

# U.S. Customs and Border Protection



## GRANT OF “LEVER-RULE” PROTECTION

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

**ACTION:** Notice of grant of “Lever-Rule” protection.

**SUMMARY:** Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection to LifeScan IP Holdings, LLC (“LifeScan”) for the federally registered and recorded “ONETOUCH VERIO” trademark. Notice of the receipt of an application for “Lever-rule” protection was published in the June 9, 2021, issue of the *Customs Bulletin*.

**FOR FURTHER INFORMATION CONTACT:** Tracie Siddiqui, Intellectual Property Enforcement Branch, Regulations and Rulings, [tracie.r.siddiqui@cbp.dhs.gov](mailto:tracie.r.siddiqui@cbp.dhs.gov).

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection for blood glucose testing strips bearing the ONETOUCH VERIO mark (U.S. Trademark Registration No. 4,112,124; CBP Recordation No. TMK 20–00237) that are manufactured in the United Kingdom and intended for sale in Australia, Austria, Bahrain, Bangladesh, Belgium, Canada, China, Czech Republic, France, Germany, Iceland, India, Italy, Japan, Kuwait, Oman, Philippines, Portugal, Russia, Saudi Arabia, Slovenia, Spain, Thailand, the United Arab Emirates, and the United Kingdom.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market ONE TOUCH VERIO blood glucose testing strips differ physically and materially from the ONE TOUCH VERIO blood glucose testing strips authorized for sale in the United States with respect to the following product characteristics: product codes, contact information, and measurements.

## ENFORCEMENT

Importation of LifeScan blood glucose testing strips manufactured the United Kingdom and intended for sale in Australia, Austria, Bahrain, Bangladesh, Belgium, Canada, China, Czech Republic, France, Germany, Iceland, India, Italy, Japan, Kuwait, Oman, Philippines, Portugal, Russia, Saudi Arabia, Slovenia, Spain, Thailand, the United Arab Emirates, and the United Kingdom and bearing the trademark listed above is restricted, unless the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: March 28, 2022

ALAINA VAN HORN

*Chief,*

*Intellectual Property Rights Branch  
Regulations and Rulings, Office of Trade*



## 19 CFR PART 177

### **MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION AND ELIGIBILITY OF CERTAIN BED LINEN PRODUCTS FOR PREFERENTIAL TARIFF TREATMENT UNDER THE UNITED STATES-ISRAEL FREE TRADE AGREEMENT**

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

**ACTION:** Notice of modification of one ruling letter and proposed revocation of treatment relating to the tariff classification and eligibility of certain bed linen products for preferential tariff treatment under the United States-Israel Free Trade Agreement.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) and eligibility for preferential tariff treatment under the United States-Israel Free Trade Agreement (“U.S.-Israel FTA”) of certain bed linen products. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed

action was published in the *Customs Bulletin*, Vol. 56, No. 5, on February 9, 2022. Two comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2022.

**FOR FURTHER INFORMATION CONTACT:** Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0062.

### **SUPPLEMENTARY INFORMATION:**

#### **BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 5, on February 9, 2022, proposing to modify one ruling letter pertaining to the tariff classification and eligibility for preferential tariff treatment under the U.S.-Israel FTA of certain bed linen. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N313390, dated August 21, 2020, CBP classified a bed linen set containing a pillow sham, duvet cover,

flat sheet, fitted sheet, and pillowcases in heading 6302, HTSUS, specifically in subheading 6302.21.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Not napped” and in subheading 6302.31.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped.” CBP has reviewed NY N313390 and has determined that it classified the wrong bed linen set composition and failed to address the eligibility of the bed linen products for preferential tariff treatment under the U.S.-Israel FTA. It is now CBP’s position that the bed linen set containing a flat sheet, fitted sheet, and pillowcase does not qualify as a set under the HTSUS and must be entered individually. Additionally, the bed linen set containing a flat sheet, fitted sheet, and pillow sham does qualify as a set under the HTSUS and may be entered under one subheading. Classification remains in 6302.21.90, HTSUS, or 6302.31.90, HTSUS. Furthermore, it is now CBP’s position that the flat sheet, fitted sheet, duvet cover, and the set containing sheets and pillow shams are not eligible for preferential tariff treatment under the U.S.-Israel FTA. The pillowcase and pillow sham, when entered individually, are eligible for preferential tariff treatment under the U.S.-Israel FTA.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N313390 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H315294, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

*Attachment*

HQ H315294

March 24, 2022

OT:RR:CTF:FTM H315294 TJS

CATEGORY: Classification

TARIFF NOs.: 6302.21.90; 6302.31.90;  
6304.92.00

Ms. SHIRLY STREZHEVSKY  
GOLDFARB SELIGMAN & Co.  
98 YIGAL ALON STREET  
TEL AVIV, 6789141  
ISRAEL

RE: Modification of NY N313390; Bed Linen; U.S.-Israel Free Trade Agreement

Dear Ms. Strezhevsky:

This is in reference to your correspondence, dated October 20, 2020, requesting reconsideration of New York Ruling Letter (“NY”) N313390, dated August 21, 2020, concerning U.S. Customs and Border Protection’s (“CBP”) tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) and the country of origin marking of certain bed linen products imported from Israel. Upon review, we have determined that NY N313390 classified the incorrect bed linen set composition and failed to address whether the goods qualify for preferential tariff treatment under the United States-Israel Free Trade Agreement (“U.S.-Israel FTA”), as requested in your initial ruling request. We have determined NY N313390 to be correct with respect to the classification and the country of origin of the individual items. Thus, the pillowcase, fitted sheet, flat sheet, and duvet cover, when entered separately, remains classified in either subheading 6302.21.90 or 6302.31.90, HTSUS, and the pillow sham remains classified in subheading 6304.92.00, HTSUS. Furthermore, the country of origin of the flat sheet remains India and the country of origin of the pillowcase, fitted sheet, duvet cover, and pillow sham is Israel. Our decision takes into consideration supplemental submissions, dated November 16, 2020, and December 16, 2021. For the reasons set forth below, we hereby modify NY N313390.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed action was published in the Customs Bulletin, Vol. 56, No. 5, on February 9, 2022. Two comments were received in response to the notice.

**FACTS:**

The subject merchandise is bed linen consisting of pillowcases, fitted sheets, flat sheets, duvet covers, and pillow shams of 100% cotton woven (percale or satin weave) fabric. The fabric is not napped, and the finished items do not contain any embroidery, lace, braid, edging, trimming, piping or applique work. The items will be imported in sets or in individual packages. A set will include a fitted sheet, flat sheet, and either pillowcases or pillow shams, packaged together for retail sale. NY N313390 stated that the set would include the duvet cover, however, you clarify that the duvet cover will be packed separately.

NY N313390 described the manufacturing process as follows:

India:

- fabric is woven.
- fabric is bleached, dyed and/or printed.
- rolls of fabric are shipped to Israel.

Israel:

- fabrics are cut to size and shape of the various components. Specifically,
  - o duvet covers are cut to the needed size. (For purposes of this ruling we assume they will always be cut on all four sides.)
  - o pillowcases are made from one piece of fabric cut on all four sides.
  - o pillow shams are made from three pieces of fabric cut on all four sides.
  - o fitted sheets are cut to needed size on all four sides.
  - o flat sheets are cut to needed size on all four sides.
- components are sewn/hemmed/elasticized, creating duvet covers, pillowcases, pillow shams, and sheets. Specifically,
  - o duvet covers are [folded over and] sewn [together] on three sides [leaving a partial opening on one side that is hemmed 5 centimeters]. Inner ties are added on all four corners to secure the comforter and eight buttons and buttonholes are added [at the opening].
  - o pillowcases are sewn to form a standard pillowcase with inner flap.
  - o pillow shams are sewn to form a standard sham with an overlapping opening on the back.
  - o fitted sheets are sewn around the edges incorporating an elastic string.
  - o flat sheets are sewn on all four sides with a 10 centimeter top hem and a 1.5 centimeter hem on the other edges.
- sheets and pillowcase are packaged together or separately, depending on the customer's order, and shipped directly to the United States.

NY N313390 classified the pillowcases, fitted sheets, flat sheets, and duvet covers under heading 6302, HTSUS, when entered separately. Specifically, when printed, these items are classified in subheading 6302.21.90, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Not napped." When not printed, these items are classified in subheading 6302.31.90, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped." NY N313390 classified the pillow shams in subheading 6304.92.00, HTSUS, which provides for "Other furnishing articles, excluding those of heading 9404: Other: Not knitted or crocheted, of cotton." Furthermore, CBP applied the rules of origin set forth in section 102.22, CBP Regulations (19 C.F.R. § 102.22), and determined that the pillowcase, fitted sheet, duvet cover, and pillow sham were substantially transformed in Israel, thereby becoming products of Israel. However, the

Israeli processing did not substantially transform the flat sheet and consequently the country of origin of the flat sheet was India, where the fabric was woven.

In your November 16, 2020, submission you provided a costs breakdown of the manufacturing processes in Israel as follows:

	Processing cost in Israel	FOB price of the product	Israeli added content without the fabric cost (in percentage)
Duvet	\$7.845	\$26.68	29%
Pillowcase	\$2.054	\$5.47	38%
Pillow sham	\$2.054	\$5.47	38%
Fitted sheet	\$4.087	\$13.20	31%
Flat sheet	\$4.008	\$12.33	33%

### ISSUES:

- (1) What is the tariff classification under the HTSUS of the bed linen when imported as a set containing a fitted sheet, a flat sheet, and either pillowcases or pillow shams?
- (2) Whether the bed linen imported into the United States from Israel is eligible for preferential tariff treatment under the U.S.-Israel FTA.

### LAW AND ANALYSIS:

#### (1) Tariff Classification

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

The relevant 2022 HTSUS provisions are as follows:

- 6302: Bed linen, table linen, toilet linen and kitchen linen:  
Other bed linen, printed:
- 6302.21: Of cotton:  
Other:
- 6302.21.90: Not napped...  
Other bed linen:
- 6302.31: Of cotton:  
Other:
- 6302.31.90: Not napped...
- 6304: Other furnishing articles, excluding those of heading 9404  
Other:
- 6304.92.00: Not knitted or crocheted, of cotton...

GRI 3(a) and (b) provide as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

\* \* \* \* \*

In understanding the language of the HTSUS, the Explanatory Notes (“EN”) of the Harmonized Commodity Description and Coding System may be utilized. The EN, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The EN to GRI 3(b) state in pertinent part:

- (VI) This second method relates only to:
  - (i) Mixtures.
  - (ii) Composite goods consisting of different materials.
  - (iii) Composite goods consisting of different components.
  - (iv) Goods put up in sets for retail sales.  
It applies only if Rule 3(a) fails.
- (VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
- (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.  
[ . . . ]
- (X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:
  - (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;



- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

\* \* \* \* \*

In the instant case, the linen set consists of a fitted sheet, a flat sheet, and either pillowcases or pillow shams. The set containing sheets and pillow shams meets the requirements of goods put up for retail sale. The set consists of at least two different articles classifiable in different headings because the set contains sheets of heading 6302 and pillow shams of heading 6304, HTSUS. The sheets and pillow shams are packaged together to carry out the specific activity of furnishing a bed and they are packaged for sale directly to users without repackaging. Thus, the set of sheets and pillow shams is a set per GRI 3(b). We find that the sheets impart the essential character to the set. This is consistent with previous CBP rulings wherein CBP classified a set of sheets and shams under the heading for sheets. *See, e.g.*, Headquarters Rulings Letter (“HQ”) 955473 (June 23, 1994); NY F86161 (Apr. 25, 2000); and NY F84299 (Mar. 28, 2000). Therefore, the entire set is classified under heading 6302, HTSUS, and specifically in subheading 6302.21.90, HTSUS, when printed and 6302.31.90, HTSUS, when not printed.

The set containing sheets and pillowcases does not qualify as a good put up for retail sale because it does not meet the first requirement. Since the sheets and pillowcases are all classified in heading 6302, HTSUS, the set does not consist of at least two different articles classifiable in different headings. Nor do we have sets at the subheading level because the sheets and pillowcases are altogether classified in either subheading 6302.21.90 or 6302.31.90, HTSUS. Therefore, the pillowcases and sheets are not considered a “set” for classification purposes and will be classified separately in subheading 6302.21.90, HTSUS, when printed and 6302.31.90, HTSUS, when not printed.

(2) U.S.-Israel FTA

The U.S.-Israel FTA is implemented in the HTSUS in General Note (“GN”) 8. Per GN 8(b), HTSUS, goods imported into the United States are eligible for duty-free treatment under the U.S.-Israel FTA if:

- (i) each article is the growth, product or manufacture of Israel or is a new or different article of commerce that has been grown, produced or manufactured in Israel;
- (ii) each article is imported directly from Israel (or directly from the West Bank, the Gaza Strip or a qualifying industrial zone as defined in general note 3(a)(v)(G) to the tariff schedule) into the customs territory of the United States; and
- (iii) the sum of—
  - (A) the cost or value of materials produced in Israel, and including the cost or value of materials produced in the West Bank, the Gaza Strip or a qualifying industrial zone pursuant to general note 3(a)(v) to the tariff schedule, plus
  - (B) the direct costs of processing operations performed in Israel, and including the direct costs of processing operations performed in the West Bank, the Gaza Strip or a qualifying

industrial zone pursuant to general note 3(a)(v) to the tariff schedule, is not less than 35 percent of the appraised value of each article at the time it is entered.

GN 8(c), HTSUS, provides in pertinent part as follows:

No goods may be considered to meet the requirements of subdivision (b)(i) of this note by virtue of having merely undergone—

(i) simple combining or packaging operations;

\* \* \* \* \*

Under the U.S.-Israel FTA, eligible articles which are the growth, product, or manufacture of Israel and are imported directly into the United States from Israel qualify for duty-free treatment provided the sum of 1) the cost or value of materials produced in Israel, plus 2) the direct costs of processing operations performed in Israel is not less than 35% of the appraised value of each article at the time it is entered. We initially note that, per your ruling request, the articles are imported directly from Israel to the United States without passing through the territory of any intermediate country and therefore meet GN 8(b)(ii), HTSUS.

*“Product of” Requirement*

Section 102.22, CBP Regulations (19 C.F.R. § 102.22), applies for the purposes of determining whether a textile or apparel product is considered a product of Israel. In NY N313390, CBP applied section 102.22 and determined that the duvet cover, fitted sheet, pillowcase, and pillow sham were products of Israel. However, CBP determined that the flat sheet was a product of India. Because the flat sheet is not a product of Israel, it does not meet GN 8(b)(i), HTSUS, and is therefore ineligible for preferential tariff treatment under the U.S.-Israel FTA.

GN 8(c)(i) provides that a good will not be considered to be a product of Israel by virtue of merely having undergone simple combining or packaging operations. *See also* 19 C.F.R. § 102.22(c)(2). As discussed above, the set consisting of sheets and a pillow sham is classified as a set under a single subheading pursuant to GRI 3(b). Since this set includes a flat sheet, which is not a product of Israel and is simply packaged together with the fitted sheet and pillow sham, the set as a whole is not considered a product of Israel. Therefore, the set is ineligible to receive preferential tariff treatment under the U.S.-Israel FTA. *See* Treasury Decision 91–7, 25 Cust. B. & Dec. No. 2 (1991). *See also* HQ 963453 (Feb. 26, 2001) (determining that a set consisting of a towel, brush, and retriever was ineligible for preferential tariff treatment under the U.S.-Israel FTA as one item in the set was not a product of Israel).

*35% Value-Content Requirement*

We must next determine whether the duvet cover, fitted sheet, pillowcase, and pillow sham meet the 35% value-content requirement. GN 8(b)(iii), HTSUS, requires that the cost or value of materials produced in Israel plus the direct costs of processing equal not less than 35% of the appraised value of the good at the time it is entered. Based on the costs breakdown you provided, only the pillowcase and pillow sham meet the 35% value-content requirement without taking into consideration the imported fabric. Therefore, the pillowcase and pillow sham are eligible for preferential tariff treatment under the U.S.-Israel FTA.

The remaining question is whether the duvet cover and fitted sheet meet the 35% value-content requirement. If an article is produced from materials

which are imported into Israel, as in this case, the cost or value of those imported materials may be counted toward the 35% value-content requirement only if they undergo a double substantial transformation in Israel. Here, the fabric from India may be considered as part of the value of material produced in Israel for purposes of the 35% value-content requirement, provided the foreign fabric is substantially transformed in Israel and this different product is then transformed into yet another new and different product which is exported directly to the United States. You believe that the processing in Israel constitutes a double substantial transformation and that the imported fabric and the direct costs of processing operations performed in Israel meet the 35% value-content requirement for duty-free treatment under the U.S.-Israel FTA. As support, you cite HQ 559810, dated August 16, 1996, NY C87902, dated June 16, 1998, NY N009941, dated May 8, 2007, and NY 805935, dated February 13, 1995.

In HQ 559810, CBP considered sweatshirts assembled in Israel from a variety of components. The sweatshirts were produced from fabric, a precut embroidered front panel, and rib trim from China. In Israel, the fabric was cut to shape and the rib trim was cut to length and/or width. With regard to the fabric used for the sleeves and back panel of the sweatshirts, CBP determined that the cutting to shape of the imported Chinese fabric substantially transformed the foreign fabric into a new and different intermediate article, ready to be put into the stream of commerce, where they could be bought and sold. While the assembly operation of sewing the sleeves and back panel of the sweatshirt into a finished sweatshirt was not complex enough to constitute a substantial transformation by itself, CBP ascertained that the overall processing operations (i.e., cutting and sewing) performed in Israel were substantial. For this reason, and in view of the production in Israel of distinct articles of commerce in the form of a sweatshirt, CBP held that the double substantial transformation requirement was satisfied with respect to the sleeves and the back panel. However, CBP held that the precut front panel and the rib trim underwent only one substantial transformation.

NY C87902 involved a welder's top and pants assembled in Israel from fabric exported from third country. In Israel, the fabric was cut to shape into panels, pockets, collars, belt loops, and waistbands and then the components were assembled by sewing and hemming. CBP held that the cutting to shape of the imported fabric substantially transformed the foreign fabric into new and different articles of commerce, and that the cut-to-shape components were intermediate articles of commerce ready to enter the stream of commerce where they could be bought and sold. Although the assembly operation was not complex enough to constitute a substantial transformation by itself, CBP ascertained that the overall processing operations (i.e., cutting and sewing) performed in Israel were substantial and therefore the fabric used for these items could be considered towards satisfying the 35% value-content requirement. Furthermore, CBP determined that the processing in Israel was not the type of minimal "pass-through" operation that should be disqualified from receiving duty-free treatment under the U.S.-Israel FTA.

NY N009941 involved a woman's dress produced of fabric from Hong Kong and Korea and cut and assembled in Sri Lanka. In that ruling, similar to NY C87902, CBP determined that the assembly operation of sewing the component parts into a finished dress was not complex enough to constitute a substantial transformation by itself. Nevertheless, the overall processing operations (i.e., cutting and sewing) performed in Sri Lanka satisfied the

double substantial transformation requirement for purposes of duty-free treatment under the Generalized System of Preferences.

NY 805935 involved a comforter cover and a pillow. In that ruling, the fabric was woven, printed or dyed, and finished in Indonesia and then shipped to Israel where it was cut and sewn to form the products. CBP held that both the comforter cover and the pillow sham underwent a substantial transformation in Israel under 19 C.F.R. § 12.130 (the predecessor to section 102.22). We note that this ruling addresses country of origin and not double substantial transformation for the 35% value-content requirement under the U.S.-Israel FTA.

In the instant case, we find that the Israeli cutting and sewing operations—which involve cutting fabric to length and width in straight lines, attaching elastic, ties, and buttons, and hemming - is significantly simpler than the cutting and sewing operations in HQ 559810, NY C87902, and NY N009941, which involved cutting specific shapes and sewing the components into garments. As indicated by these cases, CBP has consistently held that cutting specific pattern pieces for garments amounts to a substantial manufacturing operation. Conversely, CBP has held that cutting simple geometric shapes, which merely involves cutting straight lines, does not amount to a substantial manufacturing operation. For example, HQ 557672, dated April 29, 1994, involved fabric that was produced in Pakistan, cut to length and width in Puerto Rico, and then shipped to the Dominican Republic where the components were sewn and hemmed into sheets and pillowcases. CBP determined that cutting the fabric involved straight line cuts and did not rise to the complexity of cutting shaped pattern pieces for wearing apparel. Moreover, CBP held that even before the cutting operation, the fabric was readily identifiable as being intended for sheets and pillowcases. Thus, the Puerto Rican cutting operation did not substantially transform the imported fabric into a product of the United States. Similarly, HQ 957314, dated March 27, 1995, addressed a scenario wherein fabric for a fitted sheet was woven and precut in Indonesia and then transported to Malaysia or Singapore where it was elasticized and sewn into a finished fitted sheet. CBP determined that attaching the elastic and the subsequent finishing operations were simple and did not substantially transform the precut fabric. Therefore, the country of origin of the fitted sheet was Indonesia.

We find that the cutting and sewing operations in Israel do not result in a double substantial transformation because neither the cutting nor the sewing, by itself, constitutes a single substantial transformation. We find that the Israeli processing does not transform the imported fabric into distinct intermediate articles ready to enter commerce, but altogether transforms the fabric into duvet covers and fitted sheets. Accordingly, the full cost or value of the imported fabric is not included towards the 35% value-content requirement for purposes of qualifying for preferential duty treatment under the U.S.-Israel FTA. Based on the costs breakdown you provided, the duvet cover and fitted sheet do not meet the 35% value-content requirement. Therefore, the duvet cover and fitted sheet are not eligible for preferential tariff treatment under the U.S.-Israel FTA.

As noted above, we received two comments in response to the notice of the proposed modification. The first commenter asserts that none of the bed linen items are of Israeli origin for preferential tariff treatment purposes. The commenter agrees that the processing in Israel is minimal, and the fabrics imported from India merely undergo one substantial transformation, yet

challenges whether the importer can meet the 35% value-content requirement. Based on its knowledge of producing similar products, the commenter assumes that the fabrics from India constitute at least 30–45% of each article while the direct costs of processing are roughly 10–15%. Since the commenter admits they do not know the complete actual costs breakdown of the subject bed linen, we are not persuaded by their proposed calculation. We note that 19 C.F.R. § 177.9(b)(1) provides that “[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a Customs Service field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based.”

The second commenter disagrees with the proposed modification and believes that the cutting and sewing operations performed in Israel are not simple operations nor do they differ from those in HQ 559810, NY C87902, and NY N009941. Therefore, the commenter states that all of the bed linen items are eligible for the preferential tariff treatment under the U.S.-Israel FTA. The commenter asserts that the cutting and sewing each constitute a single substantial transformation because the foreign fabric imported in rolls is first transformed into cut fabric for bed linen and then further transformed into a duvet cover, fitted sheets, flat sheets, pillowcases, or pillow shams. Thus, the commenter asserts that all the bed linen items undergo a double substantial transformation in Israel. To support its claim that the operations, which may be manual or mechanical, are complex and result in a distinct article of commerce, the commenter provided a video demonstrating the cutting process and a sample price offer for pre-cut fabric. We find that neither the video nor the price offer evidence double substantial transformation. The video shows a worker using scissors to manually cut straight lines in a large piece of fabric to form a rectangle. The cutting is a simple and quick process. The price offer is intended to demonstrate that pre-cut fabric for bed linen is a new and different intermediate article of commerce, but the items remain identifiable as bed linen items. We find that simple cutting and sewing does not substantially transform the foreign fabric in Israel into a new and different product which is then transformed into yet another new and different product. Consistent with HQ 557672, cutting fabric in straight lines is not a substantial manufacturing operation, regardless of whether the fabric is solid or printed. *See also*, HQ 556015 (May 20, 1991). As discussed above, we find that the cutting and sewing of the bed linen items is a significantly different operation than those described in HQ 559810, NY C87902, and NY N009941, wherein the fabric was cut into unique shapes and sewn into wearing apparel. As such, the foreign fabric does not undergo a double substantial transformation and is not counted toward the 35% value-content requirement under the U.S.-Israel FTA.

#### **HOLDING:**

By application of GRI 1 and 3, the set containing flat sheets, fitted sheets, and pillowcases will be classified on an individual basis. When printed, each component is classified in subheading 6302.21.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen,

printed: Of cotton: Other: Not napped.” When not printed, these items are classified in subheading 6302.31.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped.” The set containing flat sheets, fitted sheets, and pillow shams will be classified as a set in subheading 6302.21.90, HTSUS, when printed, and in subheading 6302.31.90, HTSUS, when not printed. The column one, general rate of duty is 6.7% *ad valorem*.

Based on the information provided, the flat sheet, fitted sheet, duvet cover, and the set containing sheets and pillow shams are not eligible for preferential tariff treatment under the U.S.-Israel FTA. The pillowcase and pillow sham, when entered individually, are eligible for preferential tariff treatment under the U.S.-Israel FTA.

**EFFECT ON OTHER RULINGS:**

NY N313390, dated August 21, 2020, is hereby MODIFIED.

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


*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF MEN’S  
FULL ZIP HOODIE (JACKET)**

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

**ACTION:** Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of men’s full zip hoodie (jacket).

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



**DATE:** Comments must be received on or before May 13, 2022.

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

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

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify ruling letter pertaining to the tariff classification of men’s full zip hoodie (jacket). Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) NY N316817, dated February 3, 2021 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice

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

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

In NY N316817, CBP classified men's full zip hoodie (jacket) in heading 6110, HTSUS, specifically in subheading 6110.20.20, HTSUS, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of cotton: Other: Other: Other: Men's or boys': Other." CBP has reviewed NY N316817 and has determined the ruling letter to be in error. It is now CBP's position that men's full zip hoodie (jacket) is properly classified, in heading 6101, HTSUS, specifically in subheading 6101.20.20, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103: Of cotton: Men's."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N316817 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H317536, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

Attachments



N316817

January 20, 2021

CLA-2-61:OT:RR:NC:N3:356

CATEGORY: Classification

TARIFF NO.: 6110.20.2069; 6103.42.1020;  
9903.88.15

MS. ANGELA DAVIS  
FOOT LOCKER RETAIL, INC.  
3543 SIMPSON FERRY ROAD  
CAMP HILL, PA 17011

RE: The tariff classification of men's upper and lower body garments from China

DEAR MS. DAVIS:

In your letter dated December 11, 2020, you requested a tariff classification ruling. As requested, your samples will be returned.

Style 1804893, "Curfew French Terry Full Zip Hoodie," is a men's cardigan-style garment constructed from 80% cotton and 20% polyester French terry knit fabric that measures 20 stitches per two centimeters in the direction the stitches were formed. The garment features a full front opening with a zippered closure, a self-fabric hood with a drawstring, long sleeves with rib knit cuffs, diagonal pockets with zippered closures on the front panels, pockets with zippered closures on the lower front sleeves, and a rib knit bottom band. There are overlays constructed from 100% polyester woven fabric on portions of the front and back panels, the sleeves, and the hood. This woven fabric also forms the pockets of the garment. The knit portions of Style 1804893 exceed 60% of the garment's visible surface area.

Style 1804894, "Curfew French Terry Pant," is a pair of men's pull-on trousers constructed of 80% cotton and 20% polyester French terry knit fabric. The garment features an elasticized rib knit waistband with a tunnel drawstring, pockets with vertical zippered closures on the front panels, inset pockets on the back panels that you indicate will include concealed snap closures, and leg openings with rib knit ends. There are overlays constructed from 100% polyester woven fabric on the lower back leg panels, and this fabric also forms the pockets of the front panels. The knit portions of Style 1804894 exceed 60% of the garment's visible surface area.

The applicable subheading for Style 1804893 will be 6110.20.2069, Harmonized Tariff Schedule of the United States (HTSUS), which provides for: Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of cotton: Other: Other: Other: Men's or boys': Other. The rate of duty will be 16.5 percent ad valorem.

The applicable subheading for Style 1804894 will be 6103.42.1020, HTSUS, which provides for: Men's or boys'... trousers,... breeches and shorts (other than swimwear), knitted or crocheted: Of cotton: Trousers, breeches and shorts: Trousers and breeches: Men's. The rate of duty will be 16.1 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheadings 6110.20.2069 and 6103.42.1020, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad

valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheadings 6110.20.2069 and 6103.42.1020, HTSUS, listed above.

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

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Maryalice Nowak at [maryalice.nowak@cbp.dhs.gov](mailto:maryalice.nowak@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*

HQ H317536  
OT:RR:CTF:FTM H317536 JER  
CATEGORY: Classification  
TARIFF NO.: 6101.20.00

MS. ANGELA DAVIS  
FOOT LOCKER RETAIL, INC.  
3543 SIMPSON FERRY ROAD  
CAMP HILL, PA 17011

RE: Proposed Revocation of NY N316817; Tariff Classification of a Men's Full Zip Hoodie

DEAR MS. DAVIS:

This is in response to your February 3, 2021, request for reconsideration of New York Ruling Letter ("NY") NY N316817, dated December 11, 2020, filed on behalf of Foot Locker Retail, Inc. ("Foot Locker"), pertaining to the tariff classification of a men's full zip hoodie under the Harmonized Tariff Schedule of the United States ("HTSUS").

