steel v. United States*, 36 CIT ____, 823 F. Supp. 2d 1346 (2012), *appeal docketed*, No. 2012–1248 (Fed. Cir. March 6, 2012)]

Dated: March 18, 2013

Donald B. Cameron, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Union Steel Manufacturing Co., Ltd. and former Co-Plaintiff Dongbu Steel Co., Ltd. With him on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*.

Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With her on the brief were *Tony West*, Assistant Attorney General, Civil Division; and *Jeanne E. Davidson*, Director, Commercial Litigation Branch. Of counsel on the brief was *Jonathan Zielinski*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Robert E. Lighthizer, *Jeffrey D. Gerrish*, *Ellen J. Schneider*, and *Luke A. Meisner*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, D.C., for Defendant-Intervenor.

OPINION

RIDGWAY, Judge:

This action is on remand from the Court of Appeals for the Federal Circuit. *See Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (“*Dongbu II*”). In *Dongbu I*, plaintiffs Dongbu Steel Co., Ltd. and Union Steel Manufacturing Co., Ltd. – Korean manufacturers and exporters of the subject merchandise – contested the final results of the U.S. Department of Commerce’s twelfth administrative review of the antidumping duty order covering certain corrosion-resistant carbon steel flat products from the Republic of Korea, ar-

guing that the agency improperly interpreted 19 U.S.C. § 1677(35), continuing to use zeroing in administrative reviews while discontinuing the practice in investigations. *See generally Dongbu Steel Co. v. United States*, 34 CIT ____, 677 F. Supp. 2d 1353 (2010) (“*Dongbu I*”), vacated, 635 F.3d 1363 (Fed. Cir. 2011) (“*Dongbu II*”).¹ Dongbu I rejected the Korean manufacturers/exporters’ challenge to Commerce’s use of “zeroing” in administrative reviews,² denied their Motion for Judgment on the Agency Record, and sustained Commerce’s Final Results. *See generally Dongbu I*, 34 CIT at ____, 677 F. Supp. 2d at 1362–66.³ Plaintiff Union Steel appealed, and the Court of Appeals vacated and remanded. *See Dongbu II*, 635 F.3d at 1365, 1373.

Following the Court of Appeals’ issuance of its mandate, a Motion for Scheduling of Status Conference was filed by plaintiff Union Steel and its former co-plaintiff Dongbu. *See Motion for Scheduling of Status Conference* (July 25, 2011). Thereafter, Union Steel was asked to confer with the other parties concerning the language of a proposed order remanding this matter to Commerce, and to advise as to the parties’ views concerning the right (if any) of Dongbu and former defendant-intervenor ArcelorMittal USA Inc. to participate in this action on remand from the Court of Appeals in light of the fact that Dongbu and ArcelorMittal did not participate in the appeal of *Dongbu I*. *See Order* (July 28, 2011).

The parties are not in agreement as to the proper scope of the remand to Commerce. *See Summary of Plaintiff Union Steel’s Rationale For Its Proposed Remand Order* at 1–2; Defendant’s Response to the Court’s July 28, 2011 Order at 1–2, 3; [U.S. Steel] Response to the Court’s Order of July 28, 2011 at 1. Specifically, the Government and U.S. Steel argue for language that narrowly “tracks the Federal Circuit’s final instructions regarding the scope of the remand.” Defendant’s Response to the Court’s July 28, 2011 Order at 3; *see also* [U.S. Steel] Response to the Court’s Order of July 28, 2011 at 2. Emphasizing that the Court of Appeals “did not remand with any instructions,” the Government and U.S. Steel “oppose inclusion [in the order remanding this matter to the agency] of any language

¹ *See also* Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (March 20, 2007); Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea; Notice of Amended Final Results of the Twelfth Administrative Review, 72 Fed. Reg. 20,815 (April 26, 2007).

² As the Court of Appeals has explained, “[z]eroing is the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes.” *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383 (Fed. Cir. 2011) (citing *Dongbu II*, 635 F.3d at 1366).

³ Familiarity with *Dongbu I* and *Dongbu II* is presumed.

characterizing the [Court of Appeals'] remand in any way." See Defendant's Response to the Court's July 28, 2011 Order at 3; see also [U.S. Steel] Response to the Court's Order of July 28, 2011 at 2. In contrast, Union Steel contends that the language proposed by the Government and U.S. Steel concerning the scope of the remand would improperly "give[] [Commerce] a blank check to interpret the Federal Circuit's decision in *Dongbu Steel*." Summary of Plaintiff Union Steel's Rationale For Its Proposed Remand Order at 2. Union Steel argues instead for "a remand order that includes instructions for Commerce to follow the holding of the Federal Circuit in *Dongbu Steel* as further followed and endorsed by its later decision in [*JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011)]." See Summary of Plaintiff Union Steel's Rationale For Its Proposed Remand Order at 3–4. Union Steel contends that the language of its proposed remand order "is specific and faithfully tracks the holdings of those cases by directing Commerce to do precisely what the Federal Circuit directed: Either adopt a consistent interpretation of 19 U.S.C. § 1677(35) [the zeroing statute] or else provide an explanation of why such an inconsistent interpretation is reasonable." See Summary of Plaintiff Union Steel's Rationale For Its Proposed Remand Order at 4.

The parties are even more deeply divided on the issue of former plaintiff Dongbu's right to continue to participate in this action on remand from the Court of Appeals. See generally Summary of Plaintiff Union Steel's Rationale For Its Proposed Remand Order at 2; Defendant's Response to the Court's July 28, 2011 Order at 2; [U.S. Steel] Response to the Court's Order of July 28, 2011 at 2. Specifically, Dongbu contends that it is entitled to participate. See generally Plaintiff Dongbu Steel Co., Ltd.'s Brief Regarding Its Participation in This Action on Remand; Plaintiff Dongbu Steel Co., Ltd.'s Response to the Court's September 28, 2011 Order. Dongbu reasons, among other things, that, because the Court of Appeals vacated (rather than reversed) the trial court's judgment, the action "remains pending as to all parties." Plaintiff Dongbu Steel Co., Ltd.'s Response to the Court's September 28, 2011 Order. In contrast, the Government and U.S. Steel maintain that Dongbu "is not entitled to participate in [this] remand proceeding." Defendant's Response to the Court's July 28, 2011 Order at 2; see generally *id.* at 2–4; [U.S. Steel] Response to the Court's Order of July 28, 2011 at 2–4. According to the Government and U.S. Steel, "Dongbu's participation in this case ended when it did not appeal this Court's decision [*i.e.*, *Dongbu I*] to the Federal Circuit." Defendant's Response to the Court's July 28, 2011 Order at 2;

see generally *id.* at 2–4; [U.S. Steel] Response to the Court’s Order of July 28, 2011 at 2–3. The Government and U.S. Steel conclude that Dongbu therefore “is no longer a party in this case.” Defendant’s Response to the Court’s July 28, 2011 Order at 2; see generally *id.* at 2–3; [U.S. Steel] Response to the Court’s Order of July 28, 2011 at 2–4.⁴ Union Steel has taken no position on Dongbu’s participation. ArcelorMittal has advised that it does not seek to participate further in this action. See generally [ArcelorMittal] Response to the Court’s Order of September 28, 2011.⁵

With the issues of Dongbu’s right to participate and the proper scope of the remand to Commerce in this matter still pending, a decision issued in *Union Steel*, another case before this Court, in which the court sustained Commerce’s rationale for using zeroing in administrative reviews, but not in certain types of investigations. See *Union Steel v. United States*, 36 CIT ____, 823 F. Supp. 2d 1346 (2012), *appeal docketed*, No. 2012–1248 (Fed. Cir. March 6, 2012). The judgment in *Union Steel* was promptly appealed. See *id.* In the meantime, parties in other cases involving zeroing in the context of an administrative review began seeking stays pending a final appellate determination on the issue. See, e.g., *SeAH Steel Corp. v. United States*, Consol. Court No. 11–00226 (CIT March 5, 2012) (order granting plaintiffs’ motion for stay, notwithstanding defendant’s opposition, where defendant-intervenors did not object); Order (March 13, 2012), *MCC EuroChem v. United States*, Court No. 11–00450 (CIT March 13, 2012) (order granting plaintiff’s motion for stay, notwithstanding defendant’s opposition, where defendant-intervenors did not object). Recognizing that – as in the other cases in which stays were issued – a final determination in *Union Steel* is likely to be largely, if not wholly, determinative of the zeroing issue here, resolution of the parties’ disagreement as to the scope of the remand to Commerce was deferred in the interests of judicial economy and conserving the resources of the parties.

In the intervening months, stays pending a final and conclusive

⁴ See also Defendant’s Response to the Court’s September 28, 2011 Order at 1, 4–8; Brief of Defendant Intervenor United States Steel Corporation Pursuant to the Court’s Order of September 28, 2011 at 1, 3–9.

⁵ See also Defendant’s Response to the Court’s July 28, 2011 Order at 2 (advising that “ArcelorMittal has informed the rest of the parties that it does not wish to participate” in proceedings on remand from the Court of Appeals); Summary of Plaintiff Union Steel’s Rationale For Its Proposed Remand Order at 2 n.1 (stating that ArcelorMittal “confirmed by e-mail that [it] does not intend to participate in the remand proceedings before this Court”); [U.S. Steel] Response to the Court’s Order of July 28, 2011 at 2 n.1 (setting forth U.S. Steel’s “understanding that ArcelorMittal does not intend to participate in the remand proceedings”); Order (Oct. 11, 2012) (directing that “if ArcelorMittal contends that it continues to be a party to this action, it shall file notice . . . to that effect” on or before specified date).

determination in *Union Steel* have issued in a growing number of actions, including actions in which some parties opposed the entry of a stay. See, e.g., *Apex Exports v. United States*, 36 CIT ____, ____, 2012 WL 3205488 at * 1 (2012) (entering stay over opposition of plaintiffs and defendant, where defendant-intervenor “defer[red] to the Court on the appropriateness of a stay”); *Papierfabrik August Koehler AG v. United States*, 36 CIT ____, ____, 2012 WL 6136890 at * 1 (2012) (entering stay favored by defendant-intervenor, over opposition of plaintiffs and defendant); *JTEKT Corp. v. United States*, 36 CIT ____, ____, 2012 WL 2001379 at * 1–2 (2012) (entering stay supported by all plaintiffs, over objections of defendant and defendant-intervenor); *JTEKT Corp. v. United States*, 36 CIT ____, ____, 2012 WL 2000993 at * 2 (2012) (entering stay supported by all plaintiffs, over objections of defendant and defendant-intervenor); *NSK Bearings Europe Ltd. v. United States*, 36 CIT ____, ____, 2012 WL 2001745 at * 1–2 (2012) (granting plaintiffs’ motion for stay notwithstanding opposition of defendant and defendant-intervenor); *SKF USA Inc. v. United States*, 36 CIT ____, ____, 2012 WL 1999685 at * 1–2 (2012) (granting plaintiffs’ motion for stay notwithstanding opposition of defendant and defendant-intervenor); *NTN Bearing Corp. of Am. v. United States*, 36 CIT ____, ____, 2012 WL 1999645 at * 1 (2012) (granting motion for stay filed by plaintiffs and plaintiff-intervenors, supported by defendant-intervenor but opposed by defendant); *NSK Corp. v. United States*, 36 CIT ____, ____, 2012 WL 1999641 at * 1–2 (2012) (granting motion for stay filed by plaintiffs and plaintiff-intervenors, over objections of defendant and defendant-intervenor); *SKF USA, Inc. v. United States*, Court No. 11–00343 (March 21, 2012) (order entering stay where no party objected); *myonic GmbH v. United States*, Court No. 11–00349 (CIT March 21, 2012) (order entering stay where no party objected); *Schaeffler Italia S.R.I. v. United States*, Court No. 11–00380 (CIT March 21, 2012) (order entering stay where no party objected).⁶

⁶ In at least one action, the Government argued against entry of a stay by asserting that “ordering a stay would create a ‘significant administrative burden’ for the court and the defendant, predicting a ‘deluge when all cases stayed pending *Union Steel* or other zeroing appeals become simultaneously ripe for adjudication.” *Papierfabrik*, 36 CIT at ____, 2012 WL 6136890 at * 4. But the court there concluded that, to the contrary, the effect of a stay would be to “streamline and simplify resolution of the zeroing issue, avoiding unnecessary remands and appeals.” *Id.*, 36 CIT at ____, 2012 WL 6136890 at * 4.

To be sure, applications for stays have been denied in similar circumstances in some other pending actions. See, e.g., *Fischer S.A. Comercio, Industria and Agricultura v. United States*, Court No. 11–00321 (CIT Oct. 18, 2012) (order denying plaintiffs’ motion for stay of all further proceedings where, *inter alia*, action involved two claims in addition to plaintiffs’ challenge to zeroing, and where defendant and defendant-intervenors opposed stay).

In some actions, stays pending a final determination in *Union Steel* have been entered on the motion of one or more parties. In other actions, however, the stay has been at the instigation of the court itself. *Compare, e.g., NSK Bearings Europe*, 36 CIT at ____, 2012 WL 2001745 at * 1 (granting plaintiffs' motion for stay); *NTN Bearing Corp. of Am.*, 36 CIT at ____, 2012 WL 1999645 at * 1 (granting motion for stay filed by plaintiffs and plaintiff-intervenors); *with Papierfabrik*, 36 CIT at ____, 2012 WL 6136890 at * 1 (entering stay at court's own instigation); *SKF USA, Inc.*, Court No. 11-00343 (CIT Sept. 7, 2011) (same); *myonic GmbH*, Court No. 1100349 (CIT March 21, 2012) (same); *Schaeffler Italia S.R.I.*, Court No. 11-00380 (CIT Sept. 22, 2011) (same).

Stays have been entered overruling a wide range of objections. For example, in a number of actions, the Government has argued that the plaintiff(s)/movant(s) have failed to demonstrate that proceeding with litigation will entail "clear hardship." In entering stays in such cases, courts have noted that the Government's argument misconstrues the applicable legal standard, which requires that an applicant for a stay establish "clear hardship" only where "there is . . . a fair possibility that the stay for which he prays will work damage to some one else." *See, e.g., Papierfabrik*, 36 CIT at ____, 2012 WL 6136890 at * 4 (*quoting Landis*, 299 U.S. at 255); *NSK Corp.*, 36 CIT at ____, 2012 WL 1999641 at * 2 (same). In none of the cases to date has a party opposing a stay even alleged – much less demonstrated – the possibility of any concrete, cognizable harm attendant to the stay.

In some actions, parties have opposed stays based on the procedural status of the specific case at issue. However, stays have been entered even where actions are in quite advanced stages of litigation, much as stays have been entered in actions where court proceedings have just been commenced. *Compare, e.g., Papierfabrik*, 36 CIT at ____, 2012 WL 6136890 at * 1 (explaining that, in the course of hearing oral argument, "the court requested that the parties make submissions on the question of whether the court should stay this action pending the final disposition of *Union Steel*"); *NSK Corp.*, 36 CIT at ____, 2012 WL 1999641 at * 3 (rejecting defendant-intervenor's argument that "unlike other cases stayed . . . pending the resolution of *Union Steel*, this case is under submission and awaiting the court's judgment"; explain-

It is, however, black letter law that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Thus, the decision as to whether, "[w]hen and how to stay a proceeding is within the sound discretion of the trial court." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997).

ing that “[t]he advanced stage of this litigation does not preclude a stay, and defendant-intervenor has failed to identify any harm that a stay would cause”); *NSK Bearings Europe*, 36 CIT at ____, 2012 WL 2001745 at * 3 (same); *JTEKT Corp.*, 36 CIT at ____, 2012 WL 2001379 at * 3 (noting argument of defendant-intervenor in that case that stay would be inappropriate in light of advanced stage of litigation, where “the parties have completed briefing, have commented on the [first] remand results, and are awaiting judgment of the court only”); *with myonic GmbH v. United States*, Court No. 11–00349 (CIT March 21, 2012) (action stayed after entry of scheduling order, before filing of any briefs); *MCC EuroChem*, Court No. 11–00450 (CIT March 13, 2012) (action stayed following submission of joint status report, before entry of order establishing briefing schedule).

Moreover, actions have been stayed notwithstanding the pendency of claims in addition to challenges to zeroing. *See, e.g., Papierfabrik*, 36 CIT at ____ & n.1, 2012 WL 6136890 at * 1 & n.1 (indicating that “[p]laintiffs’ complaint contains three claims, the third of which challenges the Department’s use of the ‘zeroing’ methodology”; the other two claims “challenge the failure of U.S. Department of Commerce . . . to disclose certain correspondence between members of Congress and the Secretary of Commerce” before issuance of final determination, as well as “the Department’s decision not to adjust plaintiffs’ home market prices to account for monthly home market rebates”); *Apex Exports*, 36 CIT at ____, 2012 WL 3205488 at * 2 (where complaint asserts three claims, rejecting defendant’s argument that “a decision from the Federal Circuit [in *Union Steel*] will have no bearing upon the legal merits’ of the two remaining issues in this case”); *JTEKT Corp.*, 36 CIT at ____, ____ n.4, 2012 WL 2001379 at * 2, * 1 n.4 (addressing defendant’s argument “that a stay is inappropriate because ‘in addition to Commerce’s zeroing practice, the Court must resolve a number of other issues’ relating to the Department’s model-match methodology”); *JTEKT Corp.*, 36 CIT at ____, ____ n.4, 2012 WL 2000993 at * 3, * 1 n.4 (similar); *SKF USA Inc.*, 36 CIT at ____, ____ n.2, 2012 WL 1999685 at * 3, * 1 n.2 (noting defendant’s argument that stay is “inappropriate because this case involves a second issue, plaintiffs’ challenge to Commerce’s 15-day liquidation policy”); *NTN Bearing Corp. of Am.*, 36 CIT at ____ n.3, ____, 2012 WL 1999645 at * 1 n.3, * 3 (indicating that, in addition to challenge to zeroing, “[p]laintiffs bring two other claims,” “contest[ing] . . . a U.S. Department of Commerce policy of issuing duty assessment and liquidation instructions . . . fifteen days after the publication of the final results” of an administrative review and “seek[ing] correction of what they claim is a ministerial error affecting the calculation of their

credit expenses”); *SKF USA, Inc.*, Court No. 11–00343 (CIT March 21, 2012) (entering stay, even though defendant’s papers indicate that plaintiffs’ complaint includes challenge to Commerce’s policy of issuing liquidation instructions 15 days after publication of final results, in addition to challenge to zeroing); *MCC EuroChem*, Court No. 11–00450 (CIT March 13, 2012) (entering stay, even though plaintiff’s motion for stay notes that complaint also raises a second “lesser” issue, in addition to zeroing – *i.e.*, an issue concerning “treatment of freight revenue”).⁷

The case for entry of a stay obviously is even stronger where, as here, the action has never involved any claim other than a challenge to Commerce’s construction of the statute as to zeroing, and where there exists an antecedent procedural issue (*i.e.*, former plaintiff Dongbu’s right to participate in these proceedings), which – like the zeroing issue – may well be mooted by *Union Steel*. Under these circumstances, there would be no apparent harm to any party as a result of a stay. Indeed, as in the numerous other similar cases discussed herein, the entry of a stay pending a final determination in *Union Steel* will promote the interests of judicial economy and conserve the resources of the parties as well as the court.

For all these reasons, further proceedings in this action shall be stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, 36 CIT ____, 823 F. Supp. 2d 1346, appeal docketed, No. 2012–1248.

A separate order will enter accordingly.

Dated: March 18, 2013

New York, New York

/s/ Delissa A. Ridgway

DELISSA A. RIDGWAY JUDGE

⁷ In a number of cases, stays have been entered notwithstanding arguments that the plaintiff(s) failed to exhaust their administrative remedies by properly raising their objections to zeroing at the agency level, or because the zeroing issue raised before the agency is not the precise statutory construction issue that is now before the Court of Appeals. In most such instances, the court has deferred ruling on the exhaustion argument, reasoning that it may ultimately be mooted by a final determination in *Union Steel*. See, e.g., *NSK Bearings Europe*, 36 CIT at ____, 2012 WL 2001745 at * 2; *SKF USA Inc.*, 36 CIT at ____, 2012 WL 1999685 at * 2; *NTN Bearing Corp. of Am.*, 36 CIT at ____, 2012 WL 1999645 at * 3; *NSK Corp.*, 36 CIT at ____, 2012 WL 1999641 at * 2. But see *Papierfabrik*, 36 CIT at ____, 2012 WL 6136890 at * 2–3 (discussing specific circumstances of case, and explaining that “the intervening judicial decision exception [to the exhaustion requirement] applies because there was a change in the controlling law on the use of zeroing” during relevant period). In any event, there is no exhaustion argument here.

Slip Op. 13–35

CHEMSOL, LLC, PLAINTIFF, v. CHIEF JUDGE UNITED STATES, DEFENDANT

Before: Donald C. Pogue,
Court No. 11–00516

MC INTERNATIONAL, LLC, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 11–00517

[Defendant's motion to dismiss is GRANTED.] Dated: March 20, 2013

Dated: March 20, 2013

George W. Thompson, and *Russell A. Semmel*, Neville Peterson LLP, of New York, NY, for the Plaintiffs.

Justin R. Miller, *Michael Panzera*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs were, *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, and *Michael Panzera*, Office of the General Counsel, United States Trade Representative.