In NY N316817, U.S. Customs and Border Protection ("CBP") classified the men's full zip hoodie under heading 6110, HTSUS, and specifically under subheading 6110.20.2069, HTSUSA, which provides for: "Sweaters, pull-overs, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of cotton: Other: Other: Other: Men's or boys': Other." CBP has since reviewed the decision in NY N316817 and found that decision to be incorrect. Accordingly, NY N316817 shall be modified as it pertains to the tariff classification of the men's full zip hoodie.

**FACTS:**

The garment, Style Number 1804893 is described as the "Curfew French Terry Full Zip Hoodie." The garment's shell is constructed from knit and woven fabrics. It is constructed from 80% cotton, 20% polyester, French terry knitted fabric which measures 20 stitches per two centimeters counted in the direction in which the stitches were formed. One hundred percent polyester woven fabric overlays have been sewn onto portions of the hood, back yoke, center back, lower sleeves, upper chest, and pockets. Per the Foot Locker, the overlays cover 24.32% of the total body surface area. In an email correspondence with this office on February 24, 2021, Foot Locker confirmed the knit fabric weighs 300 grams per square meter (8.85 ounces per square yard). It also confirmed the polyester overlay fabric weighs 82 grams per square meter (2.42 ounces per square yard) and is not treated with Durable Water Repellent ("DWR") (i.e., it is water resistant).

Style Number 1804893 features a full front opening with a reverse coil zipper that extends to the base of a scuba-type, self-fabric hood with a drawstring inserted through a casing around the face. The garment also includes long sleeves with ribbed knit cuffs; reverse coil, zippered slant pockets; a zippered pocket on the sleeve; and a ribbed knit hem.

**ISSUE:**

Whether the subject garment is classified under heading 6101, HTSUS, as a jacket or under heading 6110, HTSUS, as a sweater-like cardigan.

**LAW AND ANALYSIS:**

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

The 2022 HTSUS provisions under consideration are as follows:

6101	Men’s or boys’ overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103.
6101.20.00	Of cotton...
6101.20.0010	Men’s....
	* * *
6110	Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted.
6110.20	Of cotton:
6110.20.20	Other...
	Other:
	Sweaters:
	* * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the HTSUS at the international level. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The provisions of EN 61.01 provides, in pertinent part, as follows:

This heading covers a category of knitted or crocheted garments for men or boys, characterized by the fact that they are generally worn over all other clothing for protection against the weather.

It includes :

Overcoats, raincoats, car-coats, capes including ponchos, cloaks, anoraks including ski-jackets, wind-cheaters, wind-jackets and similar articles, such as three-quarter coats, greatcoats, hooded capes, duffel coats, trench coats, gabardines, parkas, padded waistcoats.

The EN to heading 61.10 states, in relevant part, that:

This heading covers a category of knitted or crocheted articles, without distinction between male or female wear, 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.

\* \* \* \* \*

At issue is whether Style Number 1804893, described as the “Curfew French Terry Full Zip Hoodie,” is classifiable as a sweater-like cardigan or as a jacket. In NY N316817, CBP determined that Style Number 1804893 should be classified as a knit pull-over sweater like cardigan under heading 6110, HTSUS. On the other hand, Foot Locker argues that because Style Number 1804893 has a full-zip frontal opening and does not pull over the head (i.e., it is not a pull-over), the garment should be classified as outerwear under heading 6101, HTSUS. In support of its position, Foot Locker cites to HQ 088289, dated February 11, 1991, wherein CBP reconsidered the classification of sweat-jackets as jackets, finding that sweat-jackets remain pull-over garments which can be worn against the skin or over other garments and are not worn in the manner of a jacket. Foot Locker also cites to Headquarters Ruling Letter (“HQ”) 967845, dated July 5, 2006, in which CBP addressed the distinction between ladies’ cardigan sweaters and ladies’ jackets for purposes of classification in Chapter 61, HTSUS.

As an initial matter we note that in NY N316817, CBP determined that the French knit terry fabric imparts the essential character of the garment (because the knit fabric comprises over 75% of the surface area of the garment). Foot Locker does not contest the finding that the knit fabric imparts the essential character of the “Curfew French Terry Full Zip Hoodie”. As such, the garment was classified pursuant to GRI 3(b) and according to its knit fabric (rather than its woven fabric). At issue here is whether Style Number 1804893 is classified as a jacket (under heading 6101, HTSUS) or sweater-like cardigan (under heading 6102, HTSUS).

In determining whether the “Curfew French Terry Full Zip Hoodie” is classifiable as a jacket designed to be worn as outerwear, we consult, among other things, the ENs to heading 6101, HTSUS, which provide, in relevant part, that garments of the heading are “characterized by the fact that they are worn over all other clothing for protection against the weather.” In addition to the ENs to heading 6101, HTSUS, CBP has long held that certain physical characteristics, designs, and features were essential for an article to be defined as a jacket for tariff classification purposes. In HQ 950651, dated December 31, 1991, CBP noted that the garment at issue had several characteristics which indicated that the article was defined and therefore properly classifiable as a jacket. In particular, HQ 950651 noted that 1) The sample had “applied cuffs which are often found on jackets and not on shirts”; 2) The “garment had a rib-knit waistband”; and 3) “The extremely generous cut of the article is similar to the proportions of a jacket. The armholes and sleeves were extraordinarily large, and the blouson silhouette enabled this garment to easily accommodate jerseys and other shirts underneath.” Likewise, the decision in HQ 950651 noted that while thick or heavily weighted fabric is common among jackets, that lightweight fabric did not preclude the garment at issue from classification as a jacket because “jackets may come in various weights.”

Similarly, in HQ 966053, dated May 24, 2004, CBP determined that a garment was classified as a jacket because 1) it was constructed with a “tailored” fit, and therefore had “the structured styling or tailoring generally found in garments used as jackets”; and 2) because the garment was designed to be “worn over other apparel.” Likewise, in HQ 952024, dated September 15, 1992, in distinguishing between shirts and jackets, CBP noted that garments with “pockets below the waist”, with “ribbed waistbands” and a “means of tightening at the bottom of the garment” were excluded from

heading 6205, HTSUS, by the General Explanatory Notes to Chapter 62, but were however, characteristics which were generally associated with jackets of 6201, HTSUS. *See generally*, CBP Informed Compliance Publication entitled, "Classification: Apparel Terminology under the HTSUS (June 2008), (stating that, "*jackets* are garments designed to be worn over another garment, for protection against the elements. Jackets cover the upper body from the neck area to the waist area but are generally less than mid-thigh length. They normally have a full front opening, although some jackets may have only a partial front opening. Jackets usually have long sleeves.").

Furthermore, CBP recognized that certain garments may be ambiguous for classification purposes because they possess features of both an article of heading 6110, HTSUS, and an article of heading 6101, HTSUS. *See, e.g.*, HQ 964430, dated November 28, 2000, and HQ 965137, dated September 12, 2002, both addressing the classification of women's knit wearing apparel that possessed featured within the purview of the competing headings. We find Style Number 1804893, to be a garment of this nature, as it exhibits similarities to articles provided for in both headings, specifically regarding its coverage and full-front opening.

In cases where the garment is a hybrid or is otherwise ambiguous with characteristics of both headings (i.e., a and a sweater/cardigan, it is important to determine whether the garment is designed and constructed to be worn over all other clothing, and whether the garment provides protection against the weather in a manner akin to that of a coat. In HQ 960626, for example, CBP stated that in order for a garment to be classified as a jacket, the garment must have at least three of the features set out in the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (Nov. 23, 1988) (*hereinafter*, "Textile Guidelines"). The Textile Guidelines sets for the following criteria:

(C) **Shirt-jackets** have full or partial front openings and sleeves, and at the least cover the upper body from the neck area to the waist. They may be within the coat category if designed to be worn over another garment (other than underwear). The following criteria may be used in determining whether a shirt-jacket is designed for use over another garment, the presence of which is sufficient for its wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both:

- 1) Fabric weight equal to or exceeding 10 ounces per square yard (note (D) below re: CPO style shirts).
- 2) A full or partial lining.
- 3) Pockets at or below the waist.
- 4) Back vents or pleats. Also side vents in combination with back seams.
- 5) Eisenhower styling.
- 6) A belt or simulated belt or elasticized waist on hip length or longer shirt-jackets.
- 7) Large jacket/coat style buttons, toggles or snaps, a heavy-duty zipper or other heavy-duty closure, or buttons fastened with reinforcing thread for heavy-duty use.
- 8) Lapels.
- 9) Long sleeves without cuffs.

- 10) Elasticized or rib-knit cuffs.
- 11) Drawstring, elastic or rib-knit waistband.

Additionally, in order to distinguish between a garment which is designed to be used as a sweater-like cardigan and a garment which is constructed and designed to be used as a coat or jacket, we must examine the concept of wearing apparel or clothing generally. In *Arnold v. United States*, 147 U.S. 494, 496 (1892), the Supreme Court defined the term “wearing apparel” as “not an uncommon one in statutes, and . . . used in an inclusive sense as embracing all articles which are ordinarily worn — dress in general.” In *Antonia Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958), it was held that the term wearing apparel includes articles worn by human beings for reasons of decency, comfort, or adornment, but does not include articles worn as a protection against the hazards of a game, sport, or occupation. In *Jack Bryan, Inc. v. United States*, 72 Cust. Ct. 197, 204, C.D. 4541 (1974) the Court stated that the term wearing apparel is generic or descriptive and that under prior tariff acts it was held to mean all articles of wearing apparel worn by human beings for reasons of decency, comfort, and adornment.

In HQ 084166, dated August 4, 1989, CBP evaluated a 52% acrylic/48% lamb’s wool long-sleeved, double-breasted knit cardigan having 10 stitches per two centimeters measured in the horizontal direction. CBP found the garment at issue to be more similar to a sweater than a jacket, stating: “[i]f the stitches were not quite as fine, i.e., 9 or less stitches per 2 centimeters, the garment would be classifiable as a sweater. More importantly, the garment’s fabric and styling are more akin to that of sweaters than of jackets .... The initial impression of the garment is that it is a sweater and will be worn as such.” In HQ 084166, CBP classified the cardigan as an article similar to a sweater under subheading 6110.30.1560, HTSUSA. Likewise, in HQ 951629, dated August 21, 1992, CBP determined that a sweater-like garment was not classified as a jacket because it lacked features associated with jackets and because of its commercial perception as a cardigan sweater rather than that of a jacket.

By contrast, in HQ 088259, dated March 12, 1991, CBP evaluated a cardigan garment made of 100 percent cotton “French terry” with a full-front heavy-duty zipper opening, two side slant pockets at the waist, long sleeves with rib cuffs, a rib knit waistband, and a drawstring hood. CBP found the garment at issue to be more similar to a jacket, noting that the garment’s features were features generally found on many garments commercially recognized as jackets and that the garment would be worn “for both warmth and protection against the wind as a jacket.” As such, CBP classified the garment as a jacket. Similarly, in HQ H296342, dated, November 19, 2018, CBP revoked NY N288630, reversing a decision that a garment was classified in heading 6110, HTSUS, as a sweater and instead found that the garment had the construction and features of a jacket. The garment in HQ H296342 featured a stand-up collar with elasticized edging which provided additional warmth and protection from the cold and wind. HQ H296342 stated that although the garment’s water resistance capacity was not confirmed, its outer layer and middle layer of polyurethane film rose to the level of protection afforded by the outerwear of heading 6101, HTSUS.

Under our facts, Style Number 1804893 contains five (5) of the “Textile Guidelines” features for coats, in this case, shirt-jackets. It features a full front opening with a heavy-duty coil zipper; long sleeves with ribbed knit



cuffs; zippered pockets which slanted at or below the waist; and a ribbed knit hemmed waistband. Similarly, the combined weight of the fabric exceeds 10 ounces per square yard. The Terry knit fabric weighs 8.85 ounces per square yard and the polyester woven fabric weighs 2.42 ounces per square yard. The subject garment has ribbed cuffs and a ribbed hem waistband; both of which are satisfy the “Textile Guideline” criteria. Additionally, the hood has a scuba-type facial closing which utilizes a drawstring inserted through the casing around the face. The drawstring scuba-type facial closing enhances the garment’s capacity to provide protection against various weather conditions and therefore exceeds the factors associated with “wearing apparel” as described in *Jack Bryan, Inc.*

Moreover, the subject “Curfew French Terry Full Zip Hoodie” meets most, if not all of the requirements for a jacket as set forth in the Textile Guidelines and according to the definition of a jacket expressed in multiple rulings. See HQ 966053; HQ 950651; and HQ 952024 (which discussed various features and criteria necessary for a garment to definable as a jacket for tariff classification purposes). First, it covers the upper body from the neck area to the waist area; including the head area because of the hood. Secondly, Style Number 1804893 has a full front opening and has long sleeves. All of which are features and/or criteria that CBP has determined to be required features for a garment to be classified as a jacket. See HQ H288404, dated April 29, 2020 (CBP classified as jackets, hip-length puffer garment with hoods with full frontal openings and a zipper closure, a padded lining, and side-seam pockets. The garment had had long sleeves with elastic wrists and elastic tightening at the hem. Moreover, the ribbed cuffs and a ribbed waistband provide additional tightening elements at the cuffs and at the waist or bottom of the garment); See also, HQ 959085, dated November 26, 1996 (CBP distinguished between a jacket and a shirt, finding that the garments were jackets of heading 6201, HTSUS, because they possessed the characteristics of a jacket or coat). Most importantly, the subject “Curfew French Terry Full Zip Hoodie” is constructed and designed to be worn over all other garments as outerwear.

Lastly, a visual inspection of the subject garment reveals that Style Number 1804893 is not a hooded sweatshirt (i.e., “hoodie”) of the kind which is designed to be worn like a sweater for, decency, comfort, and adornment. Instead, Style Number 1804893 is substantially similar to the garment classified as a jacket in HQ 088259, as it too is made of French terry fabric with a full-front heavy-duty zipper opening, two side slant pockets at the waist, long sleeves with rib cuffs, a rib knit waistband, and a drawstring hood. As we stated in HQ 088259, the aforementioned are features that are generally found on garments which are commercially recognized as jackets. Much like the garments CBP has determined to be classifiable as a jacket, the subject garment is a lightweight jacket which is designed and constructed to be worn for warmth and protection against weather conditions and not merely for comfort and adornment. Accordingly, we find that Style Number 1804893 is classifiable as a jacket.

#### **HOLDING:**

By application of GRI 3(b), the subject men’s garment is classified as a jacket in heading 6101, HTSUS, specifically, in subheading 6101.20.2010, HTSUSA, which provides for: “Men’s or boys’ overcoats, carcoats, capes,



cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103: Of cotton: Men's." The 2022 column one, general rate of duty is 15.9 % *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

NY N316817, dated February 3, 2021, is MODIFIED.

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

*Sincerely,*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*



**19 CFR PART 177**

**REVOCATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF UNFRAMED AUTOMOTIVE  
SIDE MIRRORS**

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

**ACTION:** Notice of revocation of one ruling letter, and revocation of treatment relating to the tariff classification of unframed automotive side mirrors.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of unframed automotive side mirrors under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 41, on October 20, 2021. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 41, on October 20, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of unframed automotive side mirrors. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N253902, CBP classified the unframed automotive side mirrors in heading 7009, HTSUS, specifically in subheading 7009.91.10, HTSUS, which provides for “Glass mirrors, whether or not framed, including rear-view mirrors: Other: Unframed: Not over 929 cm<sup>2</sup> in reflecting area”. CBP has reviewed NY N253902 and has determined the ruling letter to be in error. It is now CBP’s position that the unframed automotive side mirrors are properly classified, in heading 7009, HTSUS, specifically in subheading 7009.10.00, HTSUS, which

provides for “Glass mirrors, whether or not framed, including rear-view mirrors: Rear-view mirrors for vehicles”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N253902, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) H318979, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: March 30, 2022

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

Attachment

## HQ H318979

March 30, 2022

OT:RR:CTF:CPMMA H318979 AJK

CATEGORY: Classification

TARIFF NO: 7009.10.00

MR. ROBERT GARDENIER  
 M. E. DEY & CO. INC.  
 700 W. VIRGINIA ST., STE 300  
 MILWAUKEE, WI 53204

RE: Revocation of NY N253902; Classification of Unframed Automotive Side Mirrors

DEAR MR. GARDENIER:

This letter is in reference to your New York Ruling Letter (NY) N253902, dated June 20, 2014, concerning the tariff classification of unframed automotive side mirrors. In NY N253902, U.S. Customs and Border Protection (CBP) classified the merchandise in subheading 7009.91.10, Harmonized Tariff Schedule of the United States (HTSUS), as unframed glass mirrors. We have reviewed NY N253902 and have determined that the classification of the merchandise in subheading 7009.91.10, HTSUS, was incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 41, on October 20, 2021. One comment was received in response to this notice.

**FACTS:**

The subject merchandise was described in NY N253902 as follows:

The [glass mirror] is unframed and the reflecting surface measures less than 929 cm<sup>2</sup>. ...

[T]he item will be used as an exterior side view mirror. ... [T]he vast majority of these products will be used in trucks.

**ISSUE:**

Whether the unframed automotive side mirrors are classified in subheading 7009.10.00, HTSUS, as rearview mirrors, or subheading 7009.91.10, HTSUS, as unframed glass mirrors.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI), and in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

\* \* \* \* \*

The HTSUS provisions at issue are as follows:

7009	Glass mirrors, whether or not framed, including rear-view mirrors:
7009.10.00	Rear-view mirrors for vehicles
	Other:
7009.91	Unframed:
7009.91.10	Not over 929 cm <sup>2</sup> in reflecting area
	* * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

EN 70.09 provides, in pertinent part, as follows:

The heading further includes magnifying or reducing mirrors and rear-view mirrors (e.g., for vehicles). All these mirrors may be backed (with paperboard, fabric, etc.), or framed (with metal, wood, plastics, etc.), and the frame itself may be trimmed with other materials (fabric, shells, mother of pearl, tortoise-shell, etc.).

\* \* \* \* \*

Heading 7009, HTSUS, is an *eo nomine* provision for rearview mirrors. However, the terms “rearview” and “rearview mirror” are not defined in chapter 79 of the HTSUS, nor are they defined elsewhere in the Nomenclature or the ENs. In the absence of a definition of a term in the HTSUS or ENs, the term is construed in accordance with its common and commercial meaning. See *Toyota Motor Sales, Inc. v. United States*, 7 C.I.T. 178, 182 (1984), *aff’d*, 753 F.2d 1061 (Fed. Cir. 1985); *Nippon Kogaku (USA), Inc. v. United States*, 69 C.C.P.A. 89 (1982). Dictionaries and other lexicographic authorities may be utilized to determine a term’s common meaning. See *Mast Indus., Inc. v. United States*, 9 C.I.T. 549 (1985), *aff’d*, 786 F.2d 1144 (Fed. Cir. 1986). Merriam-Webster Dictionary defines “rearview mirror” as “a mirror (as in an automobile) that gives a view of the area behind a vehicle”. *Rearview Mirror*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/rearview%20mirror> (last visited June 7, 2021). Moreover, the Federal Motor Vehicle Safety Standards (FMVSS) No. 111, which are federal vehicle regulations issued by the National Highway Traffic Safety Administration, defines “rear-view image” as “a visual image, detected by means of a single source, of the area directly behind a vehicle that is provided in a single location to the vehicle operator and by means of indirect vision.” 49 C.F.R. § 571.111. In addition, FMVSS No. 111 outlines the following requirements for rearview mirrors that are installed on the driver’s and passenger’s sides of passenger vehicles:

S5.2 Outside rearview mirror - driver’s side.

S5.2.1 Field of view. Each passenger car shall have an outside mirror of unit magnification. The mirror shall provide the driver a view of a level road surface extending to the horizon from a line, perpendicular to a longitudinal plane tangent to the driver’s side of the vehicle at the widest

point, extending 2.4 m out from the tangent plane 10.7 m behind the driver's eyes, with the seat in the rearmost position. The line of sight may be partially obscured by rear body or fender contours. The location of the driver's eye reference points shall be those established in Motor Vehicle Safety Standard No. 104 (§ 571.104) or a nominal location appropriate for any 95th percentile male driver.

...

S5.3 Outside rearview mirror passenger's side. Each passenger car whose inside rearview mirror does not meet the field of view requirements of S5.1.1 shall have an outside mirror of unit magnification or a convex mirror installed on the passenger's side. The mirror mounting shall provide a stable support and be free of sharp points or edges that could contribute to pedestrian injury. The mirror need not be adjustable from the driver's seat but shall be capable of adjustment by tilting in both horizontal and vertical directions.

Although the subject unframed automotive side mirrors are placed on the exterior of passenger vehicles, these mirrors reflect the area behind the vehicles. For example, the automotive side mirrors allow a driver to view other vehicles that approach from the rear. Furthermore, the FMVSS No. 111's specific provisions for outside rearview mirrors for driver's and passenger's sides demonstrates that the commercial definition of rearview mirrors includes the automotive side mirrors. Accordingly, CBP finds that the subject unframed automotive side mirrors constitute rearview mirrors in subheading 7009.10.00, HTSUS, under GRI 1.

As noted above, we received one comment in response to the notice of the proposed revocation. The comment was submitted in support of the revocation, as the commenter agrees that the unframed automotive side mirrors are properly classified in subheading 7009.10.00, HTSUS.

#### **HOLDING:**

By application of GRI 1, the unframed automotive side mirrors are classified under heading 7009, HTSUS, specifically in subheading 7009.10.00, HTSUS, which provides for "Glass mirrors, whether or not framed, including rear-view mirrors: Rear-view mirrors for vehicles". The 2022 column one, general rate of duty is 3.9% *ad valorem*.

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

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

NY N253902, dated June 20, 2014, is hereby revoked.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

*Sincerely,*

ALLYSON MATTANAH

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

## TRANSFER OF CARGO TO A CONTAINER STATION

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

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

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

**DATES:** Comments are encouraged and must be submitted (no later than May 24, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0096 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### Overview of This Information Collection

**Title:** Transfer of Cargo to a Container Station.

**OMB Number:** 1651-0096.

**Form Number:** N/A.

**Current Actions:** Extension without change of an existing information collection.

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

**Affected Public:** Businesses.

**Abstract:** Before the filing of an entry of merchandise for the purpose of breaking bulk and redelivering cargo, containerized cargo may be moved from the place of unloading or may be received directly at the container station from a bonded carrier after transportation in-bond. 19 CFR 19.41. This also applies to loose cargo as part of containerized cargo. *Id.* In accordance with 19 CFR 19.42, the container station operator may make a request for the transfer of a container to the station by submitting to CBP an abstract of the manifest for the transferred containers including the bill of lading number, marks, numbers, description of the contents, and consignee.

This information is submitted by members of the trade community who are familiar with CBP regulations.

*Type of Information Collection:* Transfer of Cargo to Container Station.

**Estimated Number of Respondents:** 14,327.

**Estimated Number of Annual Responses per Respondent:** 25.

**Estimated Number of Total Annual Responses:** 358,175.

**Estimated Time per Response:** 7 minutes.

**Estimated Total Annual Burden Hours:** 41,548.



Dated: March 21, 2022.

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

[Published in the Federal Register, March 25, 2022 (85 FR 17098)]

**PROPOSED MODIFICATION OF A RULING LETTER  
RELATING TO THE ORIGIN OF  
POLYETHERETHERKETONE POWDER**

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

**ACTION:** Notice of proposed modification of one ruling letter relating to the origin of polyetheretherketone powder.

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

**DATE:** Comments must be received on or before May 13, 2022.

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

**FOR FURTHER INFORMATION CONTACT:** Joy Marie Virga, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–1511.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the origin of PEEK powder. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N111878, dated July 14, 2010, (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N111878, CBP classified found that tempering PEEK powder in Germany resulted in a substantial transformation. CBP has reviewed NY N111878 and has determined the ruling letter to be in

error. It is now CBP's position the tempering of PEEK powder was not a substantial transformation and the country of origin of the PEEK powder was the United Kingdom.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N111878 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H305264, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to modify any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

MONIKA R BRENNER  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

N111878

July 14, 2010

CLA-2-39:OT:RR:E:NC:N2:237

CATEGORY: Country of Origin

MR. BERNHARD POMMER  
EOS GMBH ELECTRO OPTICAL SYSTEMS  
*ROBERT-STIRLING-RING 1*  
*KRAILLING, OTHER 82152*  
GERMANY

DEAR MR. POMMER:

In your letter dated June 23, 2010 you requested a country of origin ruling for the product: polyetheretherketone powder imported from the United Kingdom and tempered in Germany.

Untempered polyetheretherketone powder is imported from the United Kingdom into Germany where it is further processed by a special tempering step which allows it to be used at high temperatures in laser-sintering machines for dosing and recoating. The raw material imported into Germany cannot be used for laser sintering. The tempered powder is intended for export to the United States for use in injection molding, extrusion, compression molding and composites for the manufacture of engine parts and in heat exchange applications.

Section 134.1 (b) of the Customs Regulations (19 C.F.R. 134.1(b)) defines “country of origin” as the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of the marking laws and regulations. For country of origin purposes, a substantial transformation of an imported article occurs when it is used in manufacture, which results in an article having a name, character, or use differing from that of imported article (19 C.F.R. 134.35).

Untempered polyetheretherketone powder will be substantially transformed in Germany into an article having a name (tempered polyetheretherketone), character (capable of being processed at high temperatures in laser-sintering machines), or use (for dosing and recoating) differing from that of the untempered raw material. Therefore, for tariff purposes the country of origin of the polyetheretherketone powder tempered in Germany will be Germany.

This merchandise may be subject to the requirements of the Toxic Substances Control Act (TSCA), which are administered by the U. S. Environmental Protection Agency. Information on the TSCA can be obtained by contacting the EPA at 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, by calling the TSCA Assistance Line at (202) 554-1404, by Fax at (202) 554-5603, by e-mail to: [tsca-hotline@epa.gov](mailto:tsca-hotline@epa.gov) or by visiting their website at [www.epa.gov](http://www.epa.gov).

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Cantone at (646) 733-3038.

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

HQ H305264  
OT:RR:CTF:VS H305264 JMV  
CATEGORY: Origin

MR. BERNHARD POMMER  
EOS GMBH ELECTRO OPTICAL SYSTEMS  
*ROBERT-STIRLING-RING 1*  
*KRAILLING, OTHER 82152*  
*GERMANY*

RE: Modification of NY N111878; Polyetheretherketone Powder

DEAR MR. POMMER:

This is in reference to New York Ruling Letter (“NY”) N111878, dated July 14, 2010, issued to EOS GmbH Electro Optical Systems (“EOS”). In NY N111878, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that polyetheretherketone (“PEEK”) powder of U.K.-origin was substantially transformed in Germany and therefore a product of Germany. We have reviewed NY N111878 and found it to be in error. For the reasons set forth below, with respect to the country of origin of the subject PEEK powder, we hereby revoke NY N111878.

**FACTS:**

Untempered polyetheretherketone powder (“PEEK”), CAS number 27380–27–4, classifiable under subheading 3907.20, Harmonized Tariff Schedule of the United States (HTSUS) and in the form of a fine powder is imported from the United Kingdom into Germany. PEEK is a thermoplastic polymer that can be used in engine parts and heat exchange applications. PEEK is an organic semi-crystalline engineering polymer in the polyaryletherketone family of plastics, which is one of the most important in additive manufacturing due to its high strength, temperature resistance and chemical resistance. PEEK is commercially available in several grades according to different molecular weights (or melt viscosities) to meet the requirements of different melt-processing methods. PEEK can be processed by conventional methods such as injection molding, extrusion, compression molding etc. The processing conditions used to mold PEEK can influence the crystallinity, and hence its mechanical properties.

In Germany, the PEEK is further processed by a tempering step. Tempering allows PEEK to be used at high temperatures in laser-sintering machines for dosing and recoating. Prior to this process, the raw material imported into Germany cannot be used for laser sintering. The tempered PEEK powder, also classifiable under subheading 3907.20, HTSUS, is intended for export to the United States for use in injection molding, extrusion, compression molding and composites for the manufacture of engine parts and in heat exchange applications.

Laser sintering or powder bed fusion is an additive manufacturing process (3-D printing) where a laser consolidates, layer upon layer, powdered materials to build three dimensional objects, prototypes, or fully functional parts. Because laser sintering can create complex light weight parts without compromising functional requirements, manufacturers have become increasingly interested in laser sintering manufacturing, particularly in the aerospace, automotive, and medical industries. PEEK is a polymer commonly used in laser sintering.

Manufacturers who produce articles of PEEK via laser sintering face challenges that arise from the semi-crystalline nature of PEEK.<sup>1</sup> The semi-crystalline nature makes PEEK highly susceptible to changes in processing conditions which can lead to variation of the final performance of PEEK. However, tempering PEEK prior to laser sintering controls the crystallization of PEEK and the level of residual stress in the printed items. Additionally, tempering PEEK creates better packing during manufacture of an article and changes the angle of response or shape of PEEK powder particles, which improves the particle flow.<sup>2</sup>

#### ISSUE:

Whether the country of origin of the subject PEEK powder is Germany.

#### LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides, in relevant part:

(a) Marking of articles. Except as hereinafter provided, every article of foreign origin ... imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

Part 134, U.S. Customs and Border Protection (“CBP”) Regulations (19 C.F.R. Part 134), implements the country of origin marking requirements of 19 U.S.C. § 1304. Title 19, Section 134.1(b) defines “country of origin” as “the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the ‘country of origin’ within the meaning of this part; . . .”

A substantial transformation occurs when an article emerges from a manufacturing process with a name, character, or use, which differs from the original material subjected to the process. In *Nat’l Hand Tool Corp. v. United States*, 16 CIT 308, *aff’d per curiam*, 989 F.2d 1201 (Fed. Cir. 1993), the Court of International Trade determined that hand tool components, which were cold-formed and hot-forged in Taiwan into their final shape, with post-importation processing such as heat treatment and electroplating, and assembly occurring in the United States, did not undergo substantial transformation in the United States. There was no change in name because each article as imported had the same name in the completed tool. There was no change in character because the articles remained the same after heat treatment, electroplating, and assembly in the United States. The use of the imported articles was predetermined at the time of entry – each component

<sup>1</sup> Ali Reza Zanjanijam, et al., *Fused Filament Fabrication of PEEK: A Review of Process-Structure-Property Relationships*, POLYMERS (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7465918/>; and Manfred Schmid and Konrad Wegener, *Thermal and molecular properties of polymer powders for Selective Laser Sintering (SLS)*, AIP CONFERENCE PROCEEDINGS, (2019), <https://aip.scitation.org/doi/pdf/10.1063/1.4965571>.

<sup>2</sup> Silvia Berretta, et. al., *Processability of PEEK, a New Polymer for High Temperature Laser Sintering (HT-LS)*, 68 European Polymer Journal 243 (2015) (“Hence, a thermal treatment was carried out on PEEK 450PF in order to improve the particle flow and shape.”)

was intended to be incorporated in a particular finished mechanics' hand tool, except for one exhibit with a dual use. The court rejected the importer's claim that the value added in the United States was relatively significant to the operation in Taiwan so that substantial transformation should be found, determining that such a finding could lead to inconsistent marking requirements for importers who perform exactly the same processes on imported merchandise but sell at different prices.

A similar finding was made in *Superior Wire v. United States*, 867 F. 2d 1409 (Fed. Cir. 1989), where the appellate court affirmed the Court of International Trade's holding that no substantial transformation occurred from the multi-stage process of drawing wire rod into wire. In that case, the court noted that the "end use of the wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawing wire will be used." Accordingly, the court found that the character of the final product was predetermined and that the processing did not result in a significant change in either character or use of the imported material. While the wire rod and processed wire had different names and identities in the industry, the court concluded that they were essentially different stages of the same product.

Customs has generally held that a heat treatment will result in a substantial transformation only if alters the article's mechanical properties to a significant extent. See Headquarters Ruling Letters ("HQ") 083236 dated May 16, 1989. The decision in *Ferrostaal Metals Corp. v. United States*, 664 F.Supp. 535, 11 CIT 470 (1987), is also pertinent. That case concerned whether certain operations performed on cold-rolled steel sheet, described as a continuous hot-dip galvanizing process, substantially transformed the sheet. The process involved two steps: annealing, undertaken to restore the steel's ductility lost in a previous cold rolling, and galvanizing, or dipping the steel in a pot of molten zinc. The court held that the continuous hot-dip galvanizing process resulted in a substantial transformation, in part, because the process changed the character of the steel sheet by significantly altering its mechanical properties and chemical composition.

In HQ 561978, dated December 22, 2000, CBP considered the origin of polytetrafluoroethylene ("PTFE"), a fluoropolymer (type of plastic) used for a variety of purposes, including as a non-stick coating for metals and other plastics. The manufacturer in that case imported PTFE into Italy in powder form from Russia, Poland or China. The PTFE was processed in Italy by one of two methods then sold to the United States. The first method involved heating the PTFE powder in a pre-sintering oven to its gel point of approximately 370 degrees to create extrusion grade PTFE. This process hardened and agglomerated the PTFE, but no filler or other ingredient was added. The second method of processing in Italy involved mixing and blending the powder PTFE with filler materials of different types and quantities (also of non-Italian origin) to create "filled" PTFE. In the second scenario, the milling, mixing, and blending of the virgin PTFE with filler materials in Italy did not result in a substantial transformation of the PTFE. Similarly, in the first scenario, CBP found that while the heat treatment to which the PTFE was subjected hardened and agglomerated the product, the process caused no significant change in the mechanical properties or chemical composition of the product. Therefore, CBP found that no substantial transformation of the PTFE occurred in Italy.



In this case, while the tempering of the PEEK that takes place in Germany may enable the PEEK to be better suited for laser-sintering, the basic properties remain the same. Tempering changes the shape and structure of PEEK particles, and while this process creates better stability and flow during manufacture of an article, we find this to be a minor change. After tempering, the PEEK remains a manufactured PEEK resin whose basic properties are determined in the initial production process. Therefore, we find that there is no substantial transformation, and the country origin of the PEEK is the United Kingdom.

**HOLDING:**

Based on the information presented, the PEEK described in NY N111878 has a country of origin of the United Kingdom for marking purposes.

**EFFECT ON OTHER RULINGS:**

NY N111878, dated July 14, 2010, is hereby **REVOKED**.

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

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**19 CFR PART 177**

**REVOCATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING  
TO THE TARIFF CLASSIFICATION OF PLASTIC  
URINE DRAINAGE BAGS**

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

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of plastic urine drainage bags.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning the tariff classification of plastic urine drainage bags under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 7, on February 23, 2022. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2022.

**FOR FURTHER INFORMATION CONTACT:** Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at [suzanne.kingsbury@cbp.dhs.gov](mailto:suzanne.kingsbury@cbp.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 7, on February 23, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of plastic urine drainage bags. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") E83373, dated June 28, 1999, CBP classified plastic urine drainage bags in heading 9018, HTSUS,

specifically in subheading 9018.90.80, HTSUS, which provides for “[I]nstruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other.” CBP has reviewed NY E83373 and has determined the ruling letter to be in error. It is now CBP’s position that plastic urine drainage bags are properly classified, in heading 3926, HTSUS, specifically in subheading 3926.90.99, HTSUS, which provides for “[O]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY E83373 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H322386, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H322386

March 29, 2022

OT:RR:CTF:EMAIN H322386 SKK

CATEGORY: Classification

TARIFF NO.: 3926.90.99

MR. JACK ALSUP  
ALSUP & ALSUP, INC.  
P.O. BOX 1251  
DEL RIO, TX 78841

RE: Revocation of NY E83373; Tariff classification of plastic urine drainage bags from Mexico; capacity measures

DEAR MR. ALSUP:

This ruling is in reference to New York Ruling Letter (NY) E83373, issued to you on behalf of Plasco, Inc. on June 28, 1999, in which U.S. Customs and Border Protection (CBP) classified plastic urine drainage bags under heading 9018, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 9018.90.80, HTSUS, which provides for “other” instruments and appliances used in medical, dental or veterinary sciences.

Upon reconsideration, we have determined that the tariff classification of the subject merchandise at issue in NY E83373 is incorrect. Accordingly, pursuant to the analysis set forth below, CBP is revoking NY E83373.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke NY E83373 was published on February 23, 2022, in Volume 56, Number 7 of the Customs Bulletin. No comments were received in response to the proposed action.

**FACTS:**

The articles at issue in NY E83373 are plastic urine drainage bags, identified as the “MDI 87–012 Deluxe Rehab Leg Bag” and the “85–005 Classic U.D. Bag.” Both articles include a transparent bag marked in milliliters to permit measurement of urine and connective tubes. The leg bag also features leg straps.

**LAW AND ANALYSIS:**

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

The following HTS headings are under consideration:

- 3926 Other articles of plastics and articles of other materials of headings 3901 to 3914:
- 9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof:

Chapter 39, Note 2(u), excludes articles of chapter 90.

Chapter 90, Note 1(m), excludes “[C]apacity measures, which are to be classified according to their constituent material.”

As Chapter 39 Note 2(u) excludes articles of Chapter 90, our initial determination is whether the urine drainage bags at issue in NY E83373 are classifiable under heading 9018, HTSUS. As the subject urine drainage bags are marked in milliliters to permit measurement of urine, they are “capacity measures” and thereby precluded from classification in heading 9018, HTSUS, by application of Note 1(m) to Chapter 90, *supra*.

The subject plastic drainage bags are classified according to their constituent material in heading 3926, HSTUS, specifically subheading 3926.90.9910, HTSUS, which provides for, in pertinent part, plastic laboratory ware. This conclusion is consistent with NY N005768, dated February 6, 2007, in which CBP classified a pediatric plastic urine collection bag as plastic laboratory ware under subheading 3926.99.98, HTSUS.

**HOLDING:**

By application of GRIs 1 and 6, the plastic urine drainage bags at issue in NY E83373 are classified under heading 3926, HTS, specifically under subheading 3926.90.9910, HTSUS, which provides for “[O]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Laboratory ware.” The applicable rate of duty is 5.3% *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

NY E83373, dated June 28, 1999, is hereby REVOKED.

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

*Sincerely,*

GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**19 CFR PART 177**

**REVOCATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF BABIES’ SWIMWEAR**

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

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of babies’ swimwear.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of babies' swimwear under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 7, on February 23, 2022. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2022.

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles & Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 7, on February 23, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of babies' swimwear. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N245655, dated September 12, 2013, CBP classified babies' swimwear in heading 6111, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted." CBP has reviewed NY N245655 and has determined the ruling letter to be in error. It is now CBP's position that the babies' swimwear is properly classified, in heading 9619.00, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N245655 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H304671, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

*Attachment*



HQ H304671

March 28, 2022

OT:RR:CTF:FTM H304671 PJG

CATEGORY: Classification

TARIFF NO.: 9619.00

DIANA FERRON

PVH

200 MADISON AVENUE

NEW YORK, NEW YORK 10016

RE: Revocation of NY N245655 and NY N100856; tariff classification of babies' swimwear

DEAR MS. FERRON:

On September 12, 2013, U.S. Customs and Border Protection ("CBP") issued to you New York Ruling Letter ("NY") N245655. The ruling pertains to the tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of two styles of babies' swimwear, specifically, style numbers 7570512 and 7570513. We have since reviewed NY N245655 and determined it to be in error with respect to the classification of these products. Similarly, we have reviewed NY N100856, dated April 15, 2010, and determined it to be in error with respect to the classification of style GT210, which is a babies' swim diaper. Accordingly, NY N245655 and NY N100856 are revoked. Specifically, NY N100856 is revoked by operation of law because it was issued before heading 9619, HTSUS, was introduced. It is now CBP's position that style numbers 7570512, 7570513, and GT210 are classified in heading 9619.00, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on February 23, 2022, in Volume 56, Number 7, of the *Customs Bulletin*. No comments were received in response to this notice.

**FACTS:**

In NY N245655, styles 7570512 and 7570513 are described as follows:

Style 7570512 and Style 7570513 are babies' swimwear with an interior diaper component. The outer shells and interior linings of both garments are constructed of polyester knit fabric. Between the outer shells and the interior linings is an interior layer of thin nylon woven fabric that has a polyurethane coating. The lining assists in preventing waste and bacteria from getting into the water.

Style 7570512 is for boys. It has swim trunk styling and a fully elasticized waistband. The interior panty section is sewn into the interior waistband and has elasticized fabric at the leg openings.

Style 7570513 is for girls. It has panty styling, a fully elasticized waistband with fabric bow and elasticized fabric at the leg openings.

Both styles will be imported in babies' sizes 6 to 18 months.

In NY N245655, CBP classified styles 7570512 and 7570513 in subheading 6111.30.5070, HTSUSA, which provides for “Babies’ garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other: Other: Other.”

In NY N100856, style GT210 is described as follows:

Style GT210 is a babies’ swim diaper consisting of an outer shell and a detachable inner shell. The outer shell is constructed from 92% cotton, 8% spandex knit jersey fabric. The outer shell features elasticized leg openings, an elasticized waistband with hook and loop closures that fasten at the front of the diaper onto hook and loop strips, an embroidered g and ruffles on the front of the diaper. The detachable inner shell is constructed of a nylon woven polyurethane coated material and is held in place by four plastic snaps. The essential character of the garment is imparted by the knit outer shell.

In NY N100856, CBP classified style GT210 in subheading 6111.20.6070, HTSUSA, which provides for “Babies’ garments and clothing accessories, knitted or crocheted: Of cotton: Other: Other.”

#### **ISSUE:**

Whether the subject babies’ swimsuits are classifiable in heading 6111, HTSUS, which provides for “Babies’ garments and clothing accessories, knitted or crocheted,” or in heading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material.”

#### **LAW AND ANALYSIS:**

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

The HTSUS provisions under consideration are as follows:

- 6111** Babies’ garments and clothing accessories, knitted or crocheted:
- 9619.00** Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material:

GRI 3(a) and (b) provide as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Note 6 to Chapter 61 provides as follows:

For the purposes of heading 6111:

- (a) The expression “*babies’ garments and clothing accessories*” means articles for young children of a body height not exceeding 86 centimeters;
- (b) Articles which are, *prima facie*, classifiable both in heading 6111 and in other headings of this chapter are to be classified in heading 6111.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to GRI 3(b) states, in pertinent part:

- (VI) This second method relates only to :
- (i) Mixtures.
- (ii) Composite goods consisting of different materials.
- (iii) Composite goods consisting of different components.
- (iv) Goods put up in sets for retail sales.
- It applies only if Rule 3 (a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

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

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

\* \* \*

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which :

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

“Retail sale” does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking or incorporation with or into other goods.

The term “goods put up in sets for retail sale” therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together. For example, different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal, packaged together and intended for consumption by the purchaser would be a “set put up for retail sale”.

\* \* \*

The EN to 96.19 states, in pertinent part:

This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.

In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer’s skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.

This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).

When considering the classification of apparel made up of woven and knit fabrics, guidance may be found in HQ memo 084118. In that memo, we stated with regard to upper body garments:

- (a) For upper or lower body garments, if one component exceeds 60 percent of the visible surface area, that component will determine the classification of the garment unless the other component:
  - (1) forms the entire front of the garment; or
  - (2) provides a visual and significant decorative effect (e.g., a substantial amount of lace); or
  - (3) is over 50 percent by weight of the garment; or
  - (4) is valued at more than 10 times the primary component.

If no component comprises 60 percent of the visible surface area, or if any of the above four listed conditions are present, classification will be according to GRI 3(b) or 3(c), as appropriate.

Section XI, Note 1(u), HTSUS, provides that Section XI, which includes Chapters 61 and 62, HTSUS, does not cover “[a]rticles of chapter 96 (for example, brushes, travel sets for sewing, slide fasteners, typewriter ribbons, sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies).” Therefore, first, we must consider whether styles 7570512 and 7570513 are classifiable in Chapter 96, HTSUS.

### ***Classification of style 7570513***

First, we will address the classification of style 7570513, which is a baby girls’ panty style swimwear with an interior diaper component and a fully elasticized waistband and elasticized leg openings. In NY N070405, dated August 3, 2009, CBP found that the cotton terry knit crotch with polyurethane laminate barrier that was designed to retain waste imparted the essential character to the babies’ swim diapers that were comprised of different materials. In style 7570513, the waste retention is accomplished with the absorption qualities of the polyester knit fabric and the thin nylon woven fabric that has a polyurethane coating.

In the 2012 Basic Edition of the HTSUS, heading 9619, HTSUS, was introduced to provide for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material.” The diaper component of style 7570513 fits the description provided by EN 96.19 for articles that are classifiable in heading 9619, HTSUS, because it is composed of (a) an interior lining of polyester knit fabric that helps wick the fluid from the babies’ body and prevents chafing; (b) an absorbent component (the textile composition of which we are unaware) that collects and stores the fluid until the product can be washed and reused; (c) a layer of thin nylon woven fabric that has a polyurethane coating to prevent leakage of the fluid and bacteria from the absorbent core; and (d) the diaper component is designed to fit snugly to the baby’s body. We conclude, therefore, that style 7570513 is classifiable in heading 9619.00, HTSUS, as “similar articles.”

Since the diaper component of style 7570513 is comprised of different materials, specifically, polyester knit fabric, nylon woven fabric with polyurethane coating, and the textile composition of the absorbent component, the appropriate subheading for the subject merchandise cannot be determined pursuant to GRI 1. GRI 2(a) does not provide assistance and in accordance with the guidance provided by GRI 2(b), “[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.” Applying GRI 3(a) in the context of the subheading, we find that more than two subheadings, specifically, subheading 9619.00.64, HTSUS (Knitted; Of man-made fibers), subheading 9619.00.74, HTSUS (Other; Of man-made fibers), and subheading 9619.00, HTSUS (the eight digit subheading would depend upon the textile composition of the absorbent component), refer to only part of the materials that comprise the subject merchandise. As such, we refer to GRI 3(b), which states that “[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” In HQ H271286, dated April 4, 2017, we stated that the absorbent component imparts the essential character to articles of heading 9619, HTSUS.

In the instant case, we do not have information concerning the textile composition of the absorbent component of style 7570513. As such, style 7570513 we can only provide the classification of this product at the six-digit level, specifically, in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

### **Classification of style 7570512**

Second, we will address the classification of style 7570512, which is a baby boys’ trunk style swimwear with an interior diaper component and a fully elasticized waistband. The diaper component is sewn into the interior waistband and has elasticized fabric at the leg openings.

Initially, we must consider whether the garment is swimwear or shorts. The Court of International Trade (“CIT”) held in *Hampco Apparel, Inc. v. United States*, 12 Ct. Int’l Trade 92, 95 (1988), that we must look at the following features and, if *all* are present, then the garment is swimwear and not shorts:

- 1) whether the garment has a elasticized waistband through which a drawstring is threaded;
- 2) whether the garment has an inner lining of lightweight material, namely, nylon tricot; and
- 3) whether the garment was designed and constructed for swimming.

While style 7570512 has an elasticized waistband, it does not have a drawstring, therefore, style 7570512 is shorts and not swimwear for classification purposes.

Since style 7570512 is a lower body garment made from both woven and knit fabrics, the merchandise is classifiable in heading 6111, HTSUS (knit)<sup>1</sup>, or 6209, HTSUS (woven),<sup>2</sup> and we must consider HQ memo 084118. In accordance with HQ memo 084118 section (a)(3), we needed to determine the weights of the knit and woven components. We do not have a sample of the merchandise to determine the weights of the knit and woven components, however, in the instant case, style 7570512 also has an absorbent component that we must consider under a GRI 3(b) analysis in classifying the merchandise.

For the same reasons discussed above for style 7570513, style 7570512 is classified at the six-digit level in subheading 9619.00, HTSUS, which pro-

<sup>1</sup> The term “[b]abies’ garments and clothing accessories” is defined by Note 6(a) to Chapter 61, HTSUS, and Note 4(a) to Chapter 62, HTSUS, as “articles for young children of a body height not exceeding 86 centimeters.” Based on the information in NY N245655, style 7570512 will be imported in babies’ sizes 6 to 18 months old. In the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, 53 Fed. Reg. 52563 (Dec. 28, 1988), we noted that “[b]abies’ sizes 0–24 months normally fall within” the measurement “for young children of a body height not exceeding 86 centimeters.” Accordingly, style 7570512 could be classifiable in heading 6111, HTSUS, or heading 6209, HTSUS, as “[b]abies’ garments and clothing accessories.”

<sup>2</sup> In the past, U.S. Customs and Border Protection (“CBP”) has classified similar merchandise that was constructed of woven fabric in Chapter 62, HTSUS, when the merchandise was missing one or more of the features described in *Hampco*. See NY N183425 (Sept. 15, 2011); NY N068491 (July 15, 2009); NY N022635 (Feb. 7, 2008). Rulings concerning similar merchandise constructed of knit fabric could not be located in the Customs Rulings Online Search System (“CROSS”).

vides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

**HOLDING:**

Under the authority of GRIs 1, 3(b), and 6, style 7575013 is classified in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

Under the authority of GRIs 1, 3(b), and 6, style 7575012 is classified in subheading 9619.00, HTSUS, which provides for “Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials.”

**EFFECT ON OTHER RULINGS:**

NY N245655, dated September 12, 2013, is REVOKED.

NY N100856, dated April 15, 2010, is REVOKED by operation of law. The essential character of style GT210 is based on the absorbent component and the merchandise is classified at the six-digit level in subheading 9619.00, HTSUS. Further information concerning the textile composition of the absorbent component would be necessary to determine the classification of the merchandise beyond the six-digit level and to determine the appropriate duty rate.

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


*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED REVOCATION OF ONE RULING LETTER,  
PROPOSED MODIFICATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF MEN’S  
VEST/SLEEVELESS JACKET**

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

**ACTION:** Notice of proposed revocation of one ruling letter and proposed modification of one other ruling letter and proposed revocation of treatment relating to the tariff classification of men’s vests/sleeveless jackets.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises



interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter and modify another concerning tariff classification of men's vests/sleeveless jackets under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before May 13, 2022.

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

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

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter and modify another ruling letter pertaining to the tariff classification of men's vests/sleeveless jackets. Although in this notice, CBP is specifically

referring to Headquarters Ruling Letter (“HQ”) 964512, dated January 30, 2001, and New York Ruling Letter (“NY”) PD G80065, dated August 24, 2000 (Attachments A and B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In HQ 964512 and NY G80065, CBP classified men’s vests/sleeveless jackets in heading 6211, HTSUS, specifically in subheading 6211.33.00, HTSUS, which provides for, “Track suits, ski-suits and swimwear; other garments: Other garments, men’s or boys’: of man-made fibers: Vests: Other.” CBP has reviewed HQ 964512 and NY G80065 and has determined the ruling letters to be in error. It is now CBP’s position that men’s vest/sleeveless jacket is properly classified, in heading 6201, HTSUS, specifically in subheading 6201.93.60, HTSUS, which provides for “Men’s or boys’ overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other, Water resistant.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ 964512 and modify NY G80065 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H300624, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

Attachments

PD G80065

August 24, 2000

CLA-2-61-NO:TC I06

CATEGORY: Classification

TARIFF NO.: 6211.33.0054; 6201.93.3000;

6201.93.3511

Ms. SHERI G. LAWSON  
P.B.B. GLOBAL LOGISTICS  
434 DELAWARE AVENUE  
BUFFALO, NEW YORK 14202

RE: The tariff classification of a men's woven vest and woven jacket from Myanmar and Cambodia

DEAR Ms. LAWSON:

In your letter dated July 25, 2000, you requested a tariff classification ruling on behalf of Ash City Division, GH Imported Merchandise & Sales Limited.

Two samples of a men's vest and jacket, having outershells composed of 100% nylon woven fabric coated with polyurethane, were submitted. Each garment also features a knit, mesh, man-made fiber lining; a full frontal opening with a zipper closure extending through the stand-up collar; slanted pockets, with zipper closures, located below the waist; and a hemmed bottom. The jacket also features long, hemmed sleeves. Per your request, your samples are enclosed herewith.

The applicable subheading for the vest will be 6211.33.0054, Harmonized Tariff Schedule of the United States (HTS), which provides for track suits, ski-suits and swimwear; other garments: other garments, men's or boys': of man-made fibers: vests: other. The rate of duty will be 16.4 percent ad valorem.

If the jacket passes the water resistance test specified in Chapter 62, Additional U.S. Note 2, (HTS), then the applicable subheading for the jacket will be 6201.93.3000, HTS, which provides for men's or boys' anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: of man-made fibers: other: other: other: water resistant. The rate of duty will be 7.3 percent ad valorem.

If the jacket does not pass the water resistance test specified in Chapter 62, Additional U.S. Note 2, HTS, then the applicable subheading for the jacket will be 6201.93.3511, HTS, which provides for men's or boys' anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: of man-made fibers: other: other: other: other: men's. The rate of duty will be 28.4 percent ad valorem.

The vest falls within textile category designation 659. Based upon international textile trade agreements, products of Cambodia are subject to the requirement of a visa.

The jacket falls within textile category designation 634. Based upon international textile trade agreements, the jacket from Myanmar is not presently subject to quota restraints or visa requirements.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information,

we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web Site at WWW.CUSTOMS.GOV. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

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

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

*Sincerely,*

JOSEPH O'GORMAN  
*Acting Port Director*  
*New Orleans, Louisiana*

HQ H300624  
OT:RR:CTF:FTM H300624 JER  
CATEGORY: Classification  
TARIFF NO.: 6201.93.60

MS. SHERI LAWSON  
TRADE & REGULATORY SERVICES  
PBB GLOBAL LOGISTICS  
434 DELAWARE AVE.  
BUFFALO, NY 14202

RE: Proposed Revocation of HQ 964512 and NY G80065; Tariff  
Classification of Men's Vest

DEAR MS. LAWSON:

On January 30, 2001, U.S. Customs and Border Protection ("CBP") issued Headquarters Ruling Letter ("HQ") 964512 to you in response to your request for reconsideration of New York Ruling Letter ("NY") G80065, dated August 24, 2000 (referenced in HQ 964512 as Port Decision ("PD") G80065), on behalf of your client, Ash City Division, GH Imported Merchandise & Sales Limited, pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of the men's vest from Cambodia. NY G80065 classified the men's vest under heading 6211, HTSUS, and specifically under subheading 6211.33.0054, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, men's or boys': of man-made fibers: Vests: Other."

In your request for reconsideration, you opined that the subject men's vest should be classified as a sleeveless jacket under heading 6201, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded sleeveless jackets), other than those of heading 6203." In HQ 964512, CBP affirmed the decision in NY G80065 and upheld the classification of the imported men's vests in heading 6211, HTSUS, as a vest. NY G80065 concerned the tariff classification of a men's vest and men's jacket. Upon further review, CBP has determined that HQ 964512 was incorrect in affirming NY G80065 with respect to only the men's vest. The classification of the men's jacket in NY G80065 is not affected by this decision. CBP has determined that the men's vest in NY G80065 is classified under heading 6201, HTSUS. As such, we find that both HQ 964512 and NY G80065 are incorrect. Accordingly, HQ 964512 is hereby revoked and NY G80065 is modified to reflect the proper classification of the men's vest.

**FACTS:**

In HQ 964512, the men's vest was described as follows:

The subject merchandise is men's vest with an outershell composed of 100 percent nylon woven fabric coated with polyurethane. The polyurethane coating is not visible to the naked eye. The garment features a knit, mesh, man-made fiber lining and a full frontal opening with a zipper closure extending through the stand up collar. The garment also has slanted pockets with zippered closures located below the waist and a hemmed bottom.

In your September 11, 2000, request for reconsideration of NY G80065, you stated the following:

The vest has a woven nylon shell and will be made in Cambodia. It has been treated with a 600mm polyurethane clear coat finish, which can pass the AA TCC Test Method 35–1985. The water-resistant coating does not obscure the underlying fabric and is not visible. Fabric details follow. A sample is enclosed.

**ISSUE:**

Whether the subject men’s vest is classified under heading 6201, HTSUS, as a sleeveless jacket or under heading 6211, HTSUS, as a vest.

**LAW AND ANALYSIS:**

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

The 2022 HTSUS provisions under consideration are as follows:

6201	Men’s or boys’ overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets)
6201.40	Of man-made fibers: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Recreational performance wear: Other: Other: Other:
6201.40.4500	Water resistant . . .
6201.40.5000	Other . . .
	* * * * *
6211	Track suits, ski-suits and swimwear; other garments: Other garments, men’s or boys’ (con.):
6211.33.00	Of man-made fibers . . .
6211.33.0050	Recreational performance outerwear: Vests... * * * * *

The Additional U.S. Note to Chapter 62, HTSUS, addresses “water resistance” and states in pertinent part:

*For the purposes of subheadings . . . 6201.93.30, . . . , the term “water resistant” means that garments classifiable in those subheadings must have a water resistance (see ASTM designations D 3600–81*



and D 3781-79) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with AATCC Test Method 35-1985. This water resistance must be the result of a rubber or plastic application to the outer shell, lining, or inner lining.

\* \* \* \* \*

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the HTSUS at the international level. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The provisions of EN 61.01 apply, *mutatis mutandi*, to heading 6201, HTSUS. EN 61.01 provides, in pertinent part, as follows:

This heading covers a category of knitted or crocheted garments for men or boys, characterized by the fact that they are generally worn over all other clothing for protection against the weather.

It includes :

Overcoats, raincoats, car-coats, capes including ponchos, cloaks, anoraks including ski-jackets, wind-cheaters, wind-jackets and similar articles, such as three-quarter coats, greatcoats, hooded capes, duffel coats, trench coats, gabardines, parkas, padded waistcoats.

The provisions of EN 61.14 apply, *mutatis mutandi*, to heading 6211, HTSUS.

EN 61.14 provides, in pertinent part, as follows:

This heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter.

The heading includes, *inter alia*:

...

(5) Special articles of apparel used for certain sports or for dancing or gymnastics (e.g., fencing clothing, jockeys’ silks, ballet skirts, leotards).