OPINION**Pogue, Chief Judge:**

In these actions, Plaintiffs MC International, LLC (“MCI”) and Chemsol, LLC challenge the United States Customs and Border Protection’s (“Customs”) extension of the statutory liquidation period for their entries of citric acid. Plaintiffs seek relief declaring the extensions unlawful such that the entries have therefore been “deemed” liquidated by operation of law. The Defendant moves to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1) or, in the alternative, for failure to state a claim under USCIT Rule 12(b)(5). Defendant’s Memorandum in Support of Its Motion to Dismiss - MCI, ECF No. 23, at 1 (“Def. Mem. Supp. Mot. Dismiss MCI”); Defendant’s Memorandum in Support of Its Motion to Dismiss - Chemsol, ECF No. 23, at 1 (“Def. Mem. Supp. Mot. Dismiss Chemsol”).

Because the statutory review process for challenging liquidation of Plaintiffs’ entries under sections 514 and 515 of the Tariff Act of 1930, 19 U.S.C. § 1515–16,¹ and 28 U.S.C. 1581(a), provides an adequate remedy for Plaintiffs claims, the government’s motion to dismiss for lack of subject matter jurisdiction is granted.

¹ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

BACKGROUND

Under 19 U.S.C. § 1504(a), Customs generally has one year within which to liquidate entries. If Customs fails to liquidate the entries during that one year period, the entries liquidate by force of law, that is, they are deemed liquidated. Entries that are deemed liquidated are assessed at the duty rates asserted by the importer of record at the time of entry. 19 U.S.C. § 1504(a). Before the one year time period elapses, however, Customs may extend the time in which it may liquidate an entry. Customs may only extend the time period for liquidating an entry three times, resulting in a total of four potential years before the entry will liquidate by operation of law. 19 U.S.C. § 1504(b);² 19 C.F.R. § 159.12(f).

The entries at issue in this proceeding were imported by MCI and Chemsol (“Plaintiffs”). Specifically, during 2009-2010, MCI made thirteen consumption entries consisting of citric acid from India.³ During 2009, Chemsol made six consumption entries consisting of citric acid from the Dominican Republic.⁴ *Id.* at ¶ 19.

In 2010, U.S. Immigration and Customs Enforcement (“ICE”)⁵ and Customs initiated an investigation to determine whether Chinese citric acid was being transshipped through other countries to evade antidumping and countervailing duties. Def. Mem. Supp. Mot. Dismiss MCI at 2; Def. Mem. Supp. Mot. Dismiss Chemsol at 2. Pursuant to this investigation, Customs issued several requests to Plaintiffs for information (RFIs) for the entries at issue and notices of action (NOAs) for certain of the entries. MCI Compl. ¶¶ 14, 16; Chemsol Compl. ¶ 13; Def. Mem. Supp. Mot. Dismiss MCI at 2; Def. Mem. Supp. Mot. Dismiss Chemsol at 2. Plaintiffs allege that they provided a comprehensive response to each RFI and NOA. MCI Compl. ¶¶ 28, 33, 35, 40, 42; Chemsol Compl. ¶¶ 23, 24, 29. Nonetheless, citing the

² In relevant part, § 1504(b) provides that “[t]he Secretary of the Treasury may extend the period in which to liquidate an entry if . . . the information needed for the proper appraisal or classification of the imported . . . merchandise, . . . or for ensuring compliance with applicable law, is not available to the Customs Service. . . .”

³ Port of Houston entries: 231-9117008-6 (“A”), 231-9117479-9 (“B”), 231-9121489-2 (“C”), 231-9122919-7 (“D”), 231-9123057-5 (“E”), 231-9124127-5 (“F”), 231-9124712-4 (“G”), 231-9125025-0 (“H”), 231-9127234-6 (“I”), 231-9128716-1 (“J”); Port of Chicago entries: 231-9124126-7 (“K”), 231-9126354-3 (“L”); Port of Savannah entry: 231-9129043-9 (“M”).

⁴ Port of Houston entries: 791-6466126-0 (“A”), 791-6563184-1 (“B”), 791-6628591-0 (“C”), 791-6669107-5 (“D”), 791-6720537-0 (“E”), 791-6975108-2 (“F”).

⁵ ICE is the enforcement division of the Department of Homeland Security and is responsible for investigating, among others, alleged customs fraud. See Pub.L. No. 107-296, § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308, effective March 1, 2003; H.R. Rep. No. 37, 108th Cong. at 26, 1st Sess. 2003.

continuing investigation, Customs extended the deadline for liquidation on Plaintiffs' entries, in some cases more than once.⁶

Faced with Customs' extensions, MCI and Chemsol commenced this suit claiming that the extensions were unlawful and void under 19 U.S.C. § 1504(b) and seeking declaratory relief stating that the entries have been deemed liquidated pursuant to 19 U.S.C. § 1504(a). MCI Compl. ¶¶ 3–4; Chemsol Compl. ¶¶ 3–4. Plaintiffs assert that the court has jurisdiction under 28 U.S.C. § 1581(i)(4).⁷ As noted above, the government contends that the actions should be dismissed for lack of subject matter jurisdiction or for failure to state a claim. Def. Mem. Supp. Mot. Dismiss MCI at 1; Def. Mem. Supp. Mot. Dismiss Chemsol at 1. Specifically, in its motion, Defendant claims that Plaintiffs cannot assert § 1581(i) jurisdiction but rather must wait until Customs affirmatively liquidates the entries and then file a protest and subsequently seek review of any denial of the protest pursuant to 28 U.S.C. § 1581(a) (2006).⁸ Def. Mem. Supp. Mot. Dismiss MCI at 6; Def. Mem. Supp. Mot. Dismiss Chemsol at 6. Defendant additionally contends that the actions should be dismissed for failure to state a claim under USCIT Rule 12(b)(5) because affirmative liquidation is an element of a claim under 19 U.S.C. § 1514(a) and that element has not yet been satisfied. Def. Mem. Supp. Mot. Dismiss MCI at 16; Def. Mem. Supp. Mot. Dismiss Chemsol at 16.

In the time that has elapsed since the commencement of this action, ICE has completed its investigation and, but for Plaintiffs' suit, Customs could complete its administrative process and liquidate Plain-

⁶ Customs extended the deadline for liquidation once for all of MCI's entries, a second time for Entries A-K, and a third time for Entry A. Def. Mem. Supp. Mot. Dismiss at "Exhibit A." Following the second set of extensions, Customs did not issue any further RFIs or NOAs to MCI prior to extending the deadline for liquidation for Entry A the third time. MCI Compl. ¶ 39. With regards to Chemsol's entries, Customs extended the time frame for liquidation twice and Chemsol's Entries A and B were extended a third time. Chemsol Compl. ¶¶ 22, 25, 28, 30.

⁷ In relevant part, § 1581(i) provides that "[i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. . . ."

⁸ Section 1581(a) provides exclusive jurisdiction for this court to review civil actions commenced to "contest the denial of a protest" which is filed with Customs pursuant to 19 U.S.C. § 1514 and § 1515.

tiffs' remaining entries. Def.'s Resp. to the Court's Feb. 28, 2013 Inquiry, ECF No. 49 at 1–2. In addition, a few of Plaintiffs' entries auto-liquidated duty free in Plaintiffs' favor and are therefore moot. *Id.*

STANDARD OF REVIEW

Plaintiffs bear the burden of establishing jurisdiction. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (“[the] party seeking the exercise of jurisdiction in its favor[,] has the burden of establishing that [] jurisdiction exists.”) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)). Specifically, the party seeking jurisdiction under 1581(i) has the burden of showing that jurisdiction under any other section of 1581 is manifestly inadequate. *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549–51 (Fed. Cir. 1983); 5 U.S.C. § 704 (“[F]inal agency action . . . for which there is no other adequate remedy” is subject to judicial review).

Unless jurisdictional facts are in dispute, the basis of the court's determination is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference. *See Asahi Seiko Co. v. United States*, Slip Op. 09–131, 2009 WL 3824745 at *4 (CIT Nov. 16, 2009) (citing *Allen v. WestPoint–Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)).

When reviewing a motion to dismiss for failure to state a claim, the court “must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff.” *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)).

To survive a motion to dismiss for failure to state a claim, “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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief. *Id.* at 678.

DISCUSSION

This court's jurisdiction is set forth in 28 U.S.C. §§ 1581(a)-(i). The provision under which Plaintiffs have brought their claim, § 1581(i), is considered the “residual jurisdictional provision” and while it is “broad” in scope, it is well settled that Congress did not intend for it to be used if jurisdiction has been, is, or could be available under another sub-section of § 1581. *See Hartford Fire Ins. Co. v. United*

States, 544 F.3d 1289 (Fed. Cir. 2008) (citing *Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). Faced with the availability of the review process specified in Sections 1581(a)-(h), the party seeking judicial review must establish a reason to avoid use of those provisions, such as futility or the inadequacy of the available administrative remedy. See CHARLES H. KOCH, JR., ADMIN. L. & PRAC. § 12.22 (3d ed.). As a result, to repeat, this court will not entertain a claim under § 1581(i) where “another subsection of 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate.” *Hartford Fire Ins. Co. v. United States*, 544 F.3d at 1292; *Int'l Custom Prods. Inc. v. United States*, 467 F.3d at 1327.

In addition, when considering whether to assert jurisdiction under § 1581(i), the Court of Appeals has instructed this Court to look to “the true nature of the action” at the outset of a proceeding in order to determine which avenue of review is appropriate. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (citation omitted).

Here, the true nature of Plaintiffs’ action is a challenge to Customs’ extensions of the time for liquidation. But Customs’ actions, as alleged in Plaintiffs’ complaints, are well within the four-year period allowed for extensions; Customs continues to actively investigate the appropriate liquidation for the entries. Upon conclusion of that process and liquidation of the entries, the importers will have ample opportunity to raise any issues through the protest and judicial review process that culminates in § 1581(a). Section 1514(a) lists the decisions of Customs that may be the subject of protests. Included are decisions relating to “the liquidation or reliquidation of an entry.” 19 U.S.C. § 1514(a)(5). It is therefore clear that the Plaintiffs’ challenge to Customs’ extensions of the time for liquidation may be brought, after liquidation, by filing a protest and obtaining jurisdiction in this court under Section 1581(a). *Hilsea Investment Ltd. v. Brown*, 18 CIT 1068, 1071 (1994) (“the court can review interlocutory decisions subsumed in the final determination, including those related to methodology or procedure”); 19 U.S.C. § 1514(a)(5) (permitting review of any order or finding upon challenge to liquidation); 5 U.S.C. § 704 (“A preliminary, procedural, or intermediate agency action . . . not directly reviewable is subject to review on the review of the final agency action”). Thus § 1581(a) provides a complete and adequate remedy for any challenge to Customs’ extensions after liquidation is complete.