\* \* \* \* \*

In HQ 964512, CBP stated that the classification of the subject men’s vest rested on whether the garment’s marketing, design, and construction rendered it exclusively suitable for use as a jacket or as a vest. The decision in HQ 964512 reasoned that the *eo nomine* reference to men’s padded sleeveless jackets within heading 6201, HTSUS, precluded classification of the subject men’s vest because the men’s vest, although sleeveless, was not padded. In HQ 964512, CBP further stated that the plain language within the parenthetical of heading 6211, HTSUS, which states “including padded, sleeveless jackets” limited classification of sleeveless jackets to those which are padded or otherwise insulated. In HQ 964512, CBP stated that the language of the parenthetical “was unambiguous to the type of outerwear vests” that are included in heading 6201, HTSUS. That padded sleeveless vests are *prima facie* classified in heading 6201, HTSUS, is not disputed. *See e.g.*, NY 084041, dated September 16, 1989, and HQ 965989, dated December 19, 2002 (CBP classified padded sleeveless jackets under heading 6201, HTSUS). Upon

further consideration, we find that the determination in HQ 964512 that only padded sleeveless jackets are classified in heading 6201, HTSUS, is incorrect.

The term “including” used in the parenthetical means “containing as part of the whole being considered.”<sup>1</sup> and is “used for saying that a person or thing is part of a particular group or amount.”<sup>2</sup> The term “including” does not limit the group or whole to the specific item or thing referenced. Instead, the term “including” means that something, in this case sleeveless vests, is an item which is included in a larger group of items to be considered. Thus, the phrase “including padded sleeveless vests” is exemplary of the types of sleeveless vests, which are included in the parenthetical but does not preclude classification of other sleeveless articles that might meet the terms of heading 6201, HTSUS. For example, in NY N295141, dated March 26, 2018, CBP classified a non-padded men’s hip-length vest under heading 6201, HTSUS. The men’s vest was constructed from 100% polyester woven fabric containing a 600 mm polyurethane coating, which passed the AATCC Test Method 35–1985 water-resistance test. The garment featured a full front opening with a zipper closure, which extended through a stand-up collar; a polyester mesh lining; zippered pockets; an interior mesh pocket with a hook and loop closure; and reflective details on the back body. It also had an elastic drawcord which was threaded through the bottom hem for tightening. The vest in NY N295141 was not insulated or padded but instead had several of the features and characteristics of a rain jacket. Likewise, in HQ 967926, dated January 3, 2006, CBP classified a short-sleeved windshirt in heading 6201, HTSUS, despite the fact that it did not have all the features of a jacket. The windshirt in HQ 967926 was described as short-sleeved, made of a lightweight dobby fabric and was water-resistant. The decision in HQ 967926 reasoned that the windshirt was *ejusdem generis* to the articles of heading 6201, HTSUS. Finally, even if *arguendo* the parenthetical is limited to only padded sleeveless jackets, the decisions in NY N295141 and HQ 967926 evidence the fact that the parenthetical does not preclude other types of sleeveless jackets from being classified as windbreakers, raincoats or other “similar articles” under heading 6201, HTSUS.

The question of whether the subject men’s vest is classified under heading 6201, HTSUS, as a sleeveless jacket or under heading 6211, HTSUS, as a vest, rests in part, on whether it meets the definition of a jacket or similar article. Likewise, its classification under heading 6201, HTSUS, requires that the subject article provides protection against the elements (i.e., it is padded or insulated, is water resistant or otherwise has the capacity to guard against various weather conditions). In determining whether the subject men’s vest is classifiable as a jacket designed to be worn as outerwear, we consult the ENs to heading 6201, HTSUS, which provide, in relevant part, that “garments of the heading are generally worn over all other clothing for protection against the weather.”

In classifying a garment that is not *per se* an enumerated item under heading 6201, the first step is to determine the shared characteristics or purpose of the listed items. See HQ 967926 (discussed *supra*, noting that a

<sup>1</sup> Including. <https://www.oed.com/view/Entry/93571?rskey=OjQTu8&result=1#eid> (Last visited Nov. 9, 2021).

<sup>2</sup> Including. <https://dictionary.cambridge.org/us/dictionary/english/including> (Last visited Nov. 9, 2021).

certain windshirt was *ejusdem generis* to the articles of heading 6201, HTSUS). In previous CBP rulings we have examined the factors and characteristics which distinguish between garments which were classifiable as jackets from garments that were classifiable as a shirt (6205, HTSUS). As shall be discussed, one consistent purpose of articles enumerated *eo nomine* in heading 6201, HTSUS, is the capacity to protect against various weather conditions. While another consistent characteristic is the garments capacity to be worn over or atop other garments. For example, in HQ 960626, dated July 25, 1997, CBP addressed the difference between a jacket of heading 6201, HTSUS, and a shirt of heading 6205, HTSUS. The decision in HQ 960626 noted that in order for the garment to be classified as a jacket, the garment must have at least three of the features set out in the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (Nov. 23, 1988) (*hereinafter*, “Textile Guidelines”). The garments in HQ 960626 were determined to be designed and constructed to be worn over all other garments. In HQ 960626, CBP reasoned that the heavy-duty zipper was of a heavier gauge typically associated with a shirt worn against the skin and that the material of the jackets added warmth not merely adornment and comfort. *See also*, HQ 959085, dated November 26, 1996 (CBP distinguished between a jacket and a shirt; finding that the garments were jackets of heading 6201, HTSUS, because they possessed the characteristics of a jacket or coat). *See also*, HQ 288404, dated April 29, 2020 (CBP outlined the requirements for classification of jackets).

Although the subject men’s vest is sleeveless and therefore cannot be classified as a coat, it is instructive that it consists of several features designated for raincoats, water-resistant coats and shirt jackets in accordance with the Textile Guidelines. The Textile Guidelines state that, “Garments having features of both jackets and shirts will be categorized as coats if they possess at least three of the above listed features and if the result is not unreasonable... Garments not possessing at least 3 of the listed features will be considered on an individual basis.” The subject men’s vest has four of the Textile Guidelines features. It has a full inner lining which is made of a knit mesh, patch pockets on the exterior of the vest, which are positioned at the waist and features a heavy-duty zipper on the front, which zips up to the chin forming a stand-up collar, and a ribbed waist band. The fact that the vest has four of the aforementioned features further supports a finding that it is a sleeveless jacket designed to be worn over other garments for protection against weather conditions.

Additionally, CBP has long held that certain physical characteristics, designs, and features were essential for an article to be defined as a jacket for tariff classification purposes. In HQ 950651, dated December 31, 1991, CBP noted that the garment at issue had several characteristics which indicated that the article was defined and therefore properly classifiable as a jacket. In particular, HQ 950651 noted that 1) The sample had “applied cuffs which are often found on jackets and not on shirts”; 2) The “garment had a rib-knit waistband”; and 3) “The extremely generous cut of the article is similar to the proportions of a jacket. The armholes and sleeves were extraordinarily large, and the blouson silhouette enabled this garment to easily accommodate jerseys and other shirts underneath.” Likewise, the decision in HQ 950651 noted that while thick or heavily weighted fabric is common among jackets, that lightweight fabric did not preclude the garment at issue from classification as a jacket because “jackets may come in various weights.” Similarly,

in HQ 966053, dated May 24, 2004, CBP determined that a garment was classified as a jacket because 1) it was constructed with a “tailored” fit, and therefore had “the structured styling or tailoring generally found in garments used as jackets”; and 2) because the garment was designed to be “worn over other apparel.” Likewise, in HQ 952024, dated September 15, 1992, in distinguishing between shirts and jackets, CBP noted that garments with “pockets below the waist”, with “ribbed waistbands” and a “means of tightening at the bottom of the garment” were excluded from heading 6205, HTSUS, by the General Explanatory Notes to Chapter 62, but were however, characteristics which were generally associated with jackets of 6201, HTSUS. *See generally*, CBP Informed Compliance Publication entitled, “Classification: Apparel Terminology under the HTSUS (June 2008), (stating that, “*jackets* are garments designed to be worn over another garment, for protection against the elements. Jackets cover the upper body from the neck area to the waist area but are generally less than mid-thigh length. They normally have a full front opening, although some jackets may have only a partial front opening. Jackets usually have long sleeves.”).

Lastly, we address the Ash City’s assertion that the subject men’s vest is water-resistant. According to the reconsideration request, the vest has a woven nylon shell which has been treated with a 600 mm polyurethane clear coat finish. The 600 mm polyurethane clear coat finish is said to pass the AATCC Test Method 35–1985 as required by U.S. Note 2 to Chapter 62, HTSUS. Whether or not the polyurethane clear coat is able to pass the AATCC Test Method 35–1985 was not confirmed or dispelled by the CBP Laboratory at the time HQ 964512 was issued. However, a visual inspection of images taken of the men’s vest reveals that it does feature a nylon shell with a shiny clear coating. While the water-resistant capacity was not examined by the CBP Laboratory, outerwear with a (shiny) polyurethane clear coat is consistent with material designed to provide protection from the rain. *See* HQ H159096, dated September 9, 2013 (CBP classified women’s raincoats in heading 6202, HTSUS, primarily because they featured a thermoplastic polyurethane (“TPU”) waterproof plastic coating on top of the underlying fabric. Note that the water-resistance of the TPU was not tested by the CBP Laboratory). Much like the raincoats in HQ H159096, the instant men’s vests have the capacity to provide protection against the rain. Additionally, the men’s vest also features a knit mesh lining which is consistent with garments used for outdoor or other exercise activities such as swimming, jogging, etc. CBP has previously classified men’s jackets featuring mesh lining in heading 6201, HTSUS. *See* NY A85432, dated July 5, 1996; *see also*, NY B89665, dated October 3, 1997. Mesh lining helps let air circulate to increase ventilation so that the wearer can cool down and get rid of sweat. All About Mesh Lining and Panels, Debbie Kosy (July 14, 2015), available at <https://www.olorun-sports.com/blogs/news/49190531-all-about-mesh-lining-and-panels> (Last visited, November 9, 2021).

Furthermore, the design of the men’s vest is consistent with the criteria set forth in the ENs to heading 6201, HTSUS. For example, a visual inspection of the garment indicates that it is designed to be worn over another garment with the purpose of offering protection against the elements. The nylon shell and polyurethane clear coat finish has the appearance and construction of a jacket rather than a shirt. Likewise, the mesh lining and heavy-duty zipper do not appear to be the type of material suitable for wearing against the skin as a shirt. It does not have the appearance of a vest designed to be worn over

a dress shirt either. Moreover, it covers the upper body from the neck area to the waist area. It has a full front opening which is performed by its heavy-duty zipper which zips from the waist to the chin area forming a stand-up collar which can provide additional warmth to the neck area. The construction of the ribbed waist band appears to have the capacity to provide protection against the wind or other elements. Lastly, Ash City markets its nylon shell vests alongside their collection of cold weather coats, jackets, and vests.<sup>3</sup> It is substantially similar in purpose, design and construction to the cold weather coats, jackets and vests marketed by Ash City. Hence, much like the unpadded vest in NY N295141 and the short sleeved windshirt in HQ 967926, we find that the subject men's sleeveless vest is *ejusdem generis* to the articles enumerated in heading 6201, HTSUS. In particular, we find that the subject men's vest possesses the same characteristics and purpose which unites the coats, jackets, windbreakers and similar articles enumerated *eo nomine* under heading 6201, HTSUS.

### **HOLDING:**

By application of GRI 1, the subject men's vest is classified as a jacket in heading 6201, HTSUS. Specifically, if the men's vest meets the water resistant requirements as specified in Additional U.S. Note 2 to Chapter 62, HTSUS, the applicable subheading will be 6201.40.4500, HTSUSA, which provides for: "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other: Water resistant." The column one rate of duty is 7.1% *ad valorem*.

Alternatively, if the men's vest does not meet the water resistant requirements, the applicable subheading will be 6201.40.5000, HTSUS, which provides for: "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other, Other." The column one rate of duty is 27.7% *ad valorem*.

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

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

NY G80065, dated August 15, 2019, is MODIFIED and HQ 964512, dated January 30, 2001, is hereby REVOKED.

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

---

<sup>3</sup> Ash City's Men's Cold Weather Coats, Jackets and Vests, Walmart.com, at [https://www.walmart.com/browse/clothing/men-s-cold-weather-coats-jackets-vests/ash-city/5438\\_639019\\_9781608\\_9123654/YnJhbmQ6QXNoIENpdHkie](https://www.walmart.com/browse/clothing/men-s-cold-weather-coats-jackets-vests/ash-city/5438_639019_9781608_9123654/YnJhbmQ6QXNoIENpdHkie) (Last visited November 9, 2021).

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

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

STAR KIST Co., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2021-1548

Appeal from the United States Court of International Trade in No. 1:14-cv-00068-TMR, Judge Timothy M. Reif.

Decided: March 30, 2022

MICHAEL EDWARD ROLL, Roll & Harris LLP, Los Angeles, CA, argued for plaintiff-appellant. Also represented by BRETT IAN HARRIS, Washington, DC.

ALEXANDER J. VANDERWEIDE, Civil Division, Commercial Litigation Branch, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, JUSTIN REINHART MILLER; SHERYL FRENCH, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, New York, NY.

Before MOORE, *Chief Judge*, DYK and REYNA, *Circuit Judges*.

REYNA, *Circuit Judge*.

StarKist Co. challenges a tariff classification of four imported tuna salad products under subheading 1604.14.10 of the Harmonized Tariff Schedule of the United States. We affirm.

## HTSUS

The cross-border movement of goods across international markets is regulated by tariff classification systems for ascribing the appropriate tariff to specific imported goods. In the United States, the Harmonized Tariff Schedule of the United States (“HTSUS”) governs the classification of imported goods and merchandise and provides the applicable tariff rates. The HTSUS and the Additional U.S. Notes to the HTSUS have the force of statutory law. *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005); USITC Pub. 4368, at Preface p. 1 (2013).

The interpretation of HTSUS provisions is undertaken through General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation (“ARIs”). *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007). Absent contrary legislative intent, we construe HTSUS terms according to their common and commercial meanings, which we presume to be the same. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).



The application of the GRIs and ARIs is rigid. The GRIs are to be applied in numerical order, such that, if proper classification is achieved through a particular GRI, the remaining successive GRIs should not be considered. *Id.* GRI 1 explains that classification under any heading shall be determined according to the terms of the headings and any relative section or chapter notes. Once the court determines the appropriate heading, the court applies GRI 6 to determine the appropriate subheading. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 6 provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules.” Accordingly, where a party disputes a classification under a particular subheading, we apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification subheading, then that single classification applies, and the successive GRIs are inoperative. *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011).

#### BACKGROUND

This appeal involves two varieties of tuna salad products, albacore and chunk light, each of which is imported as ready-to-eat pouches or lunch-to-go kits. J.A. 2. The lunch-to-go kits consist of the tuna salad pouches, crackers, a mint, a napkin, and a spoon. J.A. 3.

The administrative record demonstrates that the production processes for both types of tuna salad products are the same in all ways relevant to this appeal. The fish is caught in South American or international waters, frozen, delivered to a facility in Ecuador, sorted, thawed, cooked, machine chopped, then hand-folded with a prepared mixture of other ingredients including a mayo base comprising more than 12% soybean oil. J.A. 3–4, 45–53, 55–56, 60–61. The resulting mixture is packaged into pouches using metal funnels. J.A. 4, 45, 56, 60–61.

The tuna salad products at issue have been classified by United States Customs and Border Protection (“Customs”) under subheading 1604.14.10. Heading 1604 provides:

Heading Subheading	Total Duty Rate	Article Description	Unit of Quantity	Rates of Duty		
				General	Special	2
1604 (con.)		Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs: (con.)				
1604.13		Fish, whole or in pieces, but not minced: (con.)				
1604.13.10	00	Sardines, sardinella and brisling or sprats: In oil, in airtight containers:				
		Smoked sardines, neither skinned nor boned, valued \$1 or more per kg in tin-plate containers, or \$1.10 or more per kg in other containers:	kg	Free <sup>21</sup>		30%
		Other:				
1604.13.20	00	Neither skinned nor boned:	kg	15% <sup>21</sup>	Free (A-, AU, BH, CA, CL, CO, D, E, IL, JO, MA, MX, OM, P, PA, PE, SG) 1.5% (KR)	30%
1604.13.30	00	Skinned or boned:	kg	20% <sup>21</sup>	Free (A-, AU, BH, CA, CL, CO, D, E, IL, JO, MA, MX, OM, P, PA, PE, SG) 2% (KR)	30%
		Other:				
1604.13.40	00	In immediate containers weighing with their contents under 225 grams each:	kg	Free <sup>21</sup>		25%
1604.13.90	00	Other:	kg	3.1% <sup>21</sup>	Free (A-, AU, BH, CA, CL, CO, D, E, IL, JO, KR, MA, MX, OM, P, PA, PE, SG)	25%
1604.14		Tunas, skipjack and bonito ( <i>Sarda</i> spp.):				
		Tunas and skipjack:				
		In airtight containers:				
1604.14.10		In oil:		35% <sup>21</sup>	Free (A-, AU, BH, CA, CL, D, IL, JO, MA, MX, OM, P, PA, PE, R, SG) 3.5% (CO) 7% (KR)	45%

HTSUS 1604 (emphasis added). Accordingly, subheading 1604.14.10, which carries a 35% *ad valorem* duty, covers:

Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs:

Fish, whole or in pieces, but **not minced**:

Tunas, skipjack and bonito (*Sarda* spp.):

Tunas and skipjack:

In airtight containers:

***In oil.***

HTSUS 1604.14.10 (emphases added).

StarKist seeks a classification under 1604.20.05, which covers “products containing meat of crustaceans, molluscs or other aquatic invertebrates; prepared meals,” and carries a 10% *ad valorem* duty. Appellant’s Br. 22–42. Or, in the alternative, StarKist seeks a classification under either subheading 1604.14.22, which covers tuna that is “not minced” and “not in oil,” carrying a 6% *ad valorem* duty, or subheading 1604.14.30, which covers “other,” carrying a 12.5% *ad valorem* duty. *Id.* at 42–58.

StarKist timely filed two separate Customs protests challenging the classification of the tuna salad products under subheading 1604.14.10. Customs denied both protests. StarKist paid all appli-

cable duties owed on the imports and filed this action in the United States Court of International Trade challenging the classifications. The Court of International Trade granted summary judgment in favor of the government, concluding that the tuna salad products are properly classified under 1604.14.10 because they are “not minced” and “in oil.”

The term “minced” is not defined under the HTSUS. Accordingly, the Court of International Trade analyzed different factors to interpret the meaning of the term. J.A. 15. The Court of International Trade determined that a proper understanding of the term requires considering: “(1) whether the pieces, based on their size and physical characteristics, collectively, should be considered ‘minced,’ and, (2) whether the tuna pieces are the product of a minced cut.” J.A. 15. Based on these factors, the Court of International Trade interpreted “minced” under heading 1604 to require “small pieces of a minced cut [that] are the product of a purposeful process that involves cutting or chopping.” J.A. 19.

The Court of International Trade first determined that the size and physical characteristics of the pieces collectively are such that the tuna salad products are “not minced.” J.A. 17–18. The Court of International Trade reasoned that “the presence of certain tuna pieces equivalent in size to minced tuna is purely incidental; the defining character is more accurately described as chunky, with pieces of varying size.” J.A. 17.

The Court of International Trade also determined that the tuna salad products are produced through a process distinct from mincing. J.A. 18–20. The Court of International Trade observed that the fish is first passed through a chopper with four blades, producing pieces of fish larger than Customs’ proposed definition of “minced.” J.A. 19–20. Then, these pieces are hand-folded with the other ingredients, breaking up some of the larger pieces. *Id.* The Court of International Trade reasoned that because the very small pieces in the tuna salad are produced by hand-blending rather than chopping, the subject merchandise is not the product of a minced cut. The Court of International Trade concluded that the products are “not minced” both in result and in process and, as such, are properly classified as “not minced.” J.A. 20.

The Court of International Trade then determined that the tuna salad products are also properly classified as “in oil.” J.A. 20–27. The Court of International Trade reasoned that because the oil is added after the fish is cooked but before it is packed, the StarKist products have been properly classified as “in oil” pursuant to HTSUS Chapter 16 Additional U.S. Note 1. J.A. 27.

StarKist timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

### STANDARD OF REVIEW

We review *de novo* the Court of International Trade’s decision to grant summary judgment and apply anew the standard used by the Court of International Trade to assess the subject Customs classification. *See Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374–75 (Fed. Cir. 2016). “Although we review the decision[ ] of the CIT *de novo*, we give great weight to the informed opinion of the CIT . . . and it is nearly always the starting point of our analysis.” *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016) (internal quotation marks, brackets, and citation omitted). The Court of International Trade “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” U.S. CIT R. 56(a) (2015).

Proper classification of goods under the HTSUS is a two-step process. *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016). First, we ascertain the meaning of the specific terms in the tariff provision. *Orlando Food Corp.*, 140 F.3d at 1439. Absent contrary legislative intent, we construe HTSUS terms according to their common and commercial meanings, which we presume to be the same. *Carl Zeiss*, 195 F.3d at 1379. To assist it in ascertaining the common meaning of a tariff term, the court may rely upon the term’s ordinary meaning, lexicographic and scientific authorities, dictionaries, and other reliable information sources. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988). Second, we determine whether the goods come within the description of those terms. *Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102, 1106 (Fed. Cir. 2014). This step is a factual inquiry that we review for clear error. *Id.* When there is no factual dispute regarding the nature, structure, and use of imported merchandise, the proper classification turns on the first step. *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009).

### “NOT MINCED”

Pursuant to the GRIs, the question of whether the products at issue are “not minced” is a threshold question. StarKist contends that Customs and the Court of International Trade erred in interpreting the term “minced” and/or clearly erred in concluding that StarKist’s products are “not minced.” Appellant’s Br. 25–31. We disagree.

First, we address the proper interpretation of the term “minced.” Based on the record dictionary definitions, the language and context

of the relevant subheadings, as well as the term's ordinary meaning, we conclude that when used in the context of imported fish, the common and commercial meaning of the term "minced" at least requires separation into very small pieces.<sup>1</sup>

Next, we must assess whether Customs clearly erred in its determination that the subject tuna salad products are "not minced." We find no such error. StarKist's tuna salad products at issue are not separated into very small pieces. Instead, the products are first roughly chopped, then hand-folded with additional ingredients, which results in a product consisting of some very small pieces and some chunks. J.A. 55, 60–61. More specifically, cooked albacore tuna is chopped by machine into 0.8–1.0 inch chunks, and cooked chunk light tuna is chopped by machine into 1.0–1.5 inch chunks. J.A. 45, 47–53, 55–56, 60–61, 65. Then, a person hand-folds the tuna pieces with the prepared mayonnaise-based dressing, breaking up some of these larger pieces. J.A. 48, 50, 56, 61. As the Court of International Trade recognized, at the end of this process, the products are properly described as chunky, with pieces of varying size. J.A. 18. This determination is supported by substantial evidence, including sworn testimony and laboratory reports. Accordingly, we determine that Customs did not clearly err in determining that the subject tuna salad products fall within the meaning of the term "not minced." Next, we turn to whether the products are properly classified as "in oil."

#### "IN OIL"

StarKist contends that its products are not properly classified as "in oil" because HTSUS Chapter 16 requires classification of tuna products as "in oil" only where the oil was added for purposes of packing—i.e., at the "packing stage." Appellant's Br. 42–58 (citing J.A. 56, 61, 593, 599). StarKist further contends that because the oil in its products is added during the preparation stage, and not the packing stage, its products are properly classified as "not in oil." *Id.*

HTSUS Chapter 16 Additional U.S. Note 1 governs this inquiry. Note 1 states:

For the purposes of this chapter, the term "*in oil*" means packed in oil or fat, or in added oil or fat and other substances, whether such oil or fat was introduced ***at the time of packing or prior thereto.***

---

<sup>1</sup> Because, as explained below, Customs did not clearly err in determining that the subject tuna salad products do not satisfy this requirement, we do not reach whether the pieces must be "the product of a purposeful process that involves cutting or chopping" to qualify as "minced." J.A. 19.

HTSUS Chapter 16 Additional U.S. Note 1 (second emphasis added). This statutory authority explicitly states that for the term “in oil” to apply, it matters not whether the oil was added during preparation or in the packing process.

StarKist cites two cases in support of its contention that Note 1 does not settle this issue in the government’s favor: *Del Monte Corp. v. United States*, 730 F.3d 1352 (Fed. Cir. 2013), and *Richter Bros., Inc. v. United States*, 44 C.C.P.A. 128 (1957).

*Del Monte* involves the tariff classification of StarKist’s “Tuna Fillets” products—cooked tuna products packaged in airtight foil pouches consisting of chunks of cooked albacore and yellow fin tuna marinated with a mixture of flavoring ingredients in a viscous sauce. 730 F.3d at 1355. In contrast with this case, in *Del Monte*, the tuna was placed in the packaging first, then a sauce containing oil was added. *Id.* This court determined that those StarKist products are “packed in oil” within HTSUS Chapter 16. *Id.*

In *Richter*, the product at issue was herring that was cleaned, covered with wheat meal, put on sieves, and then fried in a pan. 44 C.C.P.A. at 131. The frying fat consisted of 50% herring oil and 50% tallow. *Id.* After frying, the herring was cooled, and as much as possible of the remaining oil was drained off. *Id.* After cooling, the herring was packed into tins filled with a brine of wine, vinegar, water, sugar, and salt. *Id.* It was undisputed that some of the oil remained in the tins as a result of the frying process, but no oil, nor any ingredient containing oil, was added to the tins during packing. *Id.* Our predecessor court held that these products were not “packed in oil” under a different tariff schedule. *Id.*

StarKist contends that its tuna salad products are not “packed in oil” because they are prepared in a similar fashion to the products in *Richter*. StarKist argues that, under *Del Monte*, the oil must be added after the fish is already in the package to be considered “packed in oil.” Contrary to StarKist’s contention, Note 1 resolves this dispute by clarifying that “in oil” is meant within Chapter 16 to distinguish products that incidentally contain oil as a result of their preparation, as was the case in *Richter*, from those in which oil is separately added, as is the case here and in *Del Monte*. Accordingly, we determine that the tuna salad products are properly classified as “in oil” under subheading 1604.14.10 because the oil in the tuna salad products was introduced to the fish prior to packing and the oil is not merely incidental to the preparation, as described in Note 1.

### CONCLUSION

We hold that the tuna salad products at issue are properly classified under subheading 1604.14.10 of the HTSUS because they are “not minced” and are “in oil.” We have considered the parties remaining arguments and find them unpersuasive. Accordingly, we affirm the judgment of the Court of International Trade.

**AFFIRMED**





# U.S. Court of International Trade

Slip Op. 22–25

BUILDING SYSTEMS DE MEXICO, S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC and COREY S.A. DE C.V., Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Court No. 20–00069  
PUBLIC VERSION

[Remanding the U.S. Department of Commerce’s final determination in the less-than-fair-value investigation of certain fabricated structural steel from Mexico.]

Dated: March 21, 2022

*Matthew R. Nicely* and *Daniel M. Witkowski*, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., for plaintiff.

*In K. Cho*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant. Also on the brief were *Patricia M. McCarthy*, Assistant Director, *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Spencer Neff*, Staff Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

*Stephanie M. Bell*, Wiley Rein LLP, of Washington, D.C., argued for defendant-intervenor Full Member Subgroup of the American Institute of Steel Construction, LLC. Also on the brief were *Alan H. Price*, *Christopher B. Weld*, and *Adam M. Teslik*.

## **OPINION AND ORDER**

### **Kelly, Judge:**

Before the court is plaintiff Building Systems de Mexico, S.A. de C.V.’s (“BSM”) U.S. Court of International Trade Rule 56.2 Motion for Judgment on the Agency Record. [BSM’s] R. 56.2 Mot. for J. on the Agency R., Feb. 23, 2021, ECF No. 60 (“Pl. Br.”). BSM asserts numerous deficiencies in the final results of the U.S. Department of Commerce’s (“Commerce”) less-than-fair-value investigation into certain fabricated structural steel (“FSS”) from Mexico, including purported errors in Commerce’s calculation of BSM’s constructed value profit rate, Commerce’s application of adverse facts available, Commerce’s determination to use the purchase order date or sales order acknowledgment date as the date of sale for purposes of currency conversion, and Commerce’s calculation of BSM’s constructed export price. *See generally* Pl. Br. at 9–47; [BSM’s] Non-Confidential Reply in Supp. of

[Pl. Br.], Oct. 1, 2021, ECF No. 77 (“Pl. Reply”);<sup>1</sup> *see also Certain [FSS] from Mexico*, 85 Fed. Reg. 5390 (Dep’t Commerce Jan. 30, 2020) (Final Determination of Sales at Less Than Fair Value) (“*Final Determination*”), and accompanying Issues and Decision Memo., Jan. 24, 2020, ECF No. 21–6 (“Final Decision Memo”). Defendant United States and Defendant-Intervenor Full Member Subgroup of the American Institute of Steel Construction, LLC (“AISC”) oppose BSM’s motion. *See* Def.’s Opp’n to [Pl. Br.], July 30, 2021, ECF No. 71 (“Def. Br.”); Resp. Br. of [AISC], July 30, 2021, ECF No. 70 (“AISC Br.”).<sup>2</sup> For the following reasons, BSM’s motion is granted.