Arguing that this Court must entertain their complaint in this case under § 1581(i), Plaintiffs claim that their case is controlled by *Ford Motor Co. v. United States*, 688 F.3d 1319 (Fed. Cir. 2012) (“*Ford*”). In

Ford, the Court of Appeals for the Federal Circuit held 1581(i) jurisdiction appropriate for a deemed liquidation claim in which agency inaction was at issue. The Plaintiff had filed reconciliation entries with Customs, claiming a refund on overpayment of duties on its imports of Jaguar brand automobiles. Customs had not liquidated Ford's entries at the time the complaint was filed in the CIT and the initial one year time period for liquidation had passed. Ford sought a declaratory judgment that its entries were deemed liquidated by operation of law. The CIT declined to take jurisdiction under § 1581(i), stating that the entries must be liquidated and protests filed pursuant to § 1581(a). *Ford Motor Co. v. United States*, __ CIT __, __, 716 F. Supp. 2d 1302, 1311 (2010). The Court of Appeals reversed the CIT's holding that jurisdiction was not available under § 1581(i) on the basis that § 1581(a) jurisdiction was inadequate to address Customs' failure to act. The appeals court noted that at the time the lawsuit was initiated, none of the liquidations had yet occurred, *Ford*, 688 F.3d at 1323–24, and the § 1581(a) remedy was therefore not available. *Ford*, 688 F.3d at 1328.

Plaintiffs claim that *Ford* is controlling because the CIT acknowledged, albeit in dicta, that Customs attempted to extend the liquidation period and the CAFC did not overrule that portion of the CIT's opinion. But this reliance is unavailing. In *Ford*, the true nature of the Plaintiff's claim was a challenge seeking a declaration that Customs' inaction had caused the entries to be deemed liquidated. Notably, the Plaintiff's Complaint in *Ford* alleges that Customs did not extend the liquidation period whereas here, both Plaintiffs acknowledge that Customs acted to extend the liquidation period. Ford Second Amend. Compl., Court No. 09–00151, ECF 19 ¶ 68; MCI Compl. ¶ 3, and Chemsol Compl. ¶ 3.

The Court of Appeals, in *Ford*, did not face a scenario such as that presented here, where Plaintiffs acknowledge that Customs has taken affirmative action to extend the liquidation time period. Here, Customs has not extended liquidation beyond the four-year period and then failed to respond to importer inquiries about the status of entries. Rather, Customs' act of extending the liquidation period – and the administrative protest that Plaintiffs may file once its entries have liquidated – is precisely the type of agency action that is remediable by § 1581(a). See *United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1409–10 (Fed. Cir. 1988) (“All findings involved in a district director's decision merge in the liquidation. It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers.”) (internal quotation marks and citation omitted);

Dal-Tile Corp. v. United States, 24 CIT 939, 945 n.12, 116 F. Supp. 2d 1309, 1314–15 (2000).

It is therefore apparent that this Court should not entertain Plaintiffs' complaint here under § 1581(i). Final agency action has not occurred and the record shows that Customs' investigation continues to be active and has not lapsed into inactivity as it did in *Ford*. The matter can be brought under § 1581(a) after the Plaintiffs' entries have liquidated and Plaintiff has filed an administrative protest, should it continue to feel at that point in time that it has been injured. See *Hartford Fire*, 544 F.3d at 1292. In this context, Plaintiffs cannot claim that the § 1581(a) remedy is manifestly inadequate as there is no meaningful assertion of harm in letting Customs process and liquidate their entries.

Plaintiffs asserted during oral arguments that Customs' demonstrated inactivity was sufficient to bring their case under § 1581(i) when it failed to request further information upon the second and third extensions. This argument is unavailing. The governing statute merely states that Customs "may extend the period in which to liquidate an entry if [] the information needed . . . is not available." 19 U.S.C. § 1504(b)(1). It does not specify from whom Customs must obtain the information. Because the statute does not limit Customs' sources of information, it therefore should be construed as encompassing whatever data is "reasonably necessary for proper appraisal or classification" and not limited solely to information from the Plaintiffs. See *Detroit Zoological Soc.'y v. United States*, 10 CIT 133, 138, 630 F. Supp. 1350, 1356 (1986); see also, *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993) (Customs' decisions carry a presumption of correctness which Plaintiffs may rebut with a preponderance of the evidence).

It is also important that, here, Customs' reason for extending the liquidation period for Plaintiffs' imports is to allow ICE time to conclude its investigation of possible transshipment of goods. To allow Plaintiffs to interrupt the administrative process currently underway by providing declarative relief would severely undermine Customs and ICE's ability to conduct meaningful investigations into possible fraudulent activity. Therefore, the court declines to entertain Plaintiffs' case under § 1581(i) and holds that Plaintiffs must wait until Customs concludes the investigation currently underway and file a protest before refiling this case under § 1581(a). See *Hartford Fire*, 544 F.3d at 1292.

The court does not rely solely on the nature of Customs' investigation, but rather on Customs' broad discretion concerning whether a liquidation extension is warranted and the presumption that its de-

cisions are proper. *St. Paul Marine & Fire Ins.*, 6 F.3d at 768. At this point in the proceedings, before discovery has taken place and, indeed, when the record is not yet fully developed because Customs has not completed its decision-making process, the court finds no basis to accept Plaintiffs' conclusory claims that Customs' extensions are invalid and an abuse of discretion.

Other decisions of this Court do not require a contrary result. In *Ford Motor Co. v. United States*, __ CIT __, 806 F. Supp. 2d 1328 (2011) ("*Ford II*"), the Court of International Trade permitted an importer to bring a deemed liquidation claim in an action for declaratory judgment under 28 U.S.C. § 1581(i). But there Customs had also lapsed into inaction and failed to affirmatively liquidate the drawback entries at issue, some of which were nearly 15 years old. The plaintiff therefore continued to face liabilities of uncertain magnitude and duration. *Ford II*, 806 F. Supp. 2d at 1334. In those circumstances, the court held that requiring the plaintiff to wait for affirmative liquidation and then protest the liquidation under 19 U.S.C. § 1514, and, if Customs denied the protest, challenge that denial under 28 U.S.C. § 1581(a), would not provide an adequate remedy. *Id.* at 1336. Clearly, *Ford II* did not involve the kind of on-going administrative dispute about extensions that is at issue here.

Similarly in *Fujitsu Gen. Am., Inc. v. United States*, 24 CIT 733, 110 F. Supp. 2d 1061 (2000), aff'd 283 F.3d 1364 (Fed. Cir. 2002), the court stated in dicta that where an importer believes its entries were deemed liquidated under § 1504(d), and Customs has not actively liquidated the entries, the importer's only remedy is to seek a declaratory judgment confirming that there was a deemed liquidation under 28 U.S.C. § 1581(i). *Id.* at 739, 110 F. Supp. 2d at 1069. But the court in *Fujitsu* was considering whether jurisdiction would be appropriate after the administrative process had been completed for entries which were initially suspended from liquidation and then liquidated over a year after the suspension was lifted in violation of the timing requirement under § 1504(d). *Id.* at 7379, 110 F. Supp. 2d at 1067–68. This situation is also unlike that at issue here.

Finally, the court observes that in prior cases where the court has heard challenges to Customs' extensions of liquidation due to ongoing fraud investigations, it has done so under 1581(a). See *Ford Motor Co. v. United States*, 286 F.3d 1335, 1343 (Fed. Cir. 2002) (finding that Customs abused its discretion in extending the liquidation period when the record showed that the 44 month investigation period contained 36 months of inactivity). This case is therefore dismissed to

allow Customs to complete the liquidation process and for Plaintiffs to file an administrative protest, should they so choose.⁹

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is **GRANTED**. Plaintiffs' complaints are dismissed. Judgment will be entered accordingly.

Dated: March 20, 2013

New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 13–36

LINK SNACKS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 09–00304

[Summary judgment denied for Plaintiff; summary judgment granted for Defendant.]

Dated: March 20, 2013

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for Plaintiff Link Snacks, Inc.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge. Of Counsel was *Sheryl French*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Gordon, Judge:

This case is before the court on cross-motions for summary judgment. See Pl.'s Mot. for Summ. J., ECF No. 41 ("Pl.'s Br."); Def.'s Cross-Mot. for Summ. J. and Resp. to Pl.'s Mot. for Summ. J., ECF No. 46. Plaintiff Link Snacks, Inc. ("Link Snacks"), challenges the decision of Defendant U.S. Customs and Border Protection ("Customs") denying Link Snacks' protests of Customs' classification of the imported beef jerky within the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs classified the merchandise as "[c]ured or pickled" under subheading 1602.50.09 of the HTSUS,

⁹ Because this case is dismissed pursuant to USCIT Rule 12(b)(1), the court does not reach the Defendant's motion to dismiss under USCIT Rule 12(b)(5).

which carries a 4.5% duty rate. Plaintiff claims that the merchandise is properly classified as “[o]ther” under subheading 1602.50.2040 of the HTSUS, which carries a 1.4% duty rate. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006). For the reasons set forth below, Defendant’s motion for summary judgment is granted, and Plaintiff’s motion is denied.

I. Undisputed Facts

The following facts are not in dispute. *See* Joint Statement of Undisputed Facts, ECF No. 60 (“Undisputed Facts”). Jacks Links New Zealand, a related company in New Zealand, manufactured the subject beef jerky products that were imported at the Port of Long Beach in Court No. 09–00304. Ferreira International, LTDA, a related company in Brazil, manufactured the subject beef jerky products that were imported at the Ports of JFK and Long Beach in Court No. 09–00464. The subject beef jerky consists of sliced, cooked, cured, and dried meat seasoned with salt and other spices and flavors. The subject beef jerky products do not contain cereal or vegetables.

To process and manufacture the beef jerky at issue, the following steps are taken. First, boneless beef is purchased from a Brazilian USDA approved meat supplier (takes 1 minute to 2 days, depending on negotiations). Next, the boneless beef is inspected by Quality Control for wholesomeness upon receiving it (30 minutes per delivered load). The boneless beef is then sliced (4 to 5 hours per 20,000 pounds). It is then placed into a sanitary stainless steel vacuum tumbler for 20 minutes. Seasoning, sodium nitrite, and water are then added to the vacuum tumbler (5 minutes). The meat and the ingredients are then tumbled under vacuum for 8 to 15 minutes. The meat is then allowed to cure for 24 to 48 hours. Subsequently, the meat is placed on sanitary stainless steel hanging rods (4 to 5 hours per 20,000 pounds). The meat, still containing the rods, is then placed on stainless steel smokehouse trucks (4 to 5 hours per 20,000 pounds). The smokehouse trucks are then placed in sanitary stainless steel smokehouses (20 minutes to load 1 house). The product is then cooked with smoke cycle and smoked until all the USDA Appendix A requirements are met (3 to 6 hours). The product is then removed from the smokehouse and cooled (30 to 60 minutes). The cooled product is removed from the stainless steel rods and placed into USDA approved sanitary containers (6 hours per 10,000lbs).

The cooked jerky is then placed into a protective liner bag (6 hours per 10,000lbs). The protective liner bag is placed into a barrier plastic bag (6 hours per 10,000lbs). Oxygen scavengers are then placed into the barrier bag, most of the air is removed, and the bag is hermeti-

cally sealed (6 hours per 10,000 lbs).¹ The hermetically sealed bag is placed into a cardboard shipping container with all the pertinent Brazilian and USDA required labels (6 hours per 10,000 lbs). The boxed jerky is then placed into 20 or 40 foot shipping containers (30 minutes to 1 hour). Thereafter, the shipping containers go to the export port (3 to 5 hour drive depending on traffic).

The imported beef jerky is shelf-stable for 18–20 months. The parties agree that the subject beef jerky is classified under subheading 1602.50, HTSUS, as “Other prepared or preserved meat, meat offal or blood: Of bovine animals.”

II. Standard of Review

The court reviews Customs’ protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when “there is no genuine issue as to any material fact” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id.*

When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

While the court accords deference to Customs classification rulings relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS

¹ For purposes of this litigation only, the Government does not contest whether the imported merchandise is in airtight containers.

terms.” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

III. Discussion

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory Notes published by the World Customs Organization. *Id.* “GRI 1 is paramount . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . .” *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012).

Pursuant to GRI 1, merchandise that is described “in whole by a single classification heading or subheading” is classifiable under that heading. *CamelBak Prods. LLC v. United States*, 649 F. 3d 1361, 1364 (Fed. Cir. 2011). GRI 1 is applied as a substantive rule of interpretation when an imported article is described in whole by a single classification heading or subheading. If that single classification applies, the succeeding GRIs are inoperative. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). Here, GRI 1 resolves the classification of Link Snacks’ beef jerky, and the court, does not reach Link Snacks’ other arguments under subsequent GRIs. *See* Pl.’s Br. at 7–10; Pl.’s Supp. Legal Mem. at 6, ECF No. 66 (“Pl.’s Supp. Br.”).

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the term as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Harmonized Description and Coding System’s Explanatory Notes (“Explanatory Notes”) “accompanying a tariff subheading, which—although not controlling—provide interpretive guidance.” *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The question before the court is whether Link Snacks’ beef jerky is properly classified under HTSUS 1602.50.09 as “cured” prepared or preserved beef, or under HTSUS 1602.50.2040 as “other” prepared or preserved beef. The common and commercial meaning of “cured” is the addition of salt and nitrate/nitrite to meat. *See* Andrew Milkowski Expert Report, Ex. 3, 8, ECF No. 41 (“ . . . the modern definition of

curing involves the addition of nitrite. . . . “Two main ingredients must be used to cure meat: salt and nitrate.”) (citing Hedrick, H. B., Aberle, E.D. Forreset, J.C. Judge, M.D. Merkel, R.A. *Principles of Meat Science*. Dubuque: Kendall/Hunt Publishing Company, 1994, p.134.); Wedliny Domowe, Ex. H, ECF No. 46 (“Curing is adding salt and nitrates/nitrites to meat. If you use only salt it is called salting. If you use salt and water it is called brining. The moment you add nitrates and salt to meat it is considered curing.”); Dep. of Donald Thomas, Ex. G, 33, ECF No. 46 (“[A] classical meat science definition of curing is [the 24 to 48 hour period that Link Snacks’ beef was in a sodium nitrite] solution.”). Link Snacks also concedes that its “beef jerky undergoes a curing process in its initial stages of production.” Pl.’s Br. at 8; see also Undisputed Facts, para. 3, 7 (“The subject beef jerky consists of . . . cured . . . meat . . . The meat is then allowed to cure for 24 to 48 hours.”).

This is enough for Defendant, which makes the simple, straightforward argument that Link Snacks’ beef jerky must therefore be classified as “cured.” The court, for its part, acknowledges the attractive simplicity to this classification of the subject merchandise, one that is difficult to overcome. Link Snacks, nevertheless, offers a creditable attempt by focusing on the common and commercial meaning of “beef jerky,” which it contends is much more than simply “cured” beef.

Link Snacks argues that the further process of dehydration changes the cured beef to a completely different product, beef jerky, and that it should therefore be classified as “other” under HTSUS 1602.50.2040. It contends that Customs “seeks to define beef jerky entirely by the fact that it is dipped in a curing solution, and to ignore entirely the further processing that gives beef jerky its new identity as a finished article.” Pl.’s Supp. Br. at 11. Link Snacks explains that beef jerky is dried beef that varies greatly with “common cured processed meats such as ham, bacon and hot dogs . . .” *Id.* at 9–11 (“[T]he defining characteristic of beef jerky is its dried state.”).

Plaintiff explains that unlike ham, bacon, and hot dogs, which are highly perishable, beef jerky is not. “Without refrigeration, these processed meats [ham, bacon and hot dogs] would only last 1 to 2 days before spoiling and developing contaminants that could cause serious illness.” *Id.* at 9. In contrast, beef jerky can last for months at room temperature and 12 months or longer if vacuum packaged. *Id.* at 10. Further, beef jerky has a lower moisture to protein ratio (MPR) than the other identified cured meats. Specifically, beef jerky has a 0.75 to 1 MPR, while cooked ham has a 3.75 to 1 MPR, and a typical hot dog or bologna product has a 5 to 1 MPR. *Id.* at 9–10. Link Snacks explains that because water is added to those products to improve

palatability, it is common to visibly see volumes of water when opening the packaging of these products, while water is indiscernible to the naked eye in beef jerky. *Id.* at 10.

Next, Link Snacks relies on the U.S. Department of Agriculture's ("USDA") Food Standards and Labeling Policy Book's description of beef jerky to argue that it is not "cured" meat. The USDA provides the following under "Jerky : [a]ll Jerky products must have a MPR of 0.75:1 or less . . . Products may be cured or uncured, dried, and may be smoked or unsmoked, air or oven dried." Pl.'s Supp. Br. at 12 (citing Pl.'s Br. Ex. 5). Therefore, Link Snacks argues that beef jerky cannot be "cured" beef because curing is optional for beef jerky. Pl.'s Supp. Br. at 12. Link Snacks' beef industry expert, Dr. Andrew Milkowski, also explains that there are uncured commercial beef jerky products sold in the United States, which he has personally purchased and examined. *Id.* His review of the uncured beef jerky reveals that it has the "same range of salt, moisture and water activity as the cured Jack Link's[sic] representative product." *Id.* Dr. Milkowski states that the "water activity of all the samples satisfies the federal requirements for a product that is labeled as a shelf stable product such as beef jerky." *Id.* Last, Link Snacks distinguishes beef jerky from cured meat by relying on the USDA regulation, 9 C.F.R. § 94.4, which prohibits the importation of cured or pickled products from certain countries because of rinderpest or foot and mouth disease, yet allows dehydrated products because they are preserved by a different process than cured beef. Specifically, the regulation permits the importation of meats that have been "thoroughly cured and fully dried. . . ." 9 C.F.R. § 94.4(a)(3)(i). Link Snacks contends that the regulation "acknowledges by its very terms that "cured" and dried" are different processes and the latter is not encompassed by the former . . ." Pl.'s Supp. Br. at 13. Therefore, Link Snacks argues that beef jerky, whose intrinsic quality is its dried state, is a separate, distinct product from "cured" beef.

These are strong arguments that beef jerky is a product defined more by its dehydration than its curing. With that said, however, the court is not persuaded they are sufficient to overcome the otherwise simple and straightforward HTSUS classification for "cured" beef that depends not on dehydration processes or specific measures like MPR, but instead on the more general characteristic of whether beef is "cured." Plaintiff's beef jerky is cured. The HTSUS classification of "cured" beef encompasses all sorts of beef products, and does not draw distinctions based upon MPR or dehydration processes. The court is reluctant to impose such distinctions not found in the HTSUS. Here,

the “[c]ured” subheading, 1602.50.09, is an *eo nomine* provision that “include[s] all forms of the named article,” even improved forms.” *Carl Zeiss*, 195 F.3d at 1379. Therefore, although Plaintiff’s beef jerky may specifically be defined by a preservative process of dehydration yielding a product with a relatively low MPR, that beef jerky, nevertheless, remains “cured” within the meaning of the HTSUS. Accordingly, the court agrees with Customs that the correct classification of Plaintiff’s beef jerky is under HTSUS 1602.50.09, “[c]ured” beef.

III. Conclusion

The court will therefore enter judgment denying Plaintiff’s motion for summary judgment, and granting Defendant’s motion for summary judgment.

Dated: March 20, 2013

New York, New York

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



Slip Op. 13–37

RIDDELL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 09–00416

[On classification of certain football jerseys, pants, and girdle shells, summary judgment granted for Defendant; summary judgment denied for Plaintiff.]

Dated: March 20, 2013

Daniel J. Gluck, Christopher M. Kane, Joel K. Simon, Scott Zarin, and Mariana del Rio Kostenwein, Simon Gluck & Kane LLP, of New York for Plaintiff Riddell, Inc.

Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for Defendant United States. With her on brief was *Alexander Vanderweide*, Trial Attorney. Also with her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel was *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York.

OPINION

BARZILAY, Senior Judge:

This consolidated case is before the court on cross-motions for summary judgment. Plaintiff Riddell, Inc. (“Riddell”), challenges the decision of Defendant U.S. Customs and Border Protection (“Customs”) denying Riddell’s protest of Custom’s classification of its football pants, jerseys, and girdle shells within the Harmonized Tariff

Schedule of the United States (“HTSUS”). Customs classified the subject merchandise as “articles of apparel” and rejected Riddell’s proposed classification of the merchandise as “sports equipment.” More specifically, Customs classified (1) the football pants in Court No. 07–00413 under subheading 6114.30.30 of the HTSUS, which carries a 14.9% *ad valorem* duty; the football pants in Court No. 09–00416 under subheading 6203.43.40 of the HTSUS, which carries a 27.9% *ad valorem* duty; (2) the football jerseys under subheading 6110.30.30 of the HTSUS, which carries a 32% *ad valorem* duty; and (3) the football girdles under subheading 6207.19.90 of the HTSUS, which carries a 10.5% *ad valorem* duty. Plaintiff, however, claims that all the merchandise is properly classified under subheading 9506.99.20 of the HTSUS, which is duty free.¹ The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, Defendant’s motion for summary judgment is granted and Plaintiff’s motion is denied.

I. STANDARD OF REVIEW

The court reviews Customs’ protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when “there is no genuine dispute as to any material fact . . .” USCIT R. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 253–54.