### BACKGROUND

On February 1, 2019, AISC filed petitions requesting the imposition of antidumping duties (“ADD”) and countervailing duties (“CVD”) on imports of FSS from Canada, the People’s Republic of China (“China”), and Mexico.<sup>3</sup> Petitions for the Imposition of [ADD and CVD] on Certain [FSS] from Canada, Mexico, and [China], PD 1, CD 1, A-201–850, Bar Codes 3789352–01 and 3789335–01 (Feb. 1, 2019) (as amended, the “Petition”).<sup>4</sup> Commerce initiated an ADD investigation into FSS from Mexico on February 25, 2019. *See Certain [FSS] from Canada, Mexico, and [China]*, 84 Fed. Reg. 7330 (Dep’t Commerce March 4, 2019) (Initiation of Less-Than-Fair-Value Investigations). The period of investigation was January 1, 2018 through December 31, 2018 (“POI”). *See Final Determination*, 85 Fed. Reg. at 5390. BSM and Defendant-Intervenor Corey S.A. de C.V. (“Corey”)<sup>5</sup> were selected as mandatory respondents. *Id.* at 5391.

In its *Final Determination*, Commerce finds that certain FSS from Mexico is being, or is likely to be, sold in the United States at less than fair value. *See* Final Decision Memo at 1. As a result, Commerce imposes on BSM an estimated weighted-average dumping margin of

<sup>1</sup> Any confidential information in Pl. Br. or Pl. Reply cited in this opinion may be found at the corresponding page of the confidential version of Pl. Br. or Pl. Reply, ECF Nos. 59 and 76, respectively.

<sup>2</sup> Any confidential information in Def. Br. or AISC Br. cited in this opinion may be found at the corresponding page of the confidential version of Def. Br. or AISC Br., ECF Nos. 73 and 69, respectively.

<sup>3</sup> This action only involves ADD on FSS from Mexico.

<sup>4</sup> On May 8, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce’s final determination. *See* ECF No. 21–1–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by “PD” or “CD” to denote public or confidential documents.

<sup>5</sup> Further references in this opinion to Corey are to the collapsed entity of Corey S.A. de C.V. and Industrias Recal S.A. de C.V. *See Final Determination*, 85 Fed. Reg. at 5391 n.2. Corey S.A. de C.V. did not file a brief in support of or in opposition to this motion.

8.47%. *Final Determination*, 85 Fed. Reg. at 5392. In calculating BSM's dumping margin, Commerce makes several determinations which BSM now disputes. *See* Pl. Br. at 9–47. BSM challenges Commerce's: (i) calculation of BSM's constructed value profit rate, Pl. Br. at 9–25; *see also* Final Decision Memo at 43–51; (ii) use of adverse facts available with respect to one of BSM's sales that BSM did not report to Commerce, *see* Final Decision Memo at 53–55; Pl. Br. at 25–35; (iii) use of the purchase order date or sales order acknowledgment date as the date of sale for the purposes of converting foreign currency into U.S. dollars, Pl. Br. at 35–42; Final Decision Memo at 38–41; and (iv) calculation of BSM's constructed export price. Pl. Br. at 42–47; *see also* Final Decision Memo at 32–38. The court now remands Commerce's *Final Determination*.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i),<sup>6</sup> and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting a final affirmative less-than-fair-value determination. “The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Constructed Value

BSM asserts three challenges to Commerce's reliance on Corey's home market sales data in Commerce's calculation of BSM's constructed value profit rate. *See* Pl. Br. 9–25; *see also* Final Decision Memo at 47. First, BSM challenges a particular sale and asserts that Commerce acts arbitrarily by including the sale, which BSM contends was contracted for in 2017, not 2018, and made outside the ordinary course of trade.<sup>7</sup> Pl. Br. at 10–19. Second, BSM contends that Commerce fails to account for Corey's receipt of countervailable subsidies. *Id.* at 19–21. Finally, BSM asserts Commerce acts arbitrarily by rejecting BSM's home market data in favor of Corey's because of the

<sup>6</sup> Further citations to the Tariff Act of 1930 will be to the relevant sections of the U.S. Code, 2018 edition.

<sup>7</sup> [[ ]] Final Decision Memo at 48; Constructed Value Calculation Adjustments for the Final Determination – [Corey], Attachment 2, PD 673, CD 543, A-201–850, Bar Codes 3937094–01, 3937093–01 (Jan. 30, 2020) (“Corey CV Calc. Memo”); Pl. Br. at 10.

allegedly insufficient volume of Corey's home market sales data. *Id.* at 21–25. The court remands Commerce's calculation of BSM's constructed value profit for the following reasons.

In an investigation to determine if merchandise is being or is likely to be sold in the United States at less than fair value, Commerce compares the "normal value" of the merchandise to the U.S. price, which, as discussed below, is calculated as the "export price" or "constructed export price" under 19 U.S.C. §§ 1677a(a) or (b), respectively. 19 U.S.C. § 1677b(a). Normal value is the price for which a producer or exporter sells its merchandise in the ordinary course of trade in its home country or, in certain circumstances, a third country. *Id.* § 1677b(a)(1). However, if Commerce concludes that normal value cannot be determined under § 1677b(a)(1) using a producer or exporter's home market or third-country sales, Commerce will calculate "constructed value" to use as normal value. *Id.* §§ 1677b(a)(4), (e).

Under 19 U.S.C. § 1677b(e)(2), Commerce may calculate constructed value pursuant to one of four methods, a preferred method set forth in § 1677b(e)(2)(A), and three alternative methods set forth in § 1677b(e)(2)(B). The preferred method requires Commerce to use the actual amounts of selling, general, and administrative expenses and profits from the respondent's home market sales of the foreign like product. *Id.* § 1677b(e)(2)(A). If the preferred method is unavailable, there is no hierarchy among the alternative methods. *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 535 (Fed. Cir. 2019). Section 1677b(e)(2)(B)(ii) permits Commerce to calculate a respondent's constructed value using

the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the [respondent]) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.

19 U.S.C. § 1677b(e)(2)(B)(ii). Section 1677b(e)(2)(B)(iii) provides that Commerce may calculate "the amounts incurred or realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method," with the limitation that the amount cannot exceed "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise."<sup>8</sup> *Id.* § 1677b(e)(2)(B)(iii).

<sup>8</sup> The other alternative method, set forth in 19 U.S.C. § 1677b(e)(2)(B)(i), is not relevant to this action.

In calculating constructed value, Commerce seeks to obtain a fair approximation of the sales price and the profits realized by a respondent's home market sales, *Mid Continent*, 941 F.3d at 542, and to avoid "irrational or unrepresentative results." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,360 (Dep't Commerce May 19, 1997) ("Preamble"). Commerce must consider whether the data it uses to calculate constructed value profit results in a fair comparison between normal value and export price. See *Husteel Co. v. United States*, 39 CIT \_\_, \_\_, 98 F. Supp. 3d 1315, 1349 (2015), *aff'd*, 710 F. App'x 890, 891 (Fed. Cir. 2018). Commerce's calculation must be supported by substantial evidence, which is "such evidence that a reasonable mind might accept as adequate to support a conclusion." *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1326 (Fed. Cir. 2020) (internal quotation marks removed).

Here, Commerce uses Corey's in-scope home market sales that were made in ordinary course of trade to calculate BSM's constructed value profit. Final Decision Memo at 47. Commerce defines in-scope sales as projects that were both contracted for and completed within the POI. *Id.* at 5–8. Commerce further explains that it includes Corey's home market sales data "for projects with a contract or purchase order date and completion date during the POI." *Id.* at 11. Commerce's decision to use Corey's home market sales data is unsupported by substantial evidence because Commerce (1) does not adequately address whether the sale that BSM challenges was contracted for during the POI; and (2) relies on Corey's home market sales data without sufficiently explaining its reasoning.<sup>9</sup>

Commerce's determination that Corey's sale that BSM now challenges was in-scope is not supported by substantial evidence because Commerce does not sufficiently address how a project could be assigned a project number in Corey's accounting system outside the POI and still be in-scope. See *id.* at 10–11; Proprietary Info. in the Final Determination of the [ADD] Investigation of Certain [FSS] from Mexico: [Corey], Note 2, PD 671, CD 540, A-201–850, Bar Codes 3937089–01, 3937088–01 (Jan. 30, 2020) ("Corey Final BPI Memo"). Corey's project numbering system creates a project number when a bid is accepted. [Corey's] Section D Questionnaire Resp., 10, PD 337, CD 146, A-201–850, Bar Codes 3843383–01, 3843362–01 (June 4, 2019) ("Corey Sec. D Resp.") ("projects are coded using the year of the accepted bid along with . . . a sequential number tracking the number of projects"). Commerce concludes that the date a bid is accepted is not necessarily the date a project is contracted, which, in addition to

<sup>9</sup> BSM argues that its home market data should be used pursuant to Section 1677b(e)(2)(B)(iii). Pl. Br. at 24.

being completed within the POI, is the relevant criterion for a project being in-scope. Corey Final BPI Memo at Note 2; [Corey's] Cost Verification Exhibits, CVE-13, CD 505-06, Bar Codes 3898903-13-14 (Oct. 10, 2019) ("Corey Cost Verification Exhibits"); *see also* Final Decision Memo at 6-8. Commerce finds that the project is in-scope because although the bid was accepted in 2017, the contract for the project was not concluded until 2018. Corey Final BPI Memo at Note 2. In support of its conclusion, Commerce relies solely on two purchase orders that Corey submitted for the project, both of which are from the POI.<sup>10</sup> *Id.*

However, Corey explains that there are only three ways a bid is accepted: (1) "a contract is signed"; (2) "the customer signs a final budget proposal issued by Corey"; or (3) "the customer issues a purchase order to Corey." [Corey's] Section A Questionnaire Resp., A-26, PD 272, CD 81, A-201-850, Bar Codes 3828561-01, 3828472-01 (May 1, 2019) ("Corey Sec. A Resp."). Thus, the three ways Corey accepts bids all appear to be forms of contracts: Either a formal contract, a signed proposal, or a purchase order (which Commerce treats as a contract). Given Commerce's statement that it considers projects with "a contract or purchase order date" during the POI to be in-scope, Commerce does not satisfactorily explain why the challenged sale is in scope when it appears that a contract was entered into in 2017.<sup>11</sup>

---

<sup>10</sup> The court rejects BSM's argument that the sale is out of scope because the [ ] was labelled a [ ]. Pl. Br. at 12-13. The [ ] purchase orders on the record for the project are dated [ ]. Corey Final BPI Memo at Note 2; Verification of Sales Resp. of [Corey], 27, PD 629, CD 512, A-201-850, Bar Codes 3908072-01, 3908070-01 (Nov. 6, 2019) ("Corey Sales Verification Memo") (citing [Corey's] Sales Verification Exhibits, SV-24, CD 483, Bar Code 3897091-26 (Oct. 4, 2019) ("Corey Sales Verification Exhibits")). There is no evidence that any prior purchase order exists, and Corey certified that the [ ] for the project is the [ ]. Corey Sales Verification Memo at 27; Corey Sales Verification Exhibits at SV-24. Moreover, any alleged prior purchase order could have been issued between [ ].

<sup>11</sup> Likewise, AISC's reliance on Corey's Supplemental Section A Response is misplaced and its argument is unpersuasive. *See* AISC Br. at 11-12 (citing [Corey's] Supplemental Section A Questionnaire Resp., 3-4, PD 327, CD 136, A-201-850, Bar Codes 3838349-01, 3838344-01 (May 22, 2019) ("Corey Supp. Sec. A Resp.")). AISC asserts that another of Corey's projects supports the contention that acceptance of a bid does not necessarily entail a contract. AISC Br. at 11-12. In that project, Corey states that the customer [ ], but that the customer did not authorize Corey to place mill orders until October 2014, and that the parties did not finalize formal contracts until [ ]. Corey Supp. Sec. A Resp. at 3. Corey provides no information regarding when the bid was considered accepted. Corey states that the relevant date of sale (which AISC claims is the "acceptance" date) was when Corey "began incurring expenses for [the] project." *Id.* at 4; *see also* AISC Br. at 12. AISC's example is inapposite. Here, Commerce does not find that the bid was accepted through performance and specifically finds that Corey did not begin production on or record costs for the challenged sale prior to the POI. Final Decision Memo at 48 (determining amounts that appeared to be booked in 2017 were applied to the challenged sale in error, and amounts booked in 2019 represented returns to the warehouse); Verification of Cost Resp. of [Corey], 17, PD 627, CD 511, A-201-850,



See Final Decision Memo at 11, 47–48. Even accepting Commerce’s conclusion that the purchase orders for the project were issued during the POI, the bid was accepted some time in 2017. Commerce’s reliance on the purchase orders ignores record evidence that Corey treats a bid as accepted when a contract is formed.<sup>12</sup> Therefore the court must remand Commerce’s determination that the challenged sale was contracted for in 2018, and in scope, for reconsideration or further explanation.

However, the court sustains Commerce’s choice to disregard a Mexican subsidy program in its calculation of BSM’s constructed value profit rate.<sup>13</sup> *Id.* at 49–50. Commerce must determine, based on record evidence, whether an exporter’s home market sales benefitted from the export subsidy program. Here, Commerce finds that there is “no evidence to support BSM’s assertion that Corey’s [home market] profitability is distorted by the receipt of a countervailable export subsidy.” *Id.* at 49. In coming to that conclusion, Commerce relies on “the revenue and cost data specific to each of Corey’s [home market]

---

Bar Codes 3907204–01, 3907165–01 (Dep’t Commerce Nov. 4, 2019) (“Corey Cost Verification Memo”). Thus, Corey used different criteria to treat the bid for the challenged sale as accepted. On remand, if Commerce continues to rely on Corey’s challenged sale, Commerce must explain how Corey could assign a project number without a contract and without commencing work.

<sup>12</sup> However, Commerce reasonably finds that the challenged sale was made within the ordinary course of trade. See Final Decision Memo at 49. The ordinary course of trade means “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” 19 U.S.C. § 1677(15). Sales made outside the ordinary course trade include “merchandise sold at aberrational prices or with abnormally high profits.” 19 C.F.R. § 351.102(b)(35). Commerce determines that the Corey’s [[ ]] profit is “within the range” of profits realized by other Mexican producers in their home market sales. Final Decision Memo at 49. Specifically, Commerce cites Mexican producer Ternium’s average profit rate of 20.25%. *Id.* (citing Case Brief of BSM, 19, PD 642, CD 524, A-201–850, Bar Codes 3912338–01, 3912336–01 (Nov. 19, 2019); Submission of New Factual Info., Attachment 3, PD 494, A-201–850, Bar Code 3874205–07 (Aug. 5, 2019)). Although BSM argues that Ternium’s average profits are “barely [[ ]]” of Corey’s profits on the sale in question, and therefore are not “within the range” of Corey’s profits, an average of 20.25% profit implies individual sales of greater than 20.25%. See Pl. Br. at 18–19. Even assuming none of Ternium’s individual sales generated a profit equal to or greater than Corey’s sale, it is not unreasonable to conclude, as Commerce does, that even a profit rate that is higher than that of other comparable sales can fall short of “abnormally high profits.” 19 C.F.R. § 351.102(b)(35). Moreover, BSM itself reported a home market sale of more than [[ ]] the profit rate of the Corey sale in question. AISC Br. at 17; see also Pl. Reply at 4. BSM’s second contention—that the Corey sale was not made in the ordinary course of trade because it was contracted for and completed within one year—must also be rejected. Given Commerce’s obligation to calculate a representative constructed value that fairly approximates BSM’s sales price and profits for its home market sales “at a time reasonably corresponding,” 19 U.S.C. § 1677(a)(1)(A), to BSM’s export sales, it would be absurd to discard Corey’s home market sales that meet the criteria for in-scope export sales.

<sup>13</sup> The subsidy in question is an export subsidy pursuant to which Mexican producers are permitted to import certain materials duty free if those materials are used in the production of goods that are subsequently exported. See Pl. Br. at 20–21.

sales,” not Corey’s financial statements. *Id.* BSM essentially argues that Commerce should apply a presumption of subsidy use. Pl. Br. at 20–21; *see also* Oral Arg., 22:43, Jan. 6, 2022, *see* ECF No. 85 (“Oral Arg.”) (conceding that there is no clear-cut proof that Corey’s home market sales benefitted from the export subsidies).<sup>14</sup> Commerce reasonably finds that there was no evidence to support the conclusion that Corey’s home market sales were distorted by the export subsidies it received. Indeed, BSM does not point to any evidence that Corey used materials that it imported duty free in FSS that Corey sold in Mexico.<sup>15</sup>

The court also remands Commerce’s decision to use Corey’s home market sales data to calculate BSM’s constructed value profit because Commerce rejects BSM’s home market data for insufficient volume but relies on Corey’s indisputably fewer home market sales. Commerce determines that the preferred method is not available because BSM’s home market sales constituted less than five percent of BSM’s U.S. sales.<sup>16</sup> Final Decision Memo at 50. Having determined not to use the preferred method, Commerce chooses to use Corey’s home

---

<sup>14</sup> In the CVD context, Commerce presumes that export subsidies will also benefit home market sales unless the foreign government has an adequate system in place to track the raw materials and make sure they are only used in the production of exported goods. 19 C.F.R. § 351.519(a)(4). In the related CVD investigation, Commerce concluded that Mexico did not have an adequate tracking system in place, so Commerce presumed that Corey’s home market sales also benefitted from the export subsidies. *Certain [FSS] from Mexico*, 84 Fed. Reg. 33,227 (Dep’t Commerce July 12, 2019) (Prelim. Affirmative [CVD] Determination, and Alignment of Final Determination with Final [ADD] Determination), and corresponding Preliminary Decision Memo., 17, C-201–851, Bar Code 3857684–01 (July 8, 2019).

<sup>15</sup> Although BSM argues that it is Commerce’s burden to analyze the data on the record, BSM offers no other reasonable alternative interpretation of the data. Oral Arg. at 32:35. At argument, BSM cited four record documents that it contends Commerce should have analyzed to find Corey’s home market sales benefitted from a countervailable export subsidy. Oral Arg. at 19:00–22:30 (citing Corey Sec. D Resp., Ex. D-27, CD 155, A-201–850, Bar Code 3843362–10; [Corey’s] First Supp. Section D Resp., Ex. SD-28, CD 324, A-201–850, Bar Code 3870922–18 (July 30, 2019) (“Corey 1st Supp. Sec. D Resp.”); Corey Cost Verification Exhibits at CVE-5, CVE-7). These documents reflect, *inter alia*, line item costs related to Corey’s home market sales, including taxes and duties paid. *See* Corey Sec. D Resp. at Ex. D-27; Corey 1st Supp. Sec. D Resp. at Ex. SD-28; Corey Cost Verification at Ex. CVE-5, CVE-7. BSM does not provide any analysis as to why those inputs reflected lower costs than would be expected had Corey paid import duties on such inputs or why BSM believes that the taxes and duties Corey reported paying were too low. Commerce is not obligated to make any presumption that Corey’s home market sales benefitted from the export subsidies in the ADD context, and therefore it is reasonable to conclude, in the absence of any evidence to the contrary, that Corey’s home market sales did not benefit from a subsidy that explicitly applies to export sales.

<sup>16</sup> Commerce borrows the viability standard from 19 U.S.C. §§ 1677b(a)(1)(B)(ii) and (C)(ii), which apply when Commerce calculates normal value under § 1677b(a)(1), not when Commerce bases normal value on constructed value pursuant to § 1677b(e). However, BSM does not contest Commerce’s use of the viability standard to exclude the preferred method of calculating constructive value. Pl. Br. at 22. Therefore, the court does not analyze whether Commerce’s explanation for not using the preferred method is supported by substantial evidence or otherwise in accordance with law. *See Mid Continent*, 941 F.3d at 538 (“we do not think the five percent standard applies [in the context of calculating

market sales data pursuant to 19 U.S.C. § 1677b(e)(2)(B)(ii). *Id.* Although there is no hierarchy among the three alternative methods, Commerce’s decision to use Corey’s data must be supported by substantial evidence. *Mid Continent*, 941 F.3d at 535, 537.

Commerce’s sole explanation for rejecting BSM’s home market data is that BSM did not have a sufficient volume of home market sales in comparison with BSM’s U.S. sales. Final Decision Memo at 50. Having rejected BSM’s data for insufficient volume, Commerce chooses Corey’s data which consists of indisputably fewer sales.<sup>17</sup> *Id.*; see also Pl. Br. at 24; Def. Br. at 12. Even though Corey’s sales meet the viability standard as they make up more than five percent of Corey’s U.S. sales, without further explanation, it is unclear why it is reasonable for Commerce to conclude that Corey’s home market sales are representative of the Mexican market.<sup>18</sup>

Moreover, BSM points to several other factors that call into question the reasonableness of Commerce’s decision to rely on Corey’s data. Corey’s business model is to produce FSS for a small number of large projects each year, while BSM produces FSS for pre-engineered metal building systems (“PEMBS”), which are typically smaller projects, and as such, BSM produces FSS for thousands of projects per year. Pl. Br. at 23. Corey also offers services such as design and erection that are ancillary to the production and sale of FSS, while BSM does not. *Id.* These differences between Corey’s and BSM’s businesses detract from the reasonableness of using Corey’s home market data and must be addressed by Commerce. See *Husteel*, 98 F. Supp. 3d at 1349. Finally, although Commerce reasonably concludes that Corey’s home market sales were made within the ordinary course of trade, the fact that Corey’s home market profits were higher than any other Mexican producer on the record also factors into the representativeness of Corey’s data. See Pl. Br. at 23–24.

Commerce asserts that the statute does not obligate Commerce to analyze Corey’s operations in comparison to BSM’s, Final Decision constructed value”]; see also Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. I, at 840 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4175 (alternatives to the preferred method should only be used when the preferred method is unavailable “either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices”).

<sup>17</sup> BSM reported [[ ]] profitable home market sales contracted and completed during the POI, while Commerce calculates BSM’s constructed value based on [[ ]] reported by Corey. Pl. Br. at 24; Def. Br. at 12; Corey CV Calc. Memo at Attach. 2.

<sup>18</sup> Although Commerce states that the Court of Appeals “upheld Commerce’s practice not to calculate [constructed value] profit based on sales from a non-viable market,” Final Decision Memo at 51 (citing *Mid Continent*, 941 F.3d at 539), in that case the Court of Appeals held only that Commerce was permitted to make a “practical, function-based” determination of when home market data is “available” for the purposes of 19 U.S.C. § 1677b(e)(2)(A), including taking volume of sales into account. *Mid Continent*, 941 F.3d at 538–40.

Memo at 50; however, this assertion ignores Commerce's interpretation of its own regulations, which require Commerce to avoid "unrepresentative" results. *Preamble*, 62 Fed. Reg. at 27,360. Commerce may not simply ignore the record evidence highlighted by BSM that detracts from Commerce's conclusion that Corey's home market data provides a reasonable surrogate to use for BSM's constructed value.

## II. Adverse Facts Available

Commerce uses facts available with an adverse inference with respect to one of BSM's projects that BSM did not report during Commerce's investigation. Final Decision Memo at 54–55. When Commerce is missing information necessary to make an ADD determination, it must use facts otherwise available to fill the gap in the record created by the missing information. See 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–81 (Fed. Cir. 2003). If a gap exists because a party failed to cooperate to the best of its ability, Commerce may use an adverse inference when selecting facts available to fill the gap. 19 U.S.C. § 1677e(b); *Nippon*, 337 F.3d at 1380–83.

The project in question was contracted for in 2018 and consisted of multiple phases. Final Decision Memo at 54. BSM treated projects as substantially complete only after the FSS for the last phase of the project had been shipped. Section C Questionnaire Resp. of [BSM], 23, PD 343, CD 164, A-201–850, Bar Codes 384368501, 3843677–01 (June 4, 2019) ("BSM Sec. C Resp."). At the end of 2018, the project at issue had two phases remaining, so BSM did not consider the project to be substantially completed during the POI and thus treated the project as out of scope. Final Decision Memo at 55; Pl. Br. at 25. However, in July 2019, after the deadline for responding to Commerce's inquiries regarding in-scope projects had passed, BSM's client canceled the last two phases of the project. Pl. Br. at 25, 31.

Commerce finds that because the final two phases of the project were cancelled, the last phase was shipped during the POI and the project was in-scope. Final Decision Memo at 55. Thus, Commerce concludes that BSM had an obligation to submit data about the project but did not. *Id.* Therefore, Commerce identifies a gap in the record that it must fill with facts otherwise available. *Id.* at 54–55. Commerce further finds that BSM failed to cooperate to the best of its ability by not alerting Commerce of the sale. *Id.* at 55.

Commerce's conclusion that BSM's project was completed during the POI is not supported by substantial evidence. Commerce does not dispute that in June 2019 the project was not complete but contends that a change order in July 2019 makes the project retroactively

complete in 2018. *Id.* at 54–55; Verification of [NCI]<sup>19</sup>, 23–24, PD 625, CD 509, A-201–850, Bar Codes 3907048–01, 3907047–01 (Nov. 4, 2019) (“BSM CEP Verification Memo”); Def. Br. at 22. This conclusion is not reasonable because a project cannot be both incomplete in June 2019 and complete prior to January 1, 2019. Commerce disregards the contract modification in July 2019 and the final two phases of the project. However, Commerce may not simply ignore the evidence that the final two phases of the project remained incomplete until BSM’s client cancelled them in July 2019, which is when BSM fulfilled its obligations for the project. BSM CEP Verification Memo at 23–24. The court remands Commerce’s determination for reconsideration or further explanation.<sup>20</sup>

### III. Date of Sale

BSM challenges Commerce’s decision to use the date of the purchase order or sales order acknowledgement as the date of sale for the purposes of converting foreign currency into U.S. dollars. Pl. Br. at 35. Commerce’s regulations provide that it will normally use the invoice date as the date of sale unless Commerce is satisfied that the material terms of the transaction were established as of a different date. 19 C.F.R. § 351.401(i). Although Commerce does have a certain degree of discretion in choosing the date of sale, the invoice date is presumed to be the date of sale. *Id.*; *see also Preamble*, 62 Fed. Reg. at 27,349. Commerce will only use an alternative date if there is “satisfactory evidence that the material terms of sale are finally established,” and that “the terms of sale must be firmly established and not merely proposed” in order to rebut the presumption of using the invoice date. *Preamble*, 62 Fed. Reg. at 27,349.

Here, Commerce uses the date of the purchase order or the sales order acknowledgement as the date of sale, not the invoice date. Final Decision Memo at 40. Commerce states that NCI regards the purchase orders and sales order acknowledgments as contracts.<sup>21</sup> *Id.* Commerce further finds that FSS is “large custom-made merchan-

<sup>19</sup> NCI refers collectively to BSM’s U.S. affiliates, NCI Group, Inc. and Robertson-Ceco II Corporation.

<sup>20</sup> Given the unique facts of this case, it is likewise unclear how BSM does not meet the standard for acting to the best of its ability. *See* 19 U.S.C. § 1677e(b); *Nippon*, 337 F.3d at 1380–83. Commerce provides no explanation for applying an adverse inference other than disagreeing with BSM’s conclusion regarding the need to report the sale. Final Decision Memo at 55; *see also Nippon*, 337 F.3d at 1383 (“An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made”).

<sup>21</sup> FSS is “produced by BSM and sold by NCI . . . using purchase orders/sales order acknowledgments.” Final Decision Memo at 40.

dise,” which the *Preamble* identifies as a situation in which Commerce might deviate from using the invoice date as the date of sale. *Id.*; *Preamble* 62 Fed. Reg. at 27,349. Commerce contends that design changes and related price changes are “inevitable with respect to large-customized products,” and that “[s]uch changes do not mean that parties did not commit themselves to material aspects of the transaction which would allow production to begin.” Final Decision Memo at 41.

However, Commerce’s regulations provide that Commerce may rebut the presumptive use of the invoice date only when Commerce is satisfied that the material terms of a transaction are established on a different date. 19 C.F.R. § 351.401(i); *see also Preamble*, 62 Fed. Reg. at 27,349. The material terms of a transaction are established when they are not subject to revision, not when an enforceable contract is concluded. *See Preamble*, 62 Fed. Reg. at 27,349 (“The existence of an enforceable sales agreement between the buyer and the seller does not alter the fact that as a practical matter, customers frequently change their minds and sellers are responsive to those changes. [Commerce] also has found that in many industries, even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced”).