A classification decision involves two steps. The first addresses the proper meaning of the relevant tariff provisions, a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step determines the nature of the imported merchandise and is a question of fact. *See id.* When there is no factual dispute regarding the merchandise, as is the case here, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998).

While the court accords deference to Customs’ classification rulings

¹ Riddell abandoned its claims with respect to “scrimmage vests,” Pl. Br. 13, and “padded football girdles.” *See* Notice of Withdrawal of Arguments and References to Padded Football Girdles, ECF Docket Entry No. 52 (Sept. 14, 2012).

relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms.” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

II. UNDISPUTED FACTS

The following facts are not in dispute. Riddell’s football pants are made of polyester (and spandex) and include only youth (12 or 13 years old) sizes. They include game and practice pants. They contain four interior sleeves specifically designed to hold in place two thigh pads and two knee pads. The pants are also designed to hold in place (around a football player’s waist) two hip pads and one tail pad. As imported, though, the pants do not contain pads or padding. They have an open crotch (laced-closed with heavy strings), prominent inside stitching, and fall just below the knee area. Tight elastic closures maintain a close fit under the knee. The pants are cut larger to accommodate the insertion of padding and other protective articles such as an athletic cup.

Riddell’s football jerseys are made of knit mesh (100% polyester), with a V-shaped neck opening, elasticized short sleeves and hemmed bottom. They include both youth and adult sizes. The jerseys are constructed with extra room in the shoulders, chest, and back to accommodate shoulder pads. The jerseys hold the shoulder pads snugly to the upper body. They also have substantial stitching and extra material at the shoulders to maintain the integrity of each jersey during full-contact organized football. As imported, the jerseys do not contain shoulder pads or other padding.

Riddell’s football girdles (shells) are made of polyester and contain several internal pad sleeves for insertion of hip and tail pads. The girdles fit snugly around the pelvic area and are worn underneath football pants. As imported, the girdle shells do not contain padding.

III. DISCUSSION

The “General Rules of Interpretation (“GRIs”) govern classification of merchandise under the HTSUS, and are applied in numerical order.” *Honda of Am. Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (internal quotations and citations omitted). “What is clear from the legislative history of the World Customs Organization (“WCO”) and case law is that GRI 1 is paramount.” *Telebrands Corp. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1277, 1280 (2012).

When determining the correct classification for merchandise, a court first construes the language of the headings in question, in light of any related section or chapter notes. *See* GRI 1; *Faus Grp., Inc.*, 581 F.3d at 1372 (citing *Orlando Food Corp.*, 140 F.3d at 1440). Similarly, GRI 6 states that “classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, *mutatis mutandis*, to the above rules.” GRI 6. The “terms of the HTSUS are construed according to their common commercial meanings.” *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). To ascertain the common commercial meaning of a tariff term, the court “may rely on its own understanding of the term as well as lexicographic and scientific authorities.” *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Harmonized Description and Coding System’s Explanatory Notes (“Explanatory Notes”) “accompanying a tariff subheading, which—although not controlling—provide interpretive guidance.” *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The dispute in this case concerns whether Riddell’s football pants, jerseys, and girdle shells are properly classified as “articles of apparel” under HTSUS Chapters 61 and 62 or “sports equipment” under the HTSUS Chapter 95. The pertinent parts of Chapters 61, 62 and 95 of the HTSUS provide:

6110 Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted:

6110.30	Of man-made fibers:	
6110.30.30	Other.....	32%
*	*	*

6114 Other garments, knitted or crocheted:

6114.30	Of man-made fibers:	
6114.30.30	Other:.....	14.9%
*	*	*

6212 Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted:

6212.20.00	Girdles and panty-girdles.....	20%
*	*	*

9506 Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:

9506.99	Other:	
9506.99.20	Football, soccer and polo articles and equipment, except balls, and parts and accessories thereof.....	Free

HTSUS subheadings 6110.30.30, 6114.30.30, 6212.20.00, 9506.99.20. The subheadings are *eo nomine* provisions, or more simply, provisions “that describe[] an article by a specific name, not by use.” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)); see also *HIM/Fathom, Inc. v. United States*, 21 CIT 776, 783, 981 F. Supp. 610, 617 (1997) (“[T]he garment provisions involved, Chapters 61 and 62, are not use provisions.”). Absent limiting language or contrary legislative intent, an *eo nomine* provision covers all forms of the named article. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).

Plaintiff argues that the subject merchandise “must be classified under HTSUS 9506, based upon . . . *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246 (Fed. Cir. 2004) (“[*Bauer*]”), where hockey pants used in competitive sports with both removable and non-removable belt and padding were classified by the Court as ‘sports equipment,’ classifiable under 9506.99.25, HTSUS and under *Lemans Corp. v. United States*, 660 F.3d 1311 (Fed. Cir. 2011) (“*Lemans*”), which differentiated articles of general apparel from articles and equipment for athletics or outdoor sports classified under 9506.99.25, holding that motorcycle jackets and pants were more like, and properly classifiable as, general apparel, and were therefore not *prima facie* classifiable as sports equipment.” Pl. Br. 6. Plaintiff contends that its football pants, jerseys, and girdle shells resemble the hockey pants at issue in *Bauer* rather than the motorcycle jackets and pants at issue in *Lemans*, therefore justifying classification under HTSUS subheading 9506.99.20. Pl. Br. 6. Plaintiff also contends that if the subject merchandise “are not themselves sports equipment, then they must qualify as parts or accessories to sports equipment under *Rollerblade, Inc. v. United States*, 282 F.3d 1349 (Fed. Cir. 2002),” also justifying classification under HTSUS subheading 9506.99.20. Pl. Br. 6.

Customs, on the other hand, argues that the subject merchandise does not satisfy the definition of “sports equipment” as set forth in *Lemans*. Def. Br. 8. Customs argues that *Lemans*, alone, defines “sports equipment” for purposes of Heading 9506 and therefore rejects *Bauer* as a source of definitional authority. Def. Br. 9. According to Customs, “*Lemans* made it clear that [Heading 9506] only covers articles that are not apparel-like, protective in nature, and have minimal textile components.” Def. Br. 10. Customs, in turn, argues that the subject merchandise is properly classified as apparel because, as imported, “the pants, jerseys, and girdles are worn over the body, do not have any protective pads, and are made up of 100%

man-made textiles.” Def. Br. 3–4. Customs also maintains that “Chapters 61 and 62 do not distinguish between apparel designed for general or specific uses,” such as playing football. Def. Br. 11 (citing *Lemans*, 660 F.3d at 1317). Accordingly, Customs claims that (1) the football pants are properly classified under HTSUS subheading 6114.30.30²; (2) the football jerseys are properly classified under HTSUS subheading 6110.30.30; and (3) the football girdle shells are properly classified under HTSUS subheading 6212.20.00.³ Def. Br. 14–17.

The Notes to Chapters 61 and 62 provide that articles covered by Chapter 95, such as football equipment, are not covered under Chapters 61 and 62. *See* Notes to Section XI Note 1(t) (“This section does not cover: Articles of chapter 95 (for example, toys, games, sports requisites and nets”). The Notes to Chapter 95 provide the same exclusionary note for articles of apparel. *See* Notes to Chapter 95 Note 1(e) (“This chapter does not cover: Sports clothing or fancy dress, of textiles, of chapter 61 or 62”). Therefore, if the imported pants, jerseys, and girdles are classifiable as “sports equipment” under Chapter 95, they cannot be classified as “articles of apparel” under Chapters 61 and 62 (and vice versa). Given that this case turns on the proper interpretation and application of the term “sports equipment” under the HTSUS, the court will begin by defining the applicable tariff terms and then consider whether the subject merchandise is properly classifiable under Chapter 95.

A. Definition of Sports Equipment under HTSUS Chapter 95

Heading 9506 provides for “[a]rticles and equipment for . . . sports,” which is referred to in this case as “sports equipment.” The HTSUS does not define the term “sports equipment.” The Federal Circuit’s definition is the only source of potentially binding authority on the scope and meaning of “sports equipment” under Heading 9506. In *Bauer*, the Federal Circuit rejected the Court of International Trade’s (“CIT”) definition of “sports equipment,” which defined the term as “equipment essential to the play of the game, sport, or athletic activity.” *Bauer*, 393 F.3d at 1250. More specifically, the Federal Circuit stated:

We disagree with the Court of International Trade’s reading of the material it reviewed to reach its conclusion. The Court of

² Although Customs classified some of the pants under subheading 6203.43.40 at liquidation, Customs has determined that the more appropriate classification for all of the subject pants is under subheading 6114.30.30. Def. Br. 14 n.4.

³ Although Customs classified the girdle shells under subheading 6207.19.90 at liquidation, Customs has determined that the more appropriate classification for the subject girdles is under subheading 6212.20.00. Def. Br. 16 n.5.

International Trade suggested that we held in *Rollerblade, Inc. v. United States*, 282 F.3d 1349 (Fed. Cir. 2002), that the term “equipment” meant only articles that are indispensable to the relevant sport or athletic activity. *Bauer*, 305 F. Supp. 2d at 1356. Contrary to the Court of International Trade’s perception, we acknowledged only that the “definition offered for ‘equipment’ includes those articles that are necessary and specifically designed for use in athletics and other sports.” *Rollerblade*, 282 F.3d at 1354. Because we did not use the word “only” immediately following “includes” in *Rollerblade*, we gave no opinion whether items that are not necessary but are specially designed for use in athletics or other sports constitute “equipment.” The Court of International Trade also attempted to draw support from a Customs ruling, which concluded that the term equipment “includes the requisites needed in connection with the play of sports and athletics, that being the equipment essential to the play of the game, sport, or athletic activity.” *Bauer*, 305 F. Supp.2d at 1356 (emphasis added by the Court of International Trade) (citing N.Y. D85049 (Dec. 14, 1998)). Again, the Court of International Trade read in the word “only” immediately following the word “includes” when there appears to be no basis for limiting sports “equipment” to only sports “requisites.” As for dictionary definitions, the Court of International Trade quoted Webster’s Third New International Dictionary (“ Webster’s ”), which defined “equipment” to mean “the equipping of a person or thing” and “equip” as “to provide with what is necessary, useful or appropriate.” Webster’s 768 (1993). This definition provides no support for the Court of International Trade’s conclusion that an item must be necessary to be equipment because the definition uses the disjunctive, “or,” in the definition of “equip,” not the conjunctive, “and.” Because it is undisputed that Bauer’s pants were specially designed and intended for use only while playing ice hockey, we hold, contrary to the Court of International Trade’s conclusion, that the pants are *prima facie* classifiable under subheading 9506.99.25 as ice-hockey equipment.

Id. at 1250–51. Accordingly, the Federal Circuit rejected a definition that limited “sports equipment” to articles that are “necessary” to the sport or activity and adopted (although not explicitly) a broader dictionary definition, which covers articles that are “necessary, useful or appropriate” for that sport. *Id.* The Federal Circuit then explained

that the subject merchandise (hockey pants) were *prima facie* classifiable (under GRI 3) as hockey equipment because they were “specially designed and intended for use only while playing ice hockey.” *Id.* at 1251; *see also Rollerblade, Inc.*, 282 F.3d at 1354 (“*Rollerblade*”) (“The definition offered for ‘equipment’ includes those articles that are necessary and specifically designed for use in athletics and other sports.”); *Am. Astral Corp. v. United States*, 62 Cust. Ct. 563, 571(1969) (“*American Astral*”) (“For the statutory designation of ‘equipment’ is satisfied once it is shown that the article is specially designed for use in the game or sport.”).

In *Lemans*, however, the Federal Circuit clarified its definition of “sports equipment” under Heading 9506. *See Lemans*, 660 F.3d at 1318–21. More specifically, the Federal Circuit construed the term with the benefit of the Explanatory Notes:

In deciding that merchandise can be sports equipment as long as the goods are “useful” or “appropriate” for a sport, we did not address the extent to which the Explanatory Notes to Section 9506 clarified the meaning of the term “sports equipment,” an issue we find persuasive in this case, as discussed below. . . .

In this case, the Explanatory Notes to Section 9506 indicate that, to the extent “sports equipment” encompasses articles worn by a user, those articles are not apparel-like and are almost exclusively protective in nature. We agree with the CIT’s conclusion that all of the listed examples in Subsection (B) “center on non-clothing articles and do not describe apparel like the subject merchandise.” CIT Decision, at 1383–84. Example 13, which is the example arguably the closest to the subject merchandise, identifies “[p]rotective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.” EN 95.06(B)(13). Even that example, however, refers exclusively to items such as masks, plates, pads, and guards, and it does not reference articles that have more than minimal textile components. . . .

Accordingly, we find that the CIT properly looked to the Explanatory Notes to Section 9506 to assist with the interpretation of Heading 9506. The vast majority of the examples in those notes are items that a user would not wear on his or her body, but instead consist of articles that are entirely separate from the user (e.g., tennis nets, children’s playground equipment, archery targets, bobsleds), held by the user in his or her hand (e.g., golf clubs, tennis rackets, polo mallets, hockey sticks), or are accessories fastened to a user (e.g., snow skis, water skis, ice skates). The few examples that a user actually would wear, which are

identified in Example (13), are almost exclusively used for protection and would complement, or be worn in addition to, apparel worn for a particular sport. We therefore agree with the CIT that the Explanatory Notes distinguish the subject merchandise in this case from the goods properly classified under Heading 9506. Considering the definition of “sports equipment” as informed and clarified by these Explanatory Notes, the subject merchandise is not *prima facie* classifiable as sports equipment under Chapter 95.

Id. at 1319, 1320, 1321–22. Therefore, the Federal Circuit determined that “sports equipment” is defined as non-apparel-like merchandise that is necessary, useful or appropriate for a sport, and if the merchandise is worn by a user, those articles are almost exclusively protective in nature and would complement, or be worn in addition to, apparel worn for a particular sport. *See id.*⁴

1. Subheading 9506.99.20 (*Football Equipment*)

Subheading 9506.99.20 covers “Football . . . articles and equipment . . . , except balls and parts and accessories thereof.” The definition of “sports equipment” under Heading 9506 can be applied to the provision for “football equipment” under subheading 9506.99.20. Accordingly, “football equipment” may be defined as non-apparel-like merchandise (except balls) that is necessary, useful or appropriate for the sport of football and, if the merchandise is worn by the user, the merchandise is protective in nature, and would complement, or be worn in addition to, apparel worn while playing organized football.

The subheading also covers “parts and accessories thereof.” Note 3 to Chapter 95 provides that “parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.” HTSUS Chapter Notes to Chapter 95, Note 3. Although the HTSUS does not define “parts” or “accessories,” the Federal Circuit provided some explanation of the terms in *Rollerblade*, 282 F.3d at 1352. It defined an “accessory” as an item that “must bear a direct relationship to the primary article that it accessorizes” *Id.* According to the dictionary definition, an “accessory” is a “thing of secondary or subordinate importance (as in achieving a purpose or an effect) . . . an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of

⁴ To the extent Riddell views *Bauer*, *Rollerblade*, and *Astral* as arguing a “use” framework for defining “sports equipment,” this court declines to endorse that interpretation of the tariff provision. The definition of “sports equipment” set forth in *Lemans*, does not implicate use, but instead defines the term according to the physical characteristics of sports equipment. *See Lemans*, 660 F.3d at 1319–21.

something else . . . any of various articles of apparel (as a scarf, belt, or piece of jewelry) that accent or otherwise complete one's costume." Webster's Third International Dictionary at 11 (1993).

The Federal Circuit defined a "part" as an "essential element or constituent; integral portion which can be separated, replaced, etc." *Rollerblade*, 282 F.3d at 1352 (quoting Webster's New World Dictionary 984 (3d College Ed. 1988)). It concluded that "the term 'part,' like the term 'accessory,' must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used." *Id.* In a different case, the Federal Circuit stated that "[f]or tariff classification purposes, the mere fact that a plurality of articles may be used together does not necessarily make each article in the plurality a constituent 'part' of a single article. . . . Rather, where an article performs its separate function without loss of any of its essential characteristics, and, whether separate or joined, is complete in itself, that article is a distinct and separate commercial entity and not 'a part.'" *ABB, Inc. v. United States*, 421 F.3d 1274, 1277 (Fed. Cir. 2005) (internal quotations omitted) (citing *United States v. Willoughby Camera Stores, Inc.*, 21 CCPA 322, 324 (1933)).

B. Definition of Apparel Under HTSUS Chapters 61 and 62

Chapters 61 and 62 generally cover "Articles of apparel and clothing and accessories."⁵ The Chapter Notes do not define the term "apparel." The Federal Circuit, however, has defined "wearing apparel" under Chapters 61 and 62 as "embracing all articles which are ordinarily worn—dress in general." *Rubie's Costume Company v. United States*, 337 F.3d 1350, 1357 (Fed. Cir. 2003) (quoting *Arnold v. United States*, 147 U.S. 494, 496 (1893)). It "refers to clothes or coverings for the human body worn for decency or comfort and common knowledge indicates that adornment is also an element of many articles of wearing apparel." *Id.* (quoting *Antonio Pompeo v. United States*, 40 Cust. Ct. 362 (1958)). Within the general category of "apparel," Customs contends that the subject merchandise is properly classified under the following three subheadings.

1. Subheading 6114.30.30 (for Riddell's Pants)

Subheading 6114.30.30 covers "Other garments, knitted or crocheted: of man-made fibers: other, other: men's or boys." The term "garments" is not defined by the HTSUS. Turning to lexicographic sources, a "garment" is defined as "an article of outer clothing (as a

⁵ More specifically, Chapter 61 covers "Articles of apparel and clothing accessories, knitted or crocheted" and Chapter 62 covers "Articles of apparel and clothing accessories, not knitted or crocheted." HTSUS Chapters 61, 62.

coat or dress) usu[ally] exclusive of accessories.” Webster’s Third New International Dictionary 936 (1993). The Explanatory Notes are more specific and state that the subheading includes “[s]pecial articles of apparel, whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas, used for certain sports or for dancing or gymnastics (e.g., fencing clothing, jockeys’ silks, ballet skirts, leotards).” Explanatory Notes to Heading 61.14 (2012). In HQ Ruling 968013, a decision the court finds persuasive, Customs interpreted the term “certain” as limiting the scope of the subheading “to those articles of sporting apparel which, protective or otherwise, are as a general matter, worn only while engaging in the activity for which they were designed.” HQ Ruling 968013 (Mar. 3, 2006). Although the subheading does not reference pants specifically, Customs has interpreted the term “special articles of apparel” to include pants worn while playing organized football. *See id.* (classifying football pants under subheading 6114.30.30); *see also* HQ Ruling 967957 (Dec. 9, 2005) (classifying soccer goalkeeper pants under subheading 6114.30.30).

2. Subheading 6110.30.30 (for Riddell’s Jerseys)

Subheading 6110.30.30 covers “Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of man-made fibers: other.” The HTSUS does not define the general scope of Heading 6110 but the Explanatory Notes state that the heading covers “a category of knitted or crocheted articles . . . designed to cover the upper parts of the body (jerseys, pullovers, cardigans, waistcoats and similar articles). Articles incorporating incidentally protective components such as elbow pads sewn on sleeves and used for certain sports (e.g., soccer goalkeeper jerseys) remain classified in this heading.” Explanatory Notes to Heading 61.10 (2012). Therefore, Heading 6110 covers articles referred to as “jerseys.” *See Lemans*, 34 CIT __, __, 675 F. Supp. 2d 1374, 1380–81 (2010). Jerseys, in turn, are defined as “any of various close-fitting usually circular-knitted garments: . . . as a pullover with short or long sleeves worn especially by children, athletes, or sailors.” Webster’s Third New International Dictionary at 1214 (1993).

3. Subheading 6212.20.00 (for Riddell’s Girdles)

Subheading 6212.20.00 covers “Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Girdles and panty-girdles.” The term “girdles” is also not defined by the HTSUS. The Explanatory Notes provide that “[t]his heading covers articles of a kind designed for wear

as body-supporting garments or as supports for certain other articles of apparel, and parts thereof. Explanatory Notes to Heading 62.12 (2012). These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic). . . This heading includes, . . . Girdles and panty-girdles. . . All of the above articles may be furnished with trimmings of various kinds (ribbons, lace, etc.), and may incorporate fittings and accessories of non-textile materials (e.g., metal, rubber, plastics or leather).” Explanatory Notes 62.12 (2012). In HQ Ruling 957469, another decision the court finds persuasive, Customs defined the term “girdle” under Heading 6212:

While you are correct that the two cited definitions refer to girdles as women’s undergarments, Customs must point out the following definitions from other sources:

1. Flexible, light-weight shaped corset, made partly or entirely of elastic. Worn to confine figure, especially through hip line. From *The Fashion Dictionary*, by Mary Brooks Picken (1973), at page 163.

2. An elasticized flexible undergarment worn over the hips and waist. From *Webster’s II New Riverside University Dictionary*, (1984), at page 531.

Neither of these definitions identify girdles as gender specific. All of the definitions, however, indicate that girdles are undergarments. Customs believes that currently girdles are commonly understood to be undergarments which provide support and hold in the body along the lower torso, specifically including the waist and hips.

HQ Ruling 957469 (Nov. 7, 1995). Customs has determined, and the court agrees, that “girdles” are not gender specific. *See id.* (“Nowhere in heading 6212 or its subheadings do we find divisions based upon gender.”). Therefore, a “girdle” may be defined as an undergarment that provides support and holds in the body along the lower torso, specifically including the waist and hips.