Here, the parties do not disagree about the meaning of Commerce’s regulations, only whether the material terms of the transactions at issue are established on the purchase order or sales order acknowledgement date. *Compare* Pl. Br. at 35–39; *with* Def. Br. at 27–29; AISC Br. at 34–38. Commerce asserts that post-purchase-order changes are inevitable due to the nature of the subject merchandise. Final Decision Memo at 41 (citing *Preamble*, 62 Fed. Reg. at 27,349). This argument ignores the plain language of Commerce’s own regulations: Commerce has discretion to use a date other than the invoice, but only when there is satisfactory evidence that such other date is when the terms of a sale are established. 19 C.F.R. § 351.401(i); *see also Preamble*, 62 Fed. Reg. at 27,349 (even in the case of “large custom-made merchandise . . . the terms of the sale must be firmly established”). The material terms of FSS sales frequently changed between the purchase order and invoice, and, therefore, a purchase order generally does not establish the terms of a sale.<sup>22</sup> *See, e.g.*, Analysis Memo. for the Final Determination in the [ADD] Investiga-

---

<sup>22</sup> Indeed, BSM cites record evidence that post-purchase-order changes to material terms occurred in approximately [[ ]] of its transactions comprising approximately [[ ]] of BSM’s sales volume. Pl. Br. at 39 (citing Resp. of [BSM] to Aug. 16, 2019 Sec. C Supplemental Questionnaire, Ex. SSC-1, CD 384, A-201–850, Bar Code 3881744–01(Aug. 21, 2019)).



tion of Certain [FSS] from Mexico: [BSM], Attachment II, CD 534, A-201–850, Bar Code 3937072–02 (Jan. 30, 2020); BSM Sec. C Resp., Ex. C-13, CD 166, A-201–850, Bar Code 3843677–03 (June 4, 2019); BSM’s CEP Verification Exhibits, CEP-VE-4, CD 429, A-201–850, Bar Code 3894918–02 (Sept. 27, 2019); *see also* BSM CEP Verification Memo at 14 (“Company officials explained that the scope of a project or terms of sale may change up until a project is completed”). Thus, the evidence demonstrates that material terms are not established as of the date of the purchase order or sales order acknowledgment.

Commerce’s reliance on *LNPP from Germany* fares no better. *See* Final Decision Memo at 41 (citing *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 66 Fed. Reg. 11,557 (Dep’t Commerce Feb. 26, 2001) (Final Results of [ADD] Admin. Review) (“*LNPP from Germany*”), and accompanying Issues and Decision Memo (“*LNPP from Germany* IDM”). In that review, Commerce specifically noted that the changes at issue were “minor” changes to specifications. Final Decision Memo at 41 (citing *LNPP from Germany* IDM at Comment 1). Here, the changes in question, many of which could not be described as “minor,” were to the material terms of the contract, including price and quantity. *See* Pl. Br. at 38–39. Commerce must further explain or reconsider its determination that the date of sale for purposes of currency conversion should be the date of the purchase order or sales order acknowledgment.

#### **IV. Constructed Export Price**

Finally, BSM challenges two aspects of Commerce’s calculation of BSM’s constructed export price profit rate. First, BSM challenges Commerce’s determination to calculate separate profit rates for BSM and NCI and add them together, arguing that Commerce should have relied on NCI’s consolidated financial statements. Pl. Br. at 42–45. Second, BSM asserts that Commerce improperly removed expenses from NCI’s Costa Rican drafting facility, which Commerce determined were properly included in BSM’s indirect selling expenses under 19 U.S.C. § 1677a(d)(1). *Id.* at 45–47. For the following reasons, Commerce’s calculation of BSM’s constructed value export price is remanded.

##### **A. Constructed Export Price Profit Rate Methodology**

When determining U.S. price for purposes of a less-than-fair-value investigation, Commerce either uses the “export price” or the “constructed export price” pursuant to 19 U.S.C. §§ 1677a(a) or (b), respectively, and subject to certain adjustments set forth in subsections (c) and (d). 19 U.S.C. § 1677a. Here, Commerce calculates a con-



structed export price for BSM's U.S. sales because BSM's U.S. sales were made through its affiliate, NCI. Decision Memo. for the Prelim. Determination in the Less-Than-Fair-Value Investigation of Certain [FSS] from Mexico, 14, PD 566, A-201-850, Bar Code 3886770-01 (Sept. 4, 2019); *see also* Final Decision Memo at 11.

Commerce calculates BSM's constructed export price profit rate pursuant to 19 U.S.C. § 1677a(f)(2)(C)(iii), which provides that Commerce calculate "expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." Final Decision Memo at 35; 19 U.S.C. § 1677a(f)(2)(C)(iii). Commerce calculates separate profit ratios for BSM and NCI and then adds those together to determine BSM's constructed export price profit. Final Decision Memo at 36. Commerce cites past investigations and reviews in which Commerce calculated separate rates and added them together. *Id.*

BSM asserts that Commerce should calculate BSM's constructed export price profit rate based on NCI's consolidated financial statements. *Id.* at 42-45. BSM relies on Policy Bulletin 97/1 for the proposition that it is reasonable for Commerce to use consolidated financial statements to calculate constructed export price profit rate. *Id.* at 42-43 (citing Import Admin. Policy Bulletin No. 97/1, *Calc. of Profit for Constructed Export Price Transactions* (Dep't Commerce Sept. 4, 1997) ("Policy Bulletin 97/1"). However, although it may have been reasonable for Commerce to rely on NCI's consolidated financial statements, nothing in Policy Bulletin 97/1 requires Commerce to do so.

BSM asserts that Commerce's explanation of its methodology is insufficient because in the prior investigations and reviews on which Commerce relies Commerce rejected the consolidated financial reports because of double counting, which is not an issue here. Pl. Br. at 44. However, BSM does not provide any reason why Commerce's chosen methodology is unreasonable. BSM does not identify any error that resulted from Commerce's methodology. BSM does not identify any statute, regulation, or caselaw that precludes Commerce from employing the methodology it relies on here. At most, BSM identifies an alternative reasonable method that Commerce has sometimes employed in the past. Although BSM's preferred method may be reasonable, BSM fails to demonstrate that Commerce's method is unreasonable.

## **B. Exclusion of NCI Costa Rican Data**

Commerce's decision to remove NCI's Costa Rican data from Commerce's calculation of BSM's constructed export price profit rate must

be remanded. Defendant concedes that Commerce did not address BSM's arguments related to NCI's Costa Rican facility. Oral Arg. at 1:11:15. Moreover, Defendant fails to explain how its arguments in support of Commerce's determination are not precluded by the statute. See Def. Br. at 32.

To calculate a constructed export price, 19 U.S.C. § 1677a(d)(3) mandates that Commerce reduce the constructed export price by "the profit allocated to the expenses described in paragraphs (1) and (2)." The statute directs that Commerce shall calculate that profit by multiplying "total actual profit" by the "applicable percentage." 19 U.S.C. § 1677a(f)(1). "Total actual profit" is defined as "the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph." *Id.* § 1677a(f)(2)(D). The applicable percentage is in turn calculated by dividing "total United States expenses" by "total expenses." *Id.* § 1677a(f)(2)(A). "Total United States expenses" is defined as "the total expenses described in subsection (d)(1) and (2)." *Id.* § 1677a(f)(2)(B). Finally, "total expenses," as used in §§ 1677a(f)(2)(A) and (B), is defined as

[A]ll expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise: . . .

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise

*Id.* § 1677a(f)(2)(C). Thus, the statute requires that the agency include indirect selling expenses included under § 1677a(d)(1) when Commerce calculates constructed export price profit. *Id.* § 1677a(f).

Here, Defendant does not dispute that Commerce properly classifies NCI's Costa Rican facility's expenses as indirect selling expenses under subsection (d)(1), but rather argues that it is Commerce's practice to exclude data from facilities that are not profitable when calculating constructed export price profit rate. Def. Br. at 32. Defendant argues that this practice is reasonable because the statute provides that profit is "allocated" to the expenses described in 19 U.S.C. § 1677a(d)(1)–(2), which presupposes that there is profit to be allocated. Oral Arg. at 1:11:58. Nothing in the plain text of the statute or regulations supports Defendant's interpretation. *See* 19 U.S.C. §§ 1677a(d), (f); 19 C.F.R. § 351.402(d)(1).

Instead, the statute explicitly requires Commerce to include “all” expenses incurred that have been properly classified as indirect selling expenses under subsection (d)(1). 19 U.S.C. §§ 1677a(f)(2)(B)–(C). Likewise, the regulations provide that Commerce “normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including sales that have been disregarded as being below the cost of production.” 19 C.F.R. § 351.402(d)(1). Thus, the regulations contemplate Commerce including sales that do not generate profits. On remand, if Commerce continues to exclude NCI’s Costa Rican data, Commerce must explain why the statute and regulations permit such an exclusion.

### CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Commerce’s final determination is remanded for further explanation or reconsideration consistent with this Opinion and Order; and it is further

**ORDERED** that Commerce shall file its remand redetermination with the court within 90 days of the date of this Opinion and Order; and it is further

**ORDERED** that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

**ORDERED** that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination; and it is further

**ORDERED** that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

**ORDERED** that Commerce shall file the administrative record within 14 days of the date of the filing of its remand redetermination.

Dated: March 21, 2022

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

## Slip Op. 22–28

MAGID GLOVE & SAFETY MANUFACTURING CO. LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge  
Court No. 16–00150

[Granting defendant’s cross motion for summary judgment in an action involving the tariff classification of certain imported gloves.]

Dated: March 25, 2022

*Lawrence M. Friedman*, Barnes, Richardson & Colburn, LLP of Chicago, IL, for plaintiff. With him on the brief were *Meaghan E. Vander Schaaf* and *Robert E. Burke*.

*Marcella Powell*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Aimee Lee*, Assistant Director, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel on the brief was *Paula Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

## OPINION

### Stanceu, Judge:

Plaintiff Magid Glove & Safety Manufacturing Co. LLC (“Magid”) commenced this action to contest the denial of its administrative protest by U.S. Customs and Border Protection (“Customs” or “CBP”). Magid claims that Customs incorrectly determined the tariff classification of certain imported gloves. Before the court are cross-motions for summary judgment. The court awards summary judgment in favor of defendant United States.

### I. BACKGROUND

This case involves gloves imported from the People’s Republic of China and the Republic of Korea, each of which consists of a glove-shaped “shell” knitted from man-made fibers that, after the knitting process, is dipped in polyurethane, which forms a flexible plastic layer covering the palm and portions of the thumb and fingers of each glove. Prior to the dipping process, the shell is in the shape of a complete glove, i.e., it is knitted from yarn directly to a shape that covers the entire hand. Mot. For Summ. J. Ex. B, at 12–13 (Mar. 22, 2021), ECF No. 44–4 (deposition testimony of Gary Cohen dated Oct. 2, 2020) (“Pl.’s Ex. B”).

Magid was the importer of record on two entries of the merchandise, made at the Port of Chicago in January 2015. Following liquidation of the two entries on November 20, 2015, Magid filed a protest of the liquidations on February 8, 2016, which Customs denied on

March 1, 2016. Summons (Aug. 12, 2016), ECF No. 1. Magid initiated the instant action to contest the protest denials on August 12, 2016. *Id.*

Magid filed a motion for summary judgment with accompanying brief on March 22, 2021. Mot. For Summ. J., ECF No. 44; Mem. in Supp. of Pl.'s Mot. for Summ. J., ECF No. 44–1 (“Pl.’s Mot.”). Defendant filed a cross motion for summary judgment and opposition to plaintiff’s motion for summary judgment on June 14, 2021. Def.’s Cross Mot. for Summ. J., ECF No. 50; Def.’s Mem. in Supp. of its Cross Mot. for Summ. J. and in Opp’n to Pl.’s Mot. for Summ. J., ECF No. 50 (“Def.’s Mot.”).

On July 19, 2021, plaintiff filed a response to defendant’s cross motion for summary judgment and reply to defendant’s opposition to plaintiff’s motion for summary judgment. Pl.’s Resp. to Def.’s Cross Mot. for Summ. J. and Reply to Def.’s Opp’n to Pl.’s Mot. for Summ. J., ECF No. 51 (“Pl.’s Resp.”). Defendant replied in support of its cross motion on September 17, 2021. Reply Br. in Further Supp. of Def.’s Cross Mot. for Summ. J., ECF No. 56.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to 28 U.S.C. § 1581(a), which provides the Court of International Trade exclusive jurisdiction of a civil action commenced under section 515 of the Tariff Act of 1930 (“Tariff Act”), *as amended*, 19 U.S.C. § 1515, to contest the denial of a protest.<sup>1</sup>

Actions to contest the denial of a protest are adjudicated *de novo*. See 28 U.S.C. § 2640(a)(1) (directing the Court of International Trade to “make its determinations upon the basis of the record made before the court”). The court shall grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” CIT Rule 56(a). In a tariff classification dispute, summary judgment is appropriate where “there is no genuine dispute as to the nature of the merchandise and the classification determination turns on the proper meaning and scope of the relevant tariff provisions.” *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013) (citations omitted).

---

<sup>1</sup> Citations herein to the United States Code are to the 2012 edition.

## B. Description of the Merchandise

The facts stated in this Opinion and Order as to the description of the merchandise are not in dispute. *See* R. 56.3 Statement of Material Facts as to which There is No Genuine Issue to Be Tried (Mar. 22, 2021), ECF No. 44–2; Def.’s Statement of Material Facts as to which There is No Genuine Issue to be Tried at 4 (June 14, 2021), ECF No. 50 (“Def.’s Statement of Material Facts”).

This case involves the tariff classification of eight models of gloves (models BP169, GP150, SWGPD546, GPD546, PF540, SWGPD590, GPD590, and PU50). Pl.’s Mot. 3–4. The shell of each glove is “knit to shape on an industrial knitting machine” and is “made of man-made fibers.” *Id.* at 4. Six of the models have shells knitted exclusively from man-made textile fibers (variously, polyester, nylon, high-performance polyethylene (“HPPE”) lycra, tsunooga, and spandex). *Id.* Two models (SWGPD590 and GPD590) are made of 91% man-made textile fiber and 9% glass fiber. *Id.* After being knitted to shape on the knitting machine, each shell is further processed by being dipped in liquid polyurethane, which, as shown by the samples provided to the court, has solidified into a flexible plastic coating that covers the palms and portions of the fingers and thumb.<sup>2</sup> *Id.* at 4–5; samples. The gloves are “specially designed and marketed for use in the automotive, metal stamping, and other industrial and commercial settings.” Pl.’s Mot. at 6.

## C. Tariff Classification under the HTSUS

Tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is governed by the General Rules of Interpretation (“GRIs”), and, if applicable, the Additional U.S. Rules of Interpretation, both of which are part of the legal text of the HTSUS. The GRIs are applied in numerical order, with GRI 1 providing that “classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.” GRI 1, HTSUS. GRIs 2 through 5 apply “provided such headings or notes do not otherwise

<sup>2</sup> While plaintiff indicates that model BP 169 varies from the other models in being coated with a mixture of 75% polyester and 25% polyurethane, Mem. in Supp. of Pl.’s Mot. for Summ. J. at 4 (Mar. 22, 2021), ECF No. 44–1 (“Pl.’s Mot.”), other of plaintiff’s statements of fact inform the court that the coating on model BP 169 consists of 100% polyurethane. *Id.* at 3 (indicating that coating on model BP 169 is polyurethane); Mot. for Summ. J. Ex. A, at A002 (Mar. 22, 2021), ECF No. 44–3 (product specification sheet for BP169 describing the product as being composed of “100% polyester shell; 100% polyurethane palm coating”). The court considers each model at issue to have been dipped solely in polyurethane. Pl.’s Mot at 4–5 (“The glove then moves to a ‘dipping line’ where the gloves are dipped in liquid polyurethane.”) (citation omitted). However, even if model BP 169 varied from the others in being coated with a mixture of 75% polyester and 25% polyurethane, that difference would have no bearing on the court’s classification analysis.

require.” *Id.* After determining the correct heading, a court determines the correct subheading according to GRI 6, HTSUS (directing determination of the subheading according to the terms of the subheadings and any related subheading notes, and GRIs 1–5 as applied at the subheading level, *mutatis mutandis*); see *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

“Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings.” *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). When interpreting the HTSUS, the court “may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss*, 195 F.3d at 1379 (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)).

The court also consults the Explanatory Notes (“ENs”) for the Harmonized Commodity Description and Coding System (“Harmonized System” or “HS”) maintained by the World Customs Organization. Although not legally binding, the ENs “are generally indicative of the proper interpretation of a tariff provision.” *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)). HTSUS provisions are based on the Harmonized System rules and nomenclature (pursuant to the Harmonized System Convention) with respect to the GRIs, the section and chapter notes, and the headings and subheadings to the six-digit level. Therefore, the Explanatory Notes are informative as to the intent of the drafters of the Harmonized System where, as here, the dispute involves a legal determination of the scope of the competing headings as determined under the GRIs and the section and chapter notes.

In cases involving a tariff classification dispute, the court first considers whether “the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Plaintiff has the burden of showing that the government’s determined classification is incorrect. *Id.* at 876. If plaintiff meets that burden, the court has an independent duty to arrive at “the correct result, by whatever procedure is best suited to the case at hand.” *Id.* at 878.

#### **D. Claims of the Parties**

Upon liquidation, Customs classified the imported articles in subheading 6116.10.55, HTSUS (“Gloves, mittens and mitts, knitted or crocheted: Impregnated, coated or covered with plastics or rubber:



. . . Other: Without fourchettes: . . . Other: Containing 50 percent or more by weight of cotton, man-made fibers or other textile fibers, or any combination thereof”), subject to duty at 13.2% *ad valorem*.<sup>3</sup> Summons 2.

Plaintiff claims classification in subheading 3926.20.10, HTSUS (“Other articles of plastics and articles of other materials of headings 3901 to 3914: . . . Articles of apparel and clothing accessories (including gloves, mittens and mitts): . . . Gloves, mittens and mitts: Seamless”), free of duty. Pl.’s Mot. 7–9.

Defendant claims that the classification determined by Customs upon liquidation is correct. Def.’s Mot. 1.

### **E. Application of GRI 1, HTSUS to Determine the Appropriate Heading**

The candidate headings of the HTSUS identified by the parties, in numerical order and presented with the respective article descriptions, are as follows:

Heading 3926 “Other articles of plastics and articles of other materials of headings 3901 to 3914”

Heading 6116 “Gloves, mittens and mitts, knitted or crocheted”

The court has identified no other candidate headings.<sup>4</sup>

For purposes of GRI 1, the terms of heading 3926 do not describe Magid’s imported gloves because, while comprised in part of a plastic material (polyurethane), the gloves are not “of plastics” or of other materials of headings 3901 to 3914 (which pertain to various plastics and similar substances in primary forms). Also, note 2(p) to chapter 39, HTSUS excludes from that chapter “[g]oods of section XI (textile and textile articles).”

The article description for heading 6116, HTSUS, “Gloves, . . . knitted,” describes the merchandise at issue. *See* Pl.’s Mot. 4 (“The *knit gloves* are made of man-made fibers” and “are *knit to shape* on an industrial knitting machine.”) (citations omitted) (emphases added). Plaintiff disagrees that a term of heading 6116 is descriptive of its gloves: “A simple examination of the samples submitted to the Court

<sup>3</sup> Because the entries of the merchandise at issue occurred in 2015, citations herein to the Harmonized Tariff Schedule of the United States (“HTSUS”) are to the 2015 version.

<sup>4</sup> The court concludes that the presence of 9% glass fiber in the shells of models SWGPD590 and GPD590 is insufficient to result in classification in a heading of chapter 70, Glass and Glassware (a classification neither party argues). An examination of a sample of model GPD590 and the presence of 91% textile fiber content cause the court to conclude that these gloves do not have the character of articles of glass fiber. *See* n. 1(r) to sec. XI, HTSUS (excluding from section XI “[g]lass fibers or articles of glass fibers . . .”); *see also* EN(d) to sec. XI (explaining that the exclusion from Section XI applies also to “composite articles made of glass fibres and textile fibres having the character of articles of glass fibres (Chapter 70)”).

shows that the Government's position ignores that the knitted textile component of Heading 6116 only describes a portion of the glove." Pl.'s Resp. 11. According to Magid, "[t]his coating is a critical component of the gloves and distinguishes the gloves from uncoated textile gloves encompassed by Heading 6116," and "[a]s the gloves are composed of two or more materials, they cannot be classified under GRI 1." *Id.*

The issue presented by plaintiff's argument is whether the presence of the plastic coating on the palm and portions of the fingers and thumb of each glove is sufficient, *per se*, to exclude these articles from heading 6116, HTSUS. Relevant to that question is an Explanatory Note to chapter 61, as follows:

The classification of goods in this Chapter [61] is not affected by the presence of parts or accessories of, for example, woven fabrics, furskin, feathers, leather, plastics or metal. Where, however, the presence of these materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes (particularly Note 4 to Chapter 43 and Note 2(b) to Chapter 67, relating to the presence of furskin and feathers, respectively), or failing that, according to the General Interpretive Rules.

General EN to ch. 61. It is uncontested that the plastic coating is not mere trimming. It covers a significant portion of the glove and adds functional characteristics. *See* Pl.'s Mot. 5–6 & documents cited therein. Were it mere trimming, that fact would be conclusive in requiring classification under heading 6116, HTSUS. But the fact that it is not mere trimming does not conclusively establish the opposite, i.e., that the gloves at issue are *not* classified in heading 6116; it means only that the court should look to the relative chapter notes and the GRIs to resolve the issue of whether the plastic coating excludes the gloves from the intended scope of heading 6116. The court finds no other relative chapter notes and proceeds to apply the GRIs to resolve the question presented. The importance GRI 1 attaches to the terms of the headings provides the answer.

The General Explanatory Note to Chapter 61 applies generally to the goods of the chapter, whereas another Explanatory Note is exclusive to gloves. Explanatory Note 61.16, which the court views as indicative of the intent of the drafters of the Harmonized System as to the meaning of the terms of HS heading 61.16, instructs that "[t]his heading covers *all* knitted or crocheted gloves . . ." EN 61.16 (emphasis added). Even more significant, this Explanatory Note contemplates that knitted or crocheted gloves to which non-knitted com-

ponents have been attached still would be described by the common and commercial term “knitted or crocheted gloves,” within the meaning of that term as used by the drafters of the Harmonized System. *See id.* (instructing that the heading excludes “[k]nitted or crocheted gloves, mittens and mitts lined with furskin or artificial fur, or with furskin or artificial fur on the outside (**other than** as mere trimming) (**heading 43.03** [ . . . ‘articles of furskin’] **or 43.04** [‘artificial fur and articles thereof’])”) (emphasis added). The court reasonably may infer from the wording of this exclusion that a glove can have as a component on the outside surface or the lining a material that is not a knitted material yet still be described by the general term “knitted glove.” Moreover, in expressly excluding from the scope of the heading knitted gloves with attached furskin or artificial fur that is not mere trimming, the note does not similarly exclude knitted gloves that have been impregnated or coated with a layer of plastic, whether or not the layer is present as mere trimming. In all these respects, EN 61.16 evidences an intent on the part of the HS drafters that the heading term “Gloves, . . . knitted or crocheted” includes as a general matter those to which a non-knitted component, such as a plastic layer, has been affixed, even if that non-knitted component is more than mere trimming. In summary, the subject gloves are described by the term of heading 6116, “Gloves, . . . knitted” for purposes of GRI 1 and, therefore, fall within the scope of that heading of the HTSUS.

GRI 1 gives equal priority to the terms of the headings and “any relative Section or Chapter Notes.” GRI 1, HTSUS. In that respect, plaintiff argues that the scope of heading 6116, which is located within section XI, HTSUS, is limited so as to exclude its imported gloves. According to Magid, “Section XI, Note 1(h) expressly excludes from that Section ‘woven, knitted or crocheted fabrics, felt or nonwovens, **impregnated, coated, covered** or laminated with plastics, or articles thereof” (emphasis added) and indicates that they are to be classified in Chapter 39.” Pl.’s Mot. 16. The court disagrees.

Plaintiff’s paraphrase of note 1(h) to section XI, HTSUS misquotes and misinterprets the text. The actual text is as follows: “This section does not cover . . . Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, *of chapter 39.*” N. 1(h) to sec. XI, HTSUS (emphasis added).

As signified by the overall context and the placement of the comma following the word “thereof,” the prepositional phrase “of chapter 39” modifies and limits the term “[w]oven, knitted or crocheted fabrics . . . impregnated, coated, covered or laminated with plastics” (as well as the term “articles thereof”). According to its express terms, and as applied to the facts of this case, note 1(h) to section XI, HTSUS would exclude the gloves at issue from heading 6116, HTSUS only if they are

“articles” of “knitted . . . fabrics . . . impregnated, coated, covered or laminated . . . with plastics,” and only if those fabrics are classified within chapter 39, HTSUS. As discussed below, the court concludes that the gloves in question are not such articles.

A heading within Chapter 39, HTSUS would include within its scope some products in the form of sheets or film that are combinations of plastics and textiles and that could be described as “fabrics.” Heading 3920 thereof includes plastics in the form of sheets or film that are “not reinforced, laminated, supported or similarly combined with other materials,” and, in contrast, the subsequent heading, heading 3921, encompasses products in sheet (or film) form that *are* combinations of plastics and other materials.<sup>5</sup> See heading 3921, HTSUS (“*Other* plates, sheets, film, foil and strip, of plastics”); see also EN 39.21 (“This heading covers plates, sheets, film, foil and strip, of plastics **other than** those of heading . . . 39.20.”). By its terms, heading 3921, HTSUS includes some plastic sheet or film products that have a textile component and could be described as “fabrics.” But the HTSUS treats this limited class of goods as plastic sheet or film, despite the presence of a textile component, rather than as “textiles” or “textile fabrics,” which, as a general matter, are not within the scope of chapter 39, even if containing a component of plastic. See n. 2(p) to ch. 39, HTSUS (excluding from chapter 39 “[g]oods of section XI (textiles and textile articles).”)<sup>6</sup>

Thus, the question presented by note 1(h) to section XI, HTSUS is whether the gloves at issue can be described as “articles” of “knitted . . . fabrics . . . impregnated, coated, covered or laminated with plastics” [in this case, polyurethane], of chapter 39. N. 1(h) to sec. XI, HTSUS. Note 1(h) would appear to exclude from the scope of heading 6116, HTSUS gloves that were made up of a pre-existing fabric of heading 3921, e.g., gloves that were cut from such a fabric and subsequently assembled into complete gloves. That, of course, is not the merchandise at issue in this case. Here, the unfinished glove is

---

<sup>5</sup> Two other headings within chapter 39, HTSUS include rolls or sheets but are not pertinent here. Heading 3918, HTSUS includes plastic coverings for floors (whether or not self-adhesive) and plastic coverings for walls and ceilings, and heading 3919, HTSUS covers other plastic self-adhesive products. Therefore, heading 3921 is the only heading of chapter 39, HTSUS that could include a plastic-textile combination relevant to a classification analysis for the merchandise at issue in this litigation.

<sup>6</sup> See also n. 1 to ch. 59, HTSUS (instructing that “[e]xcept where the context otherwise requires, for the purposes of this chapter [59] the expression ‘textile fabrics’ applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of headings 6002 to 6006.”). In contrast, certain fabrics that are combinations of plastic and textile components are classified within chapter 39 rather than as “textile fabrics” of chapter 59; these expressly are excluded from the scope of heading 5903, HTSUS (“Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902 [‘tire cord fabric . . .’]”). See n. 2(a) to ch. 59, HTSUS.

dipped in polyurethane *after* the completion of the knitting process. This case, therefore, presents an issue of statutory interpretation: Is note 1(h) to section XI, HTSUS properly interpreted more broadly to encompass, as well, a knitted glove that was “impregnated, coated, covered or laminated” with plastic *after* the knitting process of the article was complete?

Note 1(h) to section XI, HTSUS applies both to fabrics and to articles of those fabrics. To accept plaintiff’s interpretation of note 1(h) to section XI, HTSUS, the court would need to interpret the note to exclude from section XI even those articles, such as the gloves at issue, that were not produced from a pre-existing knitted fabric (and, in particular, not produced from a plastic sheet containing a knitted textile component, of heading 3921, HTSUS) but instead were knitted directly from yarn to the form of an unfinished glove. According to plaintiff:

The knit gloves are made of man-made fibers. . . . The gloves have closed fingertips and no seams. . . . The textile component of the glove is complete when it comes off the machine. . . . Once the glove comes out of the knitting machine, it is put on a ‘former,’ which is shaped like a human hand. . . . The glove then moves to a ‘dipping line’ where the gloves are dipped in liquid polyurethane.

Pl.’s Mot. 4–5. *See* Pl.’s Ex. B, at 12 (describing the computer-controlled knitting process producing the finished shell directly from yarn.)

By the time the knitting process for one of Magid’s gloves was complete, the result was no longer a product that could be described as a “fabric,” i.e., a material, and had become an article, i.e., a glove-shaped shell. Even so, plaintiff’s interpretation of note 1(h) to section XI, HTSUS is not implausible when the note is read in isolation. Note 1(h) arguably could be construed broadly to apply even to articles, such as gloves, to which a plastic coating is applied *after* the article is knitted, in the sense that the plastic is applied to a portion of the knitted article that could be considered to be “fabric” of the glove. Under such a reading, the finished, coated glove arguably could qualify as an article “of” a knitted “fabric” that has been coated with plastic at the end of the manufacturing process. Nevertheless, the court concludes that this broader interpretation of note 1(h) cannot be correct.