C. Classification of the Subject Merchandise

Although the subject merchandise is designed for playing organized football and might naturally be associated with sports equipment, under the framework set forth in *Lemans* this is not the case. Under the *Lemans* framework, the subject merchandise does not satisfy the definition of “football equipment” under subheading 9506.99.20. That subheading is limited to *non-apparel-like merchandise* and, *to the extent the merchandise is worn by the user*, those articles are almost

exclusively protective in nature, and would complement, or be worn in addition to, apparel worn while playing organized football. The Explanatory Notes list (among other things) “fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards, ice-hockey pants with built-in guards and pads” as examples of protective sports equipment. Explanatory Notes to Heading 95.06(B)(13) (2012). These listed items are ordinarily worn on the body for protection. *See Lemans*, 660 F.3d at 1320. Articles worn on the body and classifiable as “football equipment” would likely include the thigh, knee, hip, and tail pads that are inserted into Riddell’s pants and girdles. *See HQ Ruling 968013* (“[T]he foam football pad sets are commonly and commercially recognized as protective pads for football. They are specifically provided for by subheading 9506.99.2000, HTSUSA . . .”). It would also likely include shoulder pads that are worn underneath Riddell’s jerseys.

Riddell’s pants, jerseys and girdles, however, do not come bundled with or otherwise incorporate any form of padding or protective inserts. *Cf. Bauer*, 393 F.3d at 1248 (“The internal guards, pads, and belt collectively comprise about 80% of the total weight of the hockey pants.”). They are composed of textile materials and therefore do not offer much protection without the pads. *See Lemans*, 660 F.3d at 1317 (“[T]he merchandise in this case does not contain protective or specialized features to the same degree as the ‘crash helmets’ used by motorcycle and auto racers . . .”). The pads are separate articles entirely. Even though Riddell’s pants, jerseys, and girdles are specifically designed to accommodate various forms of protective padding for playing organized football, this design feature does not change their identity under the HTSUS from “articles of apparel” to “sports equipment.” In *Lemans*, the Federal Circuit explained that “the headings and subheadings of Chapters 61 and 62 do not distinguish between apparel designed for general or specific uses. The fact that articles are *specialized or intended for specific purposes, such as for sports, does not alone remove them from the category of apparel.*” *Lemans*, 660 F.3d at 1317 (emphasis added).

Moreover, Riddell’s arguments for classifying the subject merchandise under subheading 9506.99.20 are predicated on its own alternative definition of the term “sports equipment.” For example, Riddell states that “our reading of [*Lemans*] is that the CAFC did not specifically find that where the article is required or ‘indispensable’ to play a particular sport that such further inquiry would be necessary. That is, if the article is required and indispensable to playing the particular sport, as opposed to simply be designed for exclusive use in the sport, consistent with the earlier decision in *Bauer Nike*, the

article would be *prima facie* classifiable as sports equipment and a GRI 3(a) comparison with the provision for apparel would be called for.” Pl. Br. 19. Riddell, in turn, cites the National Federation of High School Associations Football Rules Book (“NFHS Rules Book”) to support its argument that the subject pants, jerseys, and girdle shells, are “mandatory” football equipment (*i.e.*, items required by the rules to play football). Pl. Br. 20. According to Riddell, items required to play a particular sport are *prima facie* classifiable as “sports equipment” under *Bauer*. This argument misconstrues the definition of “sports equipment.”

Whether an article is “required” to play a given sport does not, by itself, make the article classifiable as “sports equipment” under Heading 9506. There are other characteristics of the merchandise that must be considered to determine whether classification under Heading 9506 is appropriate. The Federal Circuit explained this in *Lemans*, which clarified the definition of “sports equipment” as set forth in *Bauer*. For articles worn by the user (like football pants, jerseys, and girdles) to be classifiable as “sports equipment” under Heading 9506, they must be protective in nature. *See Lemans*, 660 F.3d at 1318–21. The merchandise in *Bauer* and *Lemans* illustrates the difference. In *Bauer*, the hockey pants contained significant padding (80% of the total weight) with an outer textile shell. *See Bauer*, 393 F.3d at 1248. They were ultimately classified as “ice-hockey equipment” rather than “garments” under GRI 3(a). *See id.* at 1252–53. In *Lemans*, though, the motorcycle jerseys, pants, and jackets contained some padding (less than 50% of the total weight) but those articles did not have the “protective or specialized features” that justify classification as “sports equipment” under Heading 9506. *Lemans*, 660 F.3d at 1317; *see id.* at 1319 (“The ice-hockey pants at issue in *Bauer*, moreover, are distinguishable from the subject merchandise. The ice-hockey pants were constructed of a nylon or polyester textile ‘shell’ and had an internal assembly of hard plastic guards and foam padding. Accordingly, they were much more like the examples of pads and guards listed in EN 95.06(B)(13), the subsection of the Explanatory Notes that the CIT distinguished from the subject merchandise in this case.”) (internal citation omitted). The *Lemans* merchandise was classified as “apparel” under GRI 1. *Id.* at 1317. Riddell’s merchandise, by contrast, contains *no protective padding* and therefore lacks the protective features that might justify classification as “football equipment” under subheading 9506.99.20.⁶

⁶ Riddell makes a separate argument that the subject merchandise is *prima facie* classifiable under subheading 9506.99.20 based on a principal use analysis. For example, Riddell

Riddell also argues that its jerseys, pants, and girdles are “parts and accessories” of football equipment and therefore properly classified under subheading 9506.99.20. Pl. Br. 26. This argument is also unpersuasive. It changes the analysis and assumes that the protective pads are “football equipment” and Riddell’s jerseys, pants, and girdles are “parts and accessories thereof.” Generally speaking, “parts and accessories” “must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used.” *Rollerblade*, 282 F.3d at 1353. Here, the subject merchandise is specifically designed to accommodate football pads, which demonstrates that the two types of merchandise are designed to be used together. This, however, is not the type of relationship that would lead the court to classify the subject merchandise as “parts and accessories” of football pads.

A “part” is defined as an “essential element or constituent; integral portion which can be separated, replaced, etc. *Id.* Moreover, the “mere fact that a plurality of articles may be used together does not necessarily make each article in the plurality a constituent ‘part’ of a single article. . . . Rather, where an article performs its separate function without loss of any of its essential characteristics, and, whether separate or joined, is complete in itself, that article is a distinct and separate commercial entity and not ‘a part.’” *ABB, Inc.*, 421 F.3d at 1277 (internal quotations and citations omitted). In this case, the pants, jerseys, and girdles are not constituent parts or essential elements of football pads. Each of the subject articles is a stand-alone product capable of functioning independently, *i.e.*, the pants, jerseys, and girdles can be worn without the pads. Although the two types of

applies the *Carborundum* factors to demonstrate that the subject merchandise is used to play organized football and therefore classifiable as “football equipment” under subheading 9506.99.20. Pl. Br. 24–26 (citing *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976)).

As Customs notes in its reply brief, none of the tariff provisions under review are governed by use. Def. Reply Br. 3, 7–8. They are *eo nomine* provisions. A use analysis is not appropriate for these *eo nomine* tariff provisions. See *Carl Zeiss*, 195 F.3d at 1379 (“[A] use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use.”). Indeed, the Federal Circuit did not undertake a principal use analysis in *Lemans*, the most recent and authoritative case on the scope and meaning of “sports equipment” under the HTSUS. Accordingly, the court will not read use into the *eo nomine* tariff provision for “sports equipment.” Riddell’s application of the *Carborundum* factors is therefore misplaced. See *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1377 (Fed. Cir. 2011) (“[T]hose factors are typically used to establish whether merchandise falls within a particular class or kind for purposes of a principal use analysis.”). Some of Riddell’s arguments implicate GRI 3 but classification under GRI 3 is unnecessary in this case because the subject merchandise can be properly classified under GRI 1. See *Telebrands Corp.*, 865 F. Supp. 2d at 1280.

merchandise—the pants, jerseys, girdles *and* football pads—are designed to be used together, that does not transform the subject merchandise into unassembled “parts” of football pads. Riddell’s pants, jerseys, and girdles are “distinct and separate” commercial entities. *See id.*

Alternatively, an “accessory” is defined as thing of secondary or subordinate importance (as in achieving a purpose or an effect) . . . an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else . . . any of various articles of apparel (as a scarf, belt, or piece of jewelry) that access or otherwise complete one’s costume.” Webster’s Third International Dictionary at 11 (1993). Classification of the subject merchandise as “accessories” is also inappropriate. The subject merchandise is designed to cover the body and provide comfort and support just like other articles of apparel that are specially designed for sports. The pads add protection. Each serves a separate function and neither is secondary or subordinate to the other. Accordingly, Riddell’s merchandise is not properly classifiable as “parts and accessories.”

Riddell’s pants, jerseys, and girdle shells are properly classified as “articles of apparel” under Chapters 61 and 62. There is no dispute that the subject merchandise is worn on the body and composed entirely of textile material. Riddell’s merchandise, therefore, can best be described as apparel-like articles specially designed for playing organized football. Specifically, Riddell’s jerseys are short-sleeved pullovers made of knit mesh (100% polyester), which satisfies the definition of jerseys as “usually circular-knitted garments . . . a pullover with short or long sleeves worn especially by . . . , athletes.” Webster’s Third New International Dictionary at 1214 (1993). Riddell’s jerseys are therefore classifiable under subheading 6110.30.30. Riddell’s pants are also made of polyester, worn on the lower body, and fall just below the knee area with tight elastic closures to maintain a close fit. They constitute “special articles of apparel” worn while playing football and therefore classifiable under subheading 6114.30.30. *See* HQ Ruling 968013 (recognizing football pants to be special articles of apparel for playing football and therefore classifiable under subheading 6114.30.30); *see also* Explanatory Notes to Heading 61.14. Likewise, Riddell’s girdle shells are made of polyester and worn around the pelvic area underneath football pants. They satisfy the definition of girdles, which are defined as undergarments that provide support and hold in the body along the lower torso, specifically including the waist and hips. As noted by Customs, classification of the subject girdle shells is more appropriate under subheading 6212.20.00 (girdles) rather than under subheading

6207.19.90, which covers “underpants and briefs.” See HTUS subheading 6207.19.90. Riddell’s girdle shells have the characteristics of an athletic girdle, not underwear, and are therefore classifiable under subheading 6212.20.00.

It is only after the pads are inserted into the pants and girdles (or under the jerseys) that the subject merchandise could be said to offer any real protection. This, though, has no bearing on proper classification given that merchandise is classifiable in its condition as imported (*i.e.*, without pads). See, *e.g.*, *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989) (“It is a principle of Customs law that imported merchandise is dutiable in its condition as imported . . .”) (citing *United States v. Citroen*, 223 U.S. 407 (1912)).

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendant. Judgment will be entered accordingly.

Dated: March 20, 2013
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