GRI 1 requires consideration of all “relative” section and chapter notes. The knitted “fabrics” that fall within chapter 39, HTSUS and that, therefore, could be described by note 1(h) to section XI are expressly limited by note 10 to chapter 39, HTSUS, and the court may

not consider the former without also considering the latter. Under note 10 to chapter 39, HTSUS, the knitted fabrics must be in uncut or basic rectangular form and thus cannot be in more complex shapes. Specifically, the note provides that “[i]n headings 3920 and 3921, the expression ‘*plates, sheets, film, foil and strip*’ applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).”<sup>7</sup> N. 10 to ch. 39, HTSUS; see EN 39.21 (“According to Note 10 to this Chapter, the expression ‘plates, sheets, film, foil and strip’ applies only to plates, sheets, film, foil and strip and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked (for example, polished, embossed, coloured, merely curved or corrugated), uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).”).

In summary, the knitted “fabrics” described by note 1(h) to section XI, in order to be considered fabrics of chapter 39, not only must be “impregnated, coated, covered or laminated with plastics,” they also must be in basic uncut or rectangular form. An article knitted directly from yarn to an advanced shape such as a glove cannot correctly be said to be of such a fabric. Because “[t]he textile component of the glove is complete when it comes off the [knitting] machine,” Pl.’s Mot. 4 (citation omitted), Magid’s gloves are not “of” a fabric of chapter 39, and note 1(h) to section XI, HTSUS does not exclude them from the scope of heading 6116, HTSUS. Plaintiff’s reliance on note 1(h) to section XI, HTSUS to support its classification position is, therefore, misplaced.

In arguing that its gloves were classified incorrectly by Customs under heading 6116, HTSUS, Magid also argues that “[t]he gloves are *prima facie* classifiable in two Headings: 3926 (‘Other articles of plastics . . .’) and 6116 (‘Gloves, mittens and mitts, knitted or crocheted’).” Pl.’s Mot. 11–12. Plaintiff’s analysis then applies GRIs 2(b) and 3(b) to conclude, for purposes of GRI 2(b), that “each Heading references a material or substance—knitted or crocheted textiles of 6116 and plastics of 3926—and must be taken to include a refer[ence] to combinations of that material with other materials.” *Id.* Then, relying on the directive in GRI 2(b) that “[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3,” plaintiff argues that the gloves are “com-

<sup>7</sup> The reference to “chapter 54,” which in headings 5407 and 5408 include only woven, not knitted, fabrics, is not relevant here.



posite goods” within the meaning of GRI 3(b) and must be classified thereunder “as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” *Id.* at 12–13 (quoting GRIs 2(b) and 3(b), HTSUS). Magid views the essential character as imparted by the layer of plastic (i.e., the polyurethane resulting from the dipping process), resulting in classification within chapter 39, and specifically in heading 3926, HTSUS as an article of plastic.

In directing that classification is determined according to the terms of the headings and any relative section and chapter notes, GRI 1 allows application of GRIs 2 through 5 only “provided such headings or notes *do not otherwise require*.” GRI 1, HTSUS (emphasis added). Here, the terms of the competing headings *do* otherwise require. Because a term within the article description for heading 6116, HTSUS describes the gloves at issue in this litigation, because these gloves are not described by a term within the competing heading 3926, HTSUS, because no other heading merits consideration, and because no section or chapter note of the HTSUS requires otherwise, heading 6116, HTSUS is the correct heading by operation of GRI 1. And because GRIs 2 through 5 apply only if the terms of the headings and the relative section and chapter notes do not otherwise require, plaintiff’s contrary argument that classification should be determined according to GRI 3(b) based on “essential character” is not correct.

### **F. Application of GRI 6, HTSUS to Determine the Correct Subheading**

The uncontested facts readily allow the court to determine, pursuant to GRI 6, the correct subheading of heading 6116, HTSUS for the classification of the merchandise at issue in this case.

Within heading 6116, HTSUS, subheading 6116.10 carries the article description “[Gloves, . . . knitted or crocheted:] . . . Impregnated, coated or covered with plastics or rubber.” This subheading describes the gloves at issue.

Within the six-digit subheading, subheadings 6116.10.05 and 6116.10.08, HTSUS, respectively, are not applicable because the gloves are not hockey gloves and are not otherwise “specially designed for use in sports.”

The parties agree that the gloves at issue do not have fourchettes, which, plaintiff explains, are strips or shaped pieces used for the sides of the fingers of a glove. Pl.’s Mot. 4 (quoting *What Every Member of the Trade Community Should Know About: Gloves, Mittens & Mitts, Not Knitted or Crocheted, Under the HTSUS* at 8 (CBP 2008)). Because they lack fourchettes, and because these gloves are not “[c]ut



and sewn from preexisting machine-knit fabric . . . ,” subheadings 6116.10.13–6116.10.48, HTSUS are eliminated from consideration.

Therefore, the correct subheading is as determined by Customs upon liquidation: subheading 6116.10.55, HTSUS (“Gloves, mittens and mitts, knitted or crocheted: Impregnated, coated or covered with plastics or rubber: . . . Other: Without fourchettes: . . . Other: Containing 50 percent or more by weight of cotton, man-made fibers or other textile fibers, or any combination thereof”), subject to duty at 13.2% *ad valorem*.

### III. CONCLUSION

For the reasons stated above, the court rules that plaintiff has not demonstrated that “the government’s classification is incorrect.” *Jarvis Clark*, 733 F.2d at 876. Accordingly, the court will deny plaintiff’s motion for summary judgment, grant defendant’s cross motion, and enter summary judgment in favor of defendant.

Dated: March 25, 2022

New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU, JUDGE

### Slip Op. 22–29

ASHLEY FURNITURE INDUSTRIES, LLC; ASHLEY FURNITURE TRADING COMPANY; WANER FURNITURE Co., LTD.; MILLENNIUM FURNITURE Co., LTD.; and COMFORT BEDDING COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC; CORSICANA MATTRESS COMPANY; ELITE COMFORT SOLUTIONS; FXI, INC.; INNOCOR, INC.; KOLCRAFT ENTERPRISES INC.; LEGGETT & PLATT, INCORPORATED; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors.

Before: Timothy M. Reif, Judge  
Court No. 21–00283

[Granting plaintiffs’ motion for statutory injunction in part and denying plaintiffs’ motion in part.]

Dated: March 28, 2022

*Kristin H. Mowry*, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs. With her on the brief were *Jeffrey S. Grimson*, *Sarah M. Wyss*, and *Wenhui (Flora) Ji*.

*Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*,

Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

## OPINION

\* \* \*

### Reif, Judge:

This action arises from a challenge by plaintiffs, Ashley Furniture Industries, LLC (“AFI”), Ashley Furniture Trading Company (“AFTC”), Wanek Furniture Co., Ltd. (“Wanek”), Millennium Furniture Co., Ltd. (“Millennium”), and Comfort Bedding Company Limited (“Comfort Bedding”) (collectively, “plaintiffs”) to certain aspects of the final affirmative determination by the U.S. Department of Commerce (“Commerce”) in the antidumping duty (“AD”) investigation and order on mattresses from the Socialist Republic of Vietnam (“Vietnam”). See *Mattresses from the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less than Fair Value* (“Final Determination”), 86 Fed. Reg. 15,889 (Dep’t of Commerce Mar. 25, 2021) (final determination) and accompanying Issues and Decision Memorandum, A-552–827 (Dep’t of Commerce Mar. 18, 2021) (“IDM”); *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia* (“Vietnam Mattresses Order”), 86 Fed. Reg. 26,460 (Dep’t of Commerce May 14, 2021) (antidumping duty order).

Plaintiffs move for a statutory injunction pursuant to section 516A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(2) (2018),<sup>1</sup> and United States Court of International Trade (“USCIT” or the “Court”) Rules 7(b) and 56.2(a) ordering that defendant, United States, is enjoined during the pendency of this litigation, including any appeals, from issuing instructions to liquidate or permitting the liquidation of certain unliquidated entries of mattresses from Vietnam. Mot. for Stat. Inj. (“Pls. Br.”) at 1–2, ECF No. 20; see also Reply to Def.’s Partial Opp’n to Pls.’ Mot. for Stat. Inj. (“Pls. Reply Br.”) at 2–3, ECF No. 32. Plaintiffs move specifically to enjoin defendant from liquidating any entries that: (1) were imported by AFI or AFTC and produced and/or exported by Wanek, Millennium or Comfort Bedding; (2) were the subject of Commerce’s Final Determination and Vietnam Mattresses Order; and (3) were entered, or withdrawn from warehouse, on or after November 3, 2020, excluding any

<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are also to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

merchandise entered, or withdrawn from warehouse, between May 2, 2021, and May 13, 2021.<sup>2</sup> Pls. Br. at 2.

Defendant partially opposes plaintiffs' motion. See Def.'s Partial Opp'n to Pls.' Mot. for Stat. Inj. ("Def. Resp. Br."), ECF No. 27. Although defendant consents to a statutory injunction covering plaintiffs' unliquidated entries through April 30, 2022, the end of the period of review ("POR") for the first administrative review ("AR"), defendant opposes the injunction of indeterminate scope<sup>3</sup> that plaintiffs seek that would cover any unliquidated entries that might be made through to the conclusion of this litigation. *Id.* at 2–3; see Pls. Br. at 2. Accordingly, plaintiffs and defendant dispute only whether the injunction on liquidation should cover entries that might be made after April 30, 2022 (plaintiffs' "future entries").

For the reasons discussed below, the court grants plaintiffs' motion in part and denies the motion in part.

## BACKGROUND

On March 31, 2020, Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, The International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Work-

---

<sup>2</sup> In the Vietnam Mattresses Order, Commerce noted that 19 U.S.C. § 1673b(d) provides that suspension of liquidation pursuant to a preliminary affirmative determination may not remain in effect for more than six months. See Vietnam Mattresses Order. Since Commerce published its Preliminary Determination on November 3, 2020, *Mattresses from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* ("Preliminary Determination"), 85 Fed. Reg. 69,591 (Dep't of Commerce Nov. 3, 2020) (preliminary determination), the six-month period starting on that date ended on May 1, 2021. Consequently, in accordance with 19 U.S.C. § 1673b(d), Commerce instructed U.S. Customs and Border Protection ("Customs") to terminate the suspension of liquidation of and to liquidate — without regard to antidumping duties — any unliquidated entries entered, or withdrawn from warehouse, during the "gap period" from May 2, 2021, the first day on which the provisional measures were no longer in effect, through May 13, 2021, the day preceding the publication of the final affirmative injury determination of the U.S. International Trade Commission ("Commission"). See Vietnam Mattresses Order; Pls. Br. at 2; see also *Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, 86 Fed. Reg. 26,545 (ITC May 14, 2021). Plaintiffs and defendant agree that entries made during this gap period are excluded properly from the requested injunction. See Pls. Br. at 2; Def.'s Partial Opp'n to Pls.' Mot. for Stat. Inj. at 3, ECF No. 27.

<sup>3</sup> Plaintiffs and defendant characterize plaintiffs' proposed statutory injunction as an "open-ended" injunction. See Pls. Br. at 2; Def. Resp. Br. at 2. The court, however, refers to plaintiffs' proposed injunction as an injunction of indeterminate scope. See *Indeterminate*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining indeterminate as "[n]ot definite, distinct, or precise; impossible to know about definitely or exactly"). Plaintiffs' proposal is indeterminate, rather than open-ended, because the proposed injunction would not enjoin the liquidation of a "definite, distinct, or precise" subset of plaintiffs' entries. *Id.* Rather, the injunction would cover all of plaintiffs' entries that might be made over the course of the instant action, the end date of which is not predetermined.

ers International Union, AFL-CIO (collectively, “petitioners”) filed a petition with Commerce and the Commission to impose antidumping duties on imports of mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey (“Turkey”) and Vietnam, and to impose countervailing duties (“CVD”) on mattress imports from the People’s Republic of China (“China”). *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-than-Fair-Value Investigations*, 85 Fed. Reg. 23,002 (Dep’t of Commerce Apr. 24, 2020) (initiation of antidumping duty investigations). On April 24, 2020, Commerce initiated AD investigations on mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, Turkey and Vietnam, as well as a CVD investigation on mattresses from China. *See id.*; *Mattresses from the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 85 Fed. Reg. 22,998 (Dep’t of Commerce April 24, 2020) (initiation of countervailing duty investigation).

On November 3, 2020, Commerce published its Preliminary Determination in Commerce’s AD investigation of mattresses from Vietnam. *See Mattresses from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* (“Preliminary Determination”), 85 Fed. Reg. 69,591 (Dep’t of Commerce Nov. 3, 2020) (preliminary determination) and accompanying Preliminary Decision Memorandum, A-552–827 (Dep’t of Commerce Oct. 27, 2020) (“PDM”). In its Preliminary Determination, Commerce collapsed Wanek, Millennium and Comfort Bedding into a single entity pursuant to 19 C.F.R. § 351.401(f) — a decision that was not contested by plaintiffs or other parties in the investigation. *See* Second Am. Compl. at 5, ECF No. 24; PDM at 2 n.11.

On December 29, 2020, plaintiffs filed a case brief disputing Commerce’s Preliminary Determination. *See* IDM at 2, 17–24, 36–39. Subsequently, Commerce held a hearing in its AD investigation on February 11, 2021. *See id.* at 2.

On March 18, 2021, Commerce issued its Final Determination, which it published in the Federal Register on March 25, 2021. *See* Final Determination. Considering certain adjustments made in the Final Determination, Commerce assigned a 144.92% weighted-average dumping margin to Wanek, Millennium and Comfort Bedding. *Id.*

On May 14, 2021, Commerce published the Vietnam Mattresses Order. *See* Vietnam Mattresses Order. In addition, on May 14, 2021, the Commission published its final affirmative injury determination on mattresses from Cambodia, China, Indonesia, Malaysia, Serbia,

Thailand, Turkey and Vietnam. *See Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, 86 Fed. Reg. 26,545 (ITC May 14, 2021).

## STANDARD OF REVIEW

This Court has jurisdiction to hear the underlying action pursuant to 28 U.S.C. § 1581(c) and has authority to grant the requested injunctive relief pursuant to 19 U.S.C. § 1516a(c)(2). Pursuant to 19 U.S.C. § 1516a(c)(2), the Court “may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a *proper showing* that the requested relief should be granted *under the circumstances*.” 19 U.S.C. § 1516a(c)(2) (emphasis supplied).

## LEGAL FRAMEWORK

### I. Statutory framework for the suspension of liquidation

The United States employs a “retrospective” duty assessment system for the collection of antidumping and countervailing duties. 19 C.F.R. § 351.212(a). Commerce’s regulations specify the way in which “final liability for antidumping and countervailing duties is determined after merchandise is imported” as follows:

Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.

*Id.*

Accordingly, liability for antidumping duties “accrues upon entry of subject merchandise” into the United States. *SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Prot.*, 32 CIT 795, 797, 571 F. Supp. 2d 1347, 1350 (2008) (citing *Parkdale Int’l v. United States*, 475 F.3d 1375, 1376–77 (Fed. Cir. 2007)). However, “the amount of actual liability may not be determined for some time after the entry occurs,” and does not become final until the point at which Customs liquidates the subject merchandise.<sup>4</sup> *Am. Power Pull Corp. v. United States*, 39 CIT \_\_, \_\_, 121 F. Supp. 3d 1296, 1300 (2015).

Several statutory provisions form the framework providing for the suspension of liquidation of entries prior to the point at which Com-

<sup>4</sup> “Liquidation” is defined as “the final computation or ascertainment of duties on entries for consumption or drawback entries.” 19 C.F.R. § 159.1.

merce instructs Customs to liquidate those entries. 19 U.S.C. § 1673b(d)(2)(A) establishes that should Commerce issue and publish a preliminary affirmative determination in an AD investigation, Commerce “shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered . . . for consumption on or after . . . the date on which notice of the determination is published in the Federal Register.” This determination provides the legal basis for the suspension of liquidation until Commerce publishes an AD order, provided that such an order is published. *See Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1300–01.

Should Commerce and the Commission then issue and publish final affirmative determinations in an AD investigation, Commerce is required to publish an AD order. 19 U.S.C. §§ 1673d(b), 1673e(a). This order provides “the legal basis for the suspension of liquidation of imports of subject merchandise that enter for consumption on or after the date of publication of that order, throughout the life of the order, and until the order is revoked.” *Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1301.

The AD order provides the legal basis for the continued suspension of liquidation of entries. However, the suspension of liquidation for “any given entry is not indefinite.” *Id.* 19 U.S.C. § 1675 details the periodic process — known as the administrative review process — through which Commerce determines the duties to be assessed on entries of subject merchandise. Each year, during the anniversary month in which Commerce published the AD order, interested parties are entitled to request that Commerce conduct an AR to determine the antidumping duties to be applied to entries covered by that AR. 19 U.S.C. § 1675(a); *see also* 19 C.F.R. § 351.213. If an interested party does not request an AR, then the entries covered by that AR are “not examined to determine the duties to be assessed.”<sup>5</sup> *OKI Elec. Indus. Co. v. United States*, 11 CIT 624, 627, 669 F. Supp. 480, 483 (1987). Rather, Commerce instructs Customs to assess antidumping duties at the cash-deposit rates in effect at the time of entry of the merchan-

---

<sup>5</sup> If a request for an AR is timely received, then that AR covers entries made “during the 12 months immediately preceding the most recent anniversary month.” 19 C.F.R. § 351.213(e)(1)(i). If the request for an AR is received during the first anniversary month after the publication of the AD order, then that first AR covers entries made “during the period from the date of suspension of liquidation . . . to the end of the month immediately preceding the first anniversary month.” *Id.* § 351.213(e)(1)(ii). Regardless of whether an interested party ultimately requests an AR, there is always a POR covering entries made during the period of time immediately preceding the AR-request period. *Id.* § 351.213(e)(1)(i)-(ii).



dise, which Customs is required to do within six months.<sup>6</sup> *See id.* at 627–28, 669 F. Supp. at 483; 19 U.S.C. § 1504(d).

If an interested party requests an AR, Commerce is required to determine the antidumping duties to be assessed on entries covered by that AR. 19 U.S.C. § 1675(a)(1). As Commerce conducts this review, the suspension of liquidation continues with respect to the entries covered by the requested AR. *See Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1301 (“It has long been recognized that . . . the suspension of liquidation of an entry must remain in effect throughout an administrative review.”); *see also Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984). “The publication of the final results of the administrative review provides the notice to Customs of the lifting of the suspension of liquidation.” *Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1301 (citing *Int’l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002)).

## II. Authority of the U.S. Court of International Trade to enjoin liquidation

An interested party may appeal to the Court a final affirmative determination by Commerce in an AD investigation. *See* 19 U.S.C. §§ 1516a(a)(2)(B)(i), 1673d. If a party commences such an appeal, it may move, pursuant to 19 U.S.C. § 1516a(c)(2), that the Court enjoin the liquidation of “some or all” entries covered by the determination pending a final conclusion to the appeal.

The purpose of this statutory injunction on liquidation is to “preserve the status quo during judicial proceedings so that relief may be provided in accordance with the final litigation results.” *Am. Cast Iron Pipe Co. v. United States*, 43 CIT \_\_, \_\_, 399 F. Supp. 3d 1362, 1366 (2019); *see also Uginé & Alz Belgium v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006). Although injunctions on liquidation have become “almost automatic” in AD and CVD proceedings, they remain “an extraordinary remedy never awarded as of right.” *Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1345 (Fed. Cir. 2019) (quoting *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014)); *Altx, Inc. v. United States*, 26 CIT 735, 736, 211 F. Supp. 2d 1378, 1380 (2002). The moving party must make a “clear showing” that an injunction on the statutorily mandated process of liquidation is warranted under the circumstances. *See Altx*, 26 CIT at 736, 211 F. Supp. 2d at 1380; *SKF USA Inc. v. United States*, 28 CIT 170, 172, 316 F. Supp. 2d 1322, 1326 (2004).

<sup>6</sup> Defendant contends that Commerce’s consistent practice is to wait 35 days “before sending out liquidation instructions” to Customs. Def. Resp. Br. at 8 n.1. Plaintiffs do not contest this contention. In this case, the court evaluates the liquidation of plaintiffs’ entries with reference to such a 35-day waiting period.



To obtain a statutory injunction, the moving party is required to establish that: (1) it will suffer irreparable harm without the injunction; (2) it is likely to succeed on the merits; (3) the balance of the equities favors the party; and (4) the injunction will better serve the public interest. See *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *Ugine*, 452 F.3d at 1292; *Am. Cast Iron Pipe*, 43 CIT at \_\_, 399 F. Supp. 3d at 1366. “[T]he absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned [to] the other factors, to justify the denial” of an injunction, and this decision lies within the sound discretion of the court. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

A party moving for a statutory injunction may follow “regular motion practice” to obtain such relief. USCIT Rules, Appendix of Forms, Specific Instructions - Form 24; see, e.g., *Fuyao Glass Indus. Grp. v. United States (Fuyao II)*, 27 CIT 1321, 1325 (2003). However, the Court also permits a party seeking an injunction on liquidation to file a Form 24 proposed order for a statutory injunction upon consent (“Form 24”). See USCIT Rules, Appendix of Forms, Specific Instructions - Form 24. Form 24 “is a streamlined form a party may use to propose a statutory [injunction], pursuant to which the party indicates the consent of the other parties and agreement that they have made ‘a proper showing . . . that the requested injunctive relief should be granted under the circumstances.’” *YC Rubber Co. (N. Am.) v. United States*, 43 CIT \_\_, \_\_ n.2, 415 F. Supp. 3d 1240, 1243 n.2 (2019) (citing USCIT Rules, Appendix of Forms, Form 24).

### **III. Application of the Court’s statutory injunction authority to the instant case**

In this case, plaintiffs appeal certain aspects of the Final Determination — a final affirmative determination by Commerce in an AD investigation. See Second Am. Compl. at 2. Plaintiffs have not yet requested an AR, as the earliest point at which a first AR can be requested is May 2022 — the first anniversary month of the Vietnam Mattresses Order. See 19 C.F.R. § 351.213(b). However, in this case an injunction on the liquidation of plaintiffs’ entries that would be covered by an AR 1, should it be requested, is not in dispute. Defendant consents to plaintiffs’ motion for a statutory injunction insofar as the injunction covers plaintiffs’ entries that would be covered by an AR 1 — *i.e.*, entries made from November 3, 2020, through April 30, 2022 (excluding any entries made from May 2, 2021, through May 13, 2021). See Def. Resp. Br. at 2–3.

Accordingly, plaintiffs and defendant dispute only whether the court should issue an injunction on the liquidation of plaintiffs’ en-

tries made after April 30, 2022 — *i.e.*, entries that would be covered by an AR 2 or any subsequent ARs. The court evaluates plaintiffs' motion with respect to these future entries in light of the Court's four-factor test for injunctive relief. The court addresses each factor in turn and concludes that: (1) the threat of liquidation of plaintiffs' future entries does not pose irreparable harm; (2) plaintiffs do not demonstrate a likelihood of success on the merits; (3) the balance of the equities tips in plaintiffs' favor; and (4) an injunction of indeterminate scope as proposed by plaintiffs does not better serve the public interest.

On this basis, plaintiffs do not make a proper showing under the circumstances that they are entitled to a statutory injunction of indeterminate scope. Consequently, the court grants an injunction on liquidation that covers plaintiffs' entries made from November 3, 2020, through April 30, 2022 (excluding any entries made during the gap period from May 2, 2021, through May 13, 2021).

## DISCUSSION

Congress enacted 19 U.S.C. § 1516a(c)(2) as part of the Trade Agreements Act of 1979 ("1979 Act"). Pub. L. No. 96–39, § 1001(a), 93 Stat. 144, 302–03 (1979) (codified as amended at 19 U.S.C. § 1516a(c)(2) (2018)). The legislative history of the 1979 Act states that Congress enacted section 516a(c)(2) to "permit the Customs Court to enjoin, during the period of judicial review, liquidation of some or all entries of merchandise covered by a determination of the administering authority or the [Commission] during a [CVD] or [AD] investigation." S. Rep. No. 96–249, at 28 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 381, 414. As enacted in 1979, 19 U.S.C. § 1516a(c)(2) provided:

(2) INJUNCTIVE RELIEF. — In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Customs Court may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances. In ruling on a request for such injunctive relief, the court shall consider, among other factors, whether —

(A) the party filing the action is likely to prevail on the merits,

(B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,

(C) the public interest would best be served if liquidation is enjoined, and

(D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

1979 Act § 1001(a).

Further, the legislative history of the 1979 Act states that Congress did not intend for section 516a(c)(2) “to be construed as granting the Customs Court full equity powers in all situations.” S. Rep. No. 96–249, at 252.

The following year, Congress enacted the Customs Courts Act of 1980. Pub. L. No. 96–417, 94 Stat. 1727 (1980) (codified as amended in scattered sections of 28 U.S.C.). The Customs Courts Act of 1980, which created the U.S. Court of International Trade, provided the Court, through 28 U.S.C. § 2643(c)(1), full powers in equity, “including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.” Customs Courts Act of 1980, §§ 101, 301.

With respect to the Court’s power to grant injunctions, the legislative history of the Customs Courts Act of 1980 states that Congress decided to not include language in 28 U.S.C. § 2643(c)(1) enumerating “standards for issuance of a preliminary or permanent injunction, thereby allowing the Court to apply the same standards as those employed by the district courts.” H.R. Rep. No. 96–1235, at 41 & n.37 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3753 & n.37 (citing Customs Courts Act of 1980, Hearing on H.R. 6394 Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary, 96th Cong. 310 (letter of Homer E. Moyer, Jr., Gen. Counsel of the U.S. Dep’t of Commerce) (“The deletion [from the proposed version of 28 U.S.C. § 2643(c)(1)] we propose would allow the [Court] to rely on the case law in considering whether to grant an injunction.”)). Further, to conform the version of 19 U.S.C. § 1516a(c)(2) enacted in 1979 to 28 U.S.C. § 2643(c)(1), Congress amended the former to remove the second sentence “pertaining to the factors to be considered by the Court to determine if it is appropriate to issue an injunction.” H.R. Rep. No. 96–1235, at 69.

Accordingly, Congress intended for the 1980 amendment of 19 U.S.C. § 1516a(c)(2) to accomplish two objectives: (1) to conform 19 U.S.C. § 1516a(c)(2) to 28 U.S.C. § 2643(c)(1); and (2) to direct the Court to “apply the same standards as those employed by the district

courts” in deciding motions for injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2). H.R. Rep. No. 96–1235, at 41, 69.<sup>7</sup>

Since 1980, Congress has not further amended 19 U.S.C. § 1516a(c)(2). In addition, the decisions whose “standards” Congress directed the Court to “apply” in deciding motions for injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2) — comprising the decisions of the USCIT, the Court of Appeals for the Federal Circuit (“Federal Circuit”), and other federal courts — establish that the four factors must be satisfied for an injunction to be granted, and, with respect to irreparable harm, that such harm must be immediate or imminent. *See, e.g., Altx*, 26 CIT at 736–37, 211 F. Supp. 2d at 1380; *Kwo Lee, Inc. v. United States*, 38 CIT 1496, 1498, 24 F. Supp. 3d 1322, 1326 (2014); *Zenith*, 710 F.2d at 809; *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009); *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1020, 1022 (9th Cir. 2016).

## I. Irreparable harm

### A. Legal framework

Irreparable harm is a “type of injury that is serious and cannot be undone.” *Shandong Huarong Gen. Grp. v. United States*, 24 CIT 1279, 1282, 122 F. Supp. 2d 1367, 1370 (2000) (internal quotation marks omitted); *see also Zenith*, 710 F.2d at 809. As such, the moving party “bears an extremely heavy burden” to establish that irreparable harm exists, *Shandong Huarong*, 24 CIT at 1282, 122 F. Supp. 2d at 136970 (citing *Queen’s Flowers de Colombia v. United States*, 20 CIT 1122, 1125, 947 F. Supp. 503, 506 (1996)), and failure to establish irreparable harm “virtually dooms” the motion. *Nucor Corp. v. United States*, 29 CIT 1452, 1464–65, 412 F. Supp. 2d 1341, 1352 (2005); *see also Altx*, 26 CIT at 738, 211 F. Supp. 2d at 1382 (citing *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 587, 588, 744 F. Supp 1177, 1179 (1990)).

The Court’s standard for irreparable harm requires that the party moving for a statutory injunction establish that the liquidation of its entries poses a “presently existing, actual” threat.<sup>8</sup> *Zenith*, 710 F.2d at 809 (quoting *S.J. Stile Assocs. Ltd. v. Snyder*, 68 CCPA 27, 30,

<sup>7</sup> The House Report states in full: “The amendment adopts a recommendation of the Department of Commerce to delete language that would have enumerated standards for issuance of a preliminary or permanent injunction, thereby allowing the Court to apply the same standards as those employed by the district courts.” H.R. Rep. No. 96–1235, at 41.

<sup>8</sup> With respect to the instant motion, the alleged irreparable harm that the parties address involves the harm that is associated with the threat of liquidation of any of plaintiffs’ future entries prior to the conclusion of this litigation. *See* Pls. Br. at 4–8 (“Plaintiffs would face *irreparable harm* if the entries are *liquidated* before a final and conclusive decision from this Court.” (emphasis supplied)); Def. Resp. Br. at 8–9 (arguing that plaintiffs fail to

C.A.D. 1261, 646 F.2d 522, 525 (1981)); *see also* *Husteel Co. v. United States*, 38 CIT 1887, 1891, 34 F. Supp. 3d 1355, 1360 (2014); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 43 CIT \_\_, \_\_, 393 F. Supp. 3d 1271, 1276–77 (2019) (quoting *Shree Rama Enters. v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194–95 (1997)). The court examines first whether the threat is “presently existing,” and then whether the threat is “actual.”

This Court evaluates whether the threat of liquidation is “presently existing” in reference to the immediacy or imminence of the threat. *See Zenith*, 710 F.2d at 809 (citing *S.J. Stile*, 68 CCPA at 30, 646 F.2d at 525; *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)) (requiring that the moving party show that it “will be *immediately* and irreparably injured” (emphasis supplied)); *Husteel*, 38 CIT at 1891–92, 34 F. Supp. 3d at 1360–61 (concluding that the moving parties faced “a sufficiently *imminent* and serious harm” to support a showing of a “presently existing, actual threat” (emphasis supplied)).

The Court’s evaluation of irreparable harm aligns with the legislative history of 19 U.S.C. § 1516a(c)(2). Specifically, the decisions whose “standards” Congress directed the Court to “apply” in deciding motions for injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2) provide that irreparable harm must be “immediate” or “imminent.” H.R. Rep. No. 96–1235, at 41, 69; *see, e.g., Altx*, 26 CIT at 736–37, 211 F. Supp. 2d at 1380; *Kwo Lee*, 38 CIT at 1498, 24 F. Supp. 3d at 1326; *Zenith*, 710 F.2d at 809; *Qingdao*, 581 F.3d at 1378; *Boardman*, 822 F.3d at 1022. *Cf.* discussion of recent decisions of the USCIT that take a different view, *infra* Section I.C.1.

In *Altx*, for example, a 2002 USCIT decision in which the plaintiffs, domestic producers, sought to enjoin the liquidation of certain entries of circular seamless stainless steel hollow products from Japan, the court determined that the plaintiffs did not provide sufficient evidence establishing that “immediate irreparable harm” was likely to occur without the injunction. *Altx*, 26 CIT at 735–37, 211 F. Supp. 2d at 1379–80. The court there underscored the importance for a moving party to provide specific allegations or evidence of harm that would result from liquidation as, absent such a showing, “it is left to speculation whether liquidating entries” poses irreparable harm. *Id.* at 737–38, 211 F. Supp. 2d at 1381–82.

Turning to *Kwo Lee*, a 2014 USCIT decision, the court granted a motion to enjoin Customs from imposing a heightened bond requirement to demonstrate an “imminent *threat of liquidation*” (emphasis supplied). Unless otherwise noted, the court evaluates plaintiffs’ allegations of irreparable harm in view of this threat of liquidation. *See Zenith*, 710 F.2d at 810; *Husteel*, 38 CIT at 1890–91, 34 F. Supp. 3d at 1360.

ment on the plaintiff's entries of fresh garlic from China. *See Kwo Lee*, 38 CIT at 1496, 24 F. Supp. 3d at 1324–25. This requirement would have exceeded significantly the typical cost to importers to obtain single transaction bonds for their entries, and the plaintiff provided evidence that it would be unable to post “full collateral for the millions of dollars” that would be required to obtain bonds for its entries. *Id.* at 1500, 24 F. Supp. 3d at 1328. Due to the likelihood of “imminent and immediate bankruptcy, loss of business, and, therefore, loss of access to meaningful judicial review,” the court concluded that the plaintiff faced irreparable harm. *Id.* at 1500–01, 24 F. Supp. 3d at 1326. The court added, in holding for plaintiff, that “the immediate threat of bankruptcy” and the “imminent and immediate . . . loss of business . . . [and] loss of access to judicial review” constituted irreparable harm because these threats were “immediate and viable,” not merely speculative or possible. *Id.* at 1500, 1504, 24 F. Supp. 3d at 1326, 1331.

The Federal Circuit has taken a similar approach in deciding motions for injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2). In *Zenith*, the Federal Circuit held that in an appeal of the final results of an AR, the liquidation of “all of the entries occurring during the review period will be . . . immediate[]” and poses irreparable harm because such liquidation precludes “effective judicial review” of the contested entries. *Zenith*, 710 F.2d at 810. In *Qingdao*, a decision also involving an appeal of the final results of an AR, the Federal Circuit held that for the same reasons as in *Zenith*, the moving party faced “immediate and irreparable harm” with respect to its entries made during the review period, as the liquidation of those entries would deprive the party of “later recourse in the event that the liquidation rate is determined to be incorrect.” *Qingdao*, 581 F.3d at 1380–81. These decisions demonstrate further the requirement that the threat of liquidation be “immediate” to pose irreparable harm.

Notably, the House Report language directs this court to “apply the same standards as those employed by the district courts,” not just the decisions of this Court and those of the Federal Circuit. H.R. Rep. No. 96–1235, at 41. In *Boardman*, for example, a Ninth Circuit decision, the court applied the standard for injunctive relief that the Supreme Court pronounced in *Winter v. Nat. Res. Def. Council, Inc. Boardman*, 822 F.3d 1011; *Winter*, 555 U.S. 7, 20 (2008). In *Boardman*, the plaintiffs, a group of fishermen, brought an antitrust action against certain seafood processor entities and sought an injunction to prevent the acquisition of one such entity by another entity. *Boardman*, 822 F.3d at 1016–17. The Ninth Circuit upheld the district court's decision



to grant the requested injunction. *Id.* at 1025. With respect to irreparable harm, the Ninth Circuit concluded that the plaintiffs’ alleged threat of “monopsony in multiple seafood input markets on the West Coast” constituted a type of irreparable harm recognized within the Circuit. *Id.* at 1022–23. Further, the Ninth Circuit determined that this threat was “sufficiently immediate” and warranted injunctive relief due to the likelihood that the plaintiffs would suffer the alleged harm “before a trial on the merits could be held.” *Id.* at 1023.

“Immediate” is defined as: “Occurring without delay; instant . . . . Not separated by other persons or things . . . . Having a direct impact; without an intervening agency.” *Immediate*, BLACK’S LAW DICTIONARY (11th ed. 2019). “Imminent” is defined as: “(Of a danger or calamity) threatening to occur immediately; dangerously impending . . . . About to take place.” *Imminent*, BLACK’S LAW DICTIONARY (11th ed. 2019).<sup>9</sup>

These definitions of “immediate” and “imminent” as well as decisions of this court indicate that a threat is presently existing if the entries at issue face immediate liquidation or liquidation as soon as the POR then-underway concludes. In particular, the Court previously has issued statutory injunctions that cover entries that already have been made and that face the immediate prospect of liquidation without further notice. *See, e.g., Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, Ct. No. 18–00195, Order for Stat. Inj. upon Consent (Jan. 19, 2021), ECF No. 65; *Dalian Meisen Woodworking Co. v. United States*, Ct. No. 20–00110, Order (Oct. 18, 2021), ECF No. 75; *see also* 19 C.F.R. § 351.212(b)-(c). Several recent decisions of the Court include within the scope of what faces a “presently existing” threat of liquidation entries that have not yet been made, but which will be made during the POR underway at the time that the respective decisions were issued. *See, e.g., Husteel*, 38 CIT at 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15.

<sup>9</sup> Other sources provide similar definitions of “immediate” and “imminent.” *See, e.g., Immediate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/immediate> (last visited Mar. 23, 2022) (“[O]ccurring, acting, or accomplished without loss or interval of time.”); *Immediate*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=immediate> (last visited Mar. 23, 2022) (“Occurring at once; happening without delay.”); *Imminent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/imminent> (last visited Mar. 23, 2022) (“[R]eady to take place . . . happening soon.”); *Imminent*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=imminent> (last visited Mar. 23, 2022) (“About to occur; impending.”). Unless otherwise noted, the court uses the terms “imminent” and “immediate” interchangeably with respect to the court’s evaluation of the irreparable harm factor.



The Court also has previously addressed circumstances in which a threat of liquidation is presently existing with respect to a subset of future entries but is not presently existing with respect to other subsets. *See, e.g., Changzhou Hawd Flooring Co. v. United States*, Ct. No. 12–00020, Order (Jan. 9, 2018), ECF No. 190, Order (Sept. 20, 2018), ECF No. 212, Order (Aug. 13, 2019), ECF No. 215. In these circumstances, the Court has issued successive injunctions covering subsets of a party’s entries upon a proper showing that the injunction on liquidation of each respective subset of entries is warranted. *See, e.g., Changzhou Hawd*, Ct. No. 1200020, Order (Jan. 9, 2018), ECF No. 190, Order (Sept. 20, 2018), ECF No. 212, Order (Aug. 13, 2019), ECF No. 215; *Linyi Chengen Import and Export Co. v. United States*, Consol. Ct. No. 18–00002, Order for Stat. Inj. upon Consent (Dec. 26, 2018), ECF No. 65, Am. Order for Stat. Inj. upon Consent (Feb. 11, 2019), ECF No. 76, Order for Stat. Inj. upon Consent (Mar. 26, 2021), ECF No. 153.

Turning to the requirement that the threat of liquidation must be “actual,” the Court has applied this term to mean that the threat may be neither “speculative . . . [n]or determined by surmise.” *Lumber*, 43 CIT at \_\_\_, 393 F. Supp. 3d at 1276 (citing *Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984); *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp 2d 1324, 1331 (2001)). “It is not enough to establish a mere possibility of injury, even where prospective injury is great.” *Id.* at 1276–77 (quoting *Shree Rama*, 21 CIT at 1167, 983 F. Supp. at 194–95). Further, the threat of liquidation is speculative if this threat is within the moving party’s “power to prevent” — *i.e.*, the “possibility” of liquidation does not present an “actual” threat if it is feasible for the moving party to pursue recourse to avoid “the eventuality of such harm.” *Fuyao Glass Indus. Grp. v. United States (Fuyao I)*, 27 CIT 1166, 1170 (2003); *see also Zenith*, 710 F.2d at 809 (“Only a viable *threat of serious harm which cannot be undone* authorizes exercise of a court’s equitable power to enjoin before the merits are fully determined.” (quoting *S.J. Stile*, 68 CCPA at 30, 646 F.2d at 525)).

The moving party has the burden to show that under the circumstances, the threat of liquidation is “presently existing” and “actual” and, consequently, poses irreparable harm. *See* 19 U.S.C. § 1516a(c)(2).

## **B. Positions of the parties**

Plaintiffs argue that the threat of liquidation of their future entries is “presently existing” and “actual” and, consequently, poses irrepa-

rable harm. *See* Pls. Br. at 5, 7; Pls. Reply Br. at 5, 13. Plaintiffs allege that this irreparable harm stems from the “possibility of not having the remedy to seek judicial review and economic loss” if Commerce instructs Customs to liquidate plaintiffs’ future entries prior to the conclusion of this litigation. Pls. Br. at 7.

### 1. Whether threat of liquidation is “presently existing”

Plaintiffs contend first that the threat of liquidation of their future entries is “presently existing” because the threat becomes imminent as soon as Commerce publishes the underlying AD or CVD order. *See* Pls. Br. at 5, 7; Pls. Reply Br. at 7–8, 10–12. Plaintiffs argue that three decisions of this Court — *Husteel*, *Mid Continent* and *Mosaic*— support their interpretation of a “presently existing” threat. *Husteel*, 38 CIT 1887, 34 F. Supp. 3d 1355; *Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT \_\_\_, 427 F. Supp. 3d 1375 (2020); *Mosaic Co. v. United States*, 45 CIT \_\_\_, 540 F. Supp. 3d 1330 (2021).

Plaintiffs point first to *Husteel*, a 2014 USCIT decision in which the court issued injunctions of limited scope that covered the moving parties’ entries made during the first POR, then underway, of the underlying AD order.<sup>10</sup> *See* Pls. Br. at 5–6; Pls. Reply Br. at 7–8 (citing *Husteel*, 38 CIT at 1888, 1890–93, 34 F. Supp. 3d at 1358, 1360–62). The court identified a “confluence of considerations” leading it to conclude that the injunctions were proper, including that the threat of harm caused by liquidation without further notice pursuant to 19 C.F.R. § 351.212(c) was “sufficiently imminent,” and that the injunctions would protect the parties from “any negative ramifications of an erroneous liquidation” of those entries. *Husteel*, 38 CIT at 1891–92, 34 F. Supp. 3d at 1360–61. Referencing *Husteel*, plaintiffs in this case contend that the threat of liquidation of their future entries is “presently existing” and consequently warrants the issuance of an injunction of indeterminate scope. *See* Pls. Br. at 5–6; Pls. Reply Br. at 7–8.

Plaintiffs point also to two recent decisions in which the Court issued injunctions fashioned similarly to the injunction of indeterminate scope that plaintiffs request. First, plaintiffs reference *Mid Continent*, a 2020 decision in which the court, approximately five years after the underlying litigation had commenced, issued an injunction of indeterminate scope because the moving parties had “established a ‘presently existing, actual threat’ of irreparable harm for entries

<sup>10</sup> In *Husteel*, the court issued multiple injunctions because several consolidated plaintiffs filed separate motions for statutory injunctions pursuant to 19 U.S.C. § 1516a(c)(2). *See Husteel*, 38 CIT at 1895, 34 F. Supp. 3d at 1363 (“The court accordingly grants the movants’ motions. One typical injunction is attached hereto for clarity. Individual orders regarding the other movants’ motions will enter separately.”).

subject to [the first] and subsequent administrative reviews.” *Mid Continent*, 44 CIT at \_\_, 427 F. Supp. 3d at 1379, 1382 (quoting *Zenith*, 710 F.2d at 809); see Pls. Br. at 5–7. The court reasoned that the threat of liquidation became “sufficiently imminent” when Commerce published the underlying AD order, as the “potential harm flows from the results of the investigation” leading to the order. *Id.* at \_\_, 427 F. Supp. 3d at 1383–84.

Second, plaintiffs reference *Mosaic*, a 2021 decision in which the court echoed the conclusion of the *Mid Continent* court that the threat of liquidation becomes immediate and presently existing upon “the publication of the CVD Order.” See Notice Suppl. Auth., ECF No. 35; *Mosaic*, 45 CIT at \_\_, 540 F. Supp. 3d at 1334, 1336. Unlike the *Mid Continent* court, however, the *Mosaic* court issued an injunction of indeterminate scope before an interested party could request an AR of entries made during the first POR. *Mosaic*, 45 CIT at \_\_, 540 F. Supp. 3d at 1335, 1337. Relying on these decisions, plaintiffs argue that the threat of liquidation of all of their entries — including their future entries — became imminent and irreparable when Commerce published the Vietnam Mattresses Order. See Notice Suppl. Auth. at 2; Pls. Br. at 7–8. Consequently, according to plaintiffs, this “presently existing” threat of liquidation warrants the issuance of an injunction of indeterminate scope. See Pls. Br. at 7–8.

Defendant argues that plaintiffs do not establish that the threat of liquidation of their future entries is “presently existing.” See Def. Resp. Br. at 11. Defendant challenges the interpretation of a “presently existing” threat that plaintiffs advance. See *id.* at 11–14. Contesting plaintiffs’ reliance on *Husteel*, defendant notes that the court in that decision did not issue an injunction of indeterminate scope similar to the injunction that plaintiffs request in this case, but rather issued injunctions of limited scope covering the moving parties’ entries made during the first POR. See *id.* at 13 (citing *Husteel*, 38 CIT at 1895–96, 34 F. Supp. 3d at 1364).

Defendant challenges also plaintiffs’ reliance on *Mid Continent* and *Mosaic*. Defendant points out that the *Mid Continent* court granted an injunction of indeterminate scope approximately five years into the litigation, after the first two ARs were completed and the next two ARs were underway. See *id.* at 12. Defendant notes that plaintiffs in this case seek an injunction of indeterminate scope “long before any of the administrative reviews are even scheduled to commence.” *Id.* (emphasis supplied).

Next, defendant challenges plaintiffs’ reliance on *Mosaic*. See Def.’s Resp. Notice Suppl. Auth., ECF No. 37. Defendant argues that the

conclusion in *Mosaic* that statutory injunctions granted pursuant to 19 U.S.C. § 1516a(c)(2) are not “extraordinary” remedies is inconsistent with past decisions of the Federal Circuit. *See id.* at 2–3 (citing *Wind Tower*, 741 F.3d at 95; *Zenith*, 710 F.2d at 809–10). Defendant points also to the *Mosaic* decision’s “heav[y]” reliance upon the language and principles of *Mid Continent*, a decision that, according to defendant, is factually dissimilar to this case. *See id.* at 3–4.

Further, defendant argues that the alleged threat posed by the liquidation of plaintiffs’ future entries does not accord with the interpretation that a threat is “presently existing” if the entries at issue face immediate liquidation or liquidation as soon as the POR then-underway concludes. *See* Def. Resp. Br. at 5–6, 11; *see also* *Asociación de Exportadores*, Ct. No. 18–00195, Order for Stat. Inj. upon Consent (Jan. 19, 2021), ECF No. 65; *Dalian*, Ct. No. 20–00110, Order (Oct. 18, 2021), ECF No. 75; *Husteel*, 38 CIT at 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15. To support this argument, defendant details Commerce’s administrative procedure for lifting the suspension of liquidation and directing that Customs liquidate entries of merchandise. *See* Def. Resp. Br. at 6–8. Defendant points out that under the applicable regulation, interested parties are entitled to request an AR during each anniversary month of the Vietnam Mattresses Order — the month of May. *See id.* at 6; 19 C.F.R. § 351.213(b)(1); Vietnam Mattresses Order. Defendant consents to an injunction of limited scope covering plaintiffs’ entries that would be covered by an AR 1, which can be requested in May 2022. *See* Def. Resp. Br. at 2. Notably, defendant’s consent to an injunction of limited scope covering such entries is not contingent on plaintiffs or any other interested party requesting an AR 1 in May 2022.<sup>11</sup> *See id.*

For entries that would be covered by an AR 2 — which would cover entries made between May 1, 2022, and April 30, 2023 — plaintiffs or any other interested party are entitled to request that AR in May 2023. 19 C.F.R. § 351.213(b)(1). Accordingly, defendant argues that the earliest date that plaintiffs’ entries could be subject to liquidation

---

<sup>11</sup> It is the practice of the United States to consent to injunctions of limited scope without requiring that the moving parties request ARs of the entries corresponding to each injunction. *See, e.g., Cheng Shin Rubber Ind. Co. v. United States*, Ct. No. 21–00398, Def.’s Opp. Pl.’s Mot. Modify Inj. (Jan. 18, 2022) at 12, ECF No. 40; *Best Mattresses Int’l Co. v. United States*, Consol. Ct. No. 21–00281, Def.’s Partial Opp. Pls.’ Mot. for Stat. Inj. (Aug. 20, 2021) at 2, 7, ECF No. 25; *Mosaic*, Consol. Ct. No. 21–00116, Gov.’s Partial Opp. OCP S.A.’s Mot. for Stat. Inj. in Case No. 21–00218 (July 23, 2021) at 8 n.2, ECF No. 28; *Camso Inc. v. United States*, Consol. Ct. No. 17–00060, Consent Mot. for Prelim. Inj. (June 12, 2017), at 5, ECF No. 31.

is July 6, 2023.<sup>12</sup> Based on the statutory timeline for the liquidation of entries subject to the Vietnam Mattresses Order, defendant contends that the threat of liquidation of plaintiffs' future entries is not "presently existing." *See* Def. Resp. Br. at 9–11.

## 2. Whether threat of liquidation is "actual"

Plaintiffs contend also that the threat of liquidation of their future entries is "actual." Plaintiffs articulate two reasons that the "premature[]" liquidation of their future entries presents a sufficiently non-speculative threat. Pls. Reply Br. at 5 n.1.

First, plaintiffs argue that their entries face an actual threat of liquidation that "increases as the litigation" proceeds. *See id.* at 4–5, 8. Plaintiffs allege that the threat of liquidation of their future entries at the 144.92% rate set by Commerce in its Final Determination is non-speculative because at this moment in time — when plaintiffs' motion for a statutory injunction is being deliberated — that rate applies equally to all of their entries, including all entries that have not yet been made. *See id.* at 4–5. Plaintiffs contend further that it is "not reasonable" for defendant to assume that plaintiffs will make certain decisions that could affect whether this rate will in fact apply to their future entries. *Id.* at 5. These decisions include whether plaintiffs will exercise their rights to request any future ARs, and, if they make such a request with respect to one or more ARs, whether plaintiffs might choose on one or more occasions to appeal to this Court the results of the respective AR, and whether plaintiffs will seek future injunctions in conjunction with any such appeals. *See id.* at 4–5. Accordingly, plaintiffs argue that since defendant cannot presume how plaintiffs will make any of these decisions, "[a]s the years go on" the scenarios under which plaintiffs' future entries face an actual threat of liquidation at the 144.92% rate will "multiply." *Id.* at 5.

Second, plaintiffs contend that potential miscommunication or errors by the United States that could result in the "premature[]" liquidation of their future entries pose an actual, non-speculative threat. *See id.* at 5 n.1, 10, 13–14.

---

<sup>12</sup> As discussed in note 6, *supra*, the court evaluates the liquidation of plaintiffs' entries with reference to Commerce's consistent practice of waiting 35 days before sending liquidation instructions to Customs. *See also* Def. Resp. Br. at 8 n.1. Accordingly, July 6, 2023 (35 days following the conclusion of the May 2023 AR-request period) is the earliest date on which Commerce could send liquidation instructions to Customs — though it is not necessarily the case that liquidation will commence on this date. 19 C.F.R. § 351.212(c). Subsequently, Customs must within six months liquidate the covered entries, or else those entries will be deemed liquidated at the cash-deposit rate in effect at the time of entry. 19 U.S.C. § 1504(d); *see also Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1301–02.

Defendant challenges plaintiffs' assertion that the "premature liquidation" of their future entries presents a sufficiently non-speculative threat. *See* Def. Resp. Br. at 15–16. Defendant contends, rather, that it is plaintiffs' requested relief that is premature, as the alleged threat to their future entries is speculative. *See id.* at 15.

Defendant points to *Fuyao I* and *Fuyao II*, two 2003 decisions of this Court concerning successive motions to enjoin the liquidation of the moving party's entries that were subject to an AD order. *See id.* at 14–15 (citing *Fuyao I*, 27 CIT 1166; *Fuyao II*, 27 CIT 1321). In *Fuyao I*, the court denied the moving party's first motion for an injunction, concluding that the party's argument on the irreparable harm factor was not persuasive. *See Fuyao I*, 27 CIT at 1168. The party had argued that it was in the process of reevaluating its decision to request an AR, and should it withdraw its request, that it would suffer irreparable harm because its entries covered by the AR would be liquidated. *See id.* The court rejected this argument, reasoning that because the moving party had not yet decided to withdraw its request, the irreparable harm was "wholly within [the party's] power to prevent" and was "more in the way of a possibility than a present threat." *Id.* at 1170. Consequently, the court concluded that the irreparable harm associated with liquidation was too speculative to warrant the issuance of an injunction. *Id.* (citing *S.J. Stile*, 68 CCPA at 30, 646 F.2d at 525).

Following the court's decision, the moving party withdrew its AR request and moved a second time for an injunction. *See Fuyao II*, 27 CIT at 1321–22. This time, the court concluded that the party had "established the 'crucial element' of immediate irreparable harm" because the prospect of the liquidation of its entries was no longer speculative. *Id.* at 1324 (quoting *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1354 (2002), *aff'd in part sub nom. Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed. Cir. 2003)). Accordingly, the court issued an injunction covering the party's entries that would have been subject to the withdrawn AR. *See id.* at 1322, 1324.

Defendant argues that the circumstances in this case resemble the circumstances in *Fuyao I*. *See* Def. Resp. Br. at 14–15. According to defendant, plaintiffs are entitled "when the time is appropriate" to request one or more ARs or to move for one or more injunctions on the liquidation of their future entries. *Id.* at 10, 16–17. Defendant contends that the availability to plaintiffs of this recourse renders the liquidation of plaintiffs' future entries more of a possibility than an "actual" threat. *See id.* at 14–15.



### C. Analysis

Plaintiffs do not demonstrate that the threat of liquidation of their future entries is “presently existing” and “actual.” Accordingly, plaintiffs do not face irreparable harm without an injunction of indeterminate scope.

#### 1. Whether threat of liquidation is “presently existing”

The threat of liquidation of plaintiffs’ future entries is not “presently existing.” To start, the alleged threat posed by the liquidation of plaintiffs’ future entries does not accord with the understanding that a threat is presently existing if the entries at issue face immediate liquidation or liquidation as soon as the POR then-underway concludes. *See, e.g., Asociación de Exportadores*, Ct. No. 18–00195, Order for Stat. Inj. upon Consent (Jan. 19, 2021), ECF No. 65; *Dalian*, Ct. No. 20–00110, Order (Oct. 18, 2021), ECF No. 75; *Husteel*, 38 CIT at 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15.

Defendant’s description of Commerce’s process for the suspension of liquidation, which plaintiffs do not contest, establishes that the earliest point at which plaintiffs’ future entries might be liquidated is July 6, 2023. The basis for this conclusion — which the parties do not contest — is that defendant consents already to an injunction that covers plaintiffs’ entries that would be covered by an AR 1 and are made between November 3, 2020, and April 30, 2022 (excluding any entries made during the gap period from May 2, 2021, through May 13, 2021). Defendant consents to the court enjoining these entries to the end of the litigation. *See* Def. Resp. Br. at 2. The first subset of plaintiffs’ entries that faces a threat of liquidation is the subset that would be covered by an AR 2 and might be made between May 1, 2022, and April 30, 2023 — entries the review of which plaintiffs or any other interested party is entitled to request in May 2023.<sup>13</sup>

This statutory timeline indicates that the threat of liquidation of plaintiffs’ future entries is not “immediate” or “imminent” as the Court previously has interpreted those terms. *Cf. Mid Continent*, 44 CIT \_\_, 427 F. Supp. 3d 1375; *Mosaic*, 45 CIT \_\_, 540 F. Supp. 3d 1330; *Best Mattresses*, 46 CIT \_\_, Slip Op. 22–11 (Feb. 14, 2022).

Further, of the three decisions that plaintiffs claim support their interpretation of a “presently existing” threat, *Husteel* is not apposite

<sup>13</sup> As discussed *infra*, Section I.C.2.a, plaintiffs may also preserve a suspension of liquidation on their entries by seeking a Form 24 agreement or pursuing “regular motion practice.” *See* USCIT Rules, Appendix of Forms, Specific Instructions - Form 24.



to this case and *Mid Continent* and *Mosaic* are not persuasive sources of authority. To start, *Husteel* does not support plaintiffs' argument that the threat of liquidation of their future entries is imminent. In *Husteel*, the court issued injunctions of limited scope covering a limited and defined subset of future entries — specifically, entries that would be made during the nine remaining months of the first POR of the underlying AD order in that case. See *Husteel*, 38 CIT at 1896, 34 F. Supp. 3d at 1364; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72. Plaintiffs attempt to analogize the *Husteel* injunctions to plaintiffs' requested injunction of indeterminate scope, which would cover *all* of plaintiffs' future entries. However, contrary to plaintiffs' assertion, the *Husteel* court did not consider an injunction covering all future entries necessary to ensure “that movants receive the full benefit of their judicial challenge to the investigation, and possibly to the order itself.” See *Husteel*, 38 CIT at 1891, 34 F. Supp. 3d at 1360; see also Pls. Reply Br. at 7. Accordingly, the facts and holding of *Husteel* do not support plaintiffs' argument.

Turning to *Mid Continent*, the court does not find persuasive plaintiffs' reliance on the conclusion in that decision that the harm of liquidation becomes “sufficiently imminent” when Commerce publishes an AD or CVD order, on the grounds that the “potential harm flows from the results of the investigation” leading to the order. *Mid Continent*, 44 CIT at \_\_\_, 427 F. Supp. 3d at 1383–84. Typically, the Court has issued statutory injunctions that cover entries facing immediate liquidation or liquidation as soon as the POR then-underway concludes. See, e.g., *Asociación de Exportadores*, Ct. No. 18–00195, Order for Stat. Inj. upon Consent (Jan. 19, 2021), ECF No. 65; *Dalian*, Ct. No. 20–00110, Order (Oct. 18, 2021), ECF No. 75; *Husteel*, 38 CIT at 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15. Once that POR concludes, Customs typically does not liquidate entries made during the ensuing POR for, at minimum, approximately 14 months.<sup>14</sup> See 19 C.F.R. § 351.213(b)(1), (e)(1). Further, with respect to entries that

---

<sup>14</sup> These ensuing entries typically are not liquidated for, at minimum, approximately 14 months, because Commerce must wait for the combined length of the following time periods to pass prior to sending liquidation instructions to Customs: (1) the 12-month POR during which the entries are made, see 19 C.F.R. § 351.213(e)(1); (2) the anniversary month of the underlying order, which serves as a one-month AR request period, see 19 C.F.R. § 351.213(b)(1); and (3) Commerce's typical 35-day waiting period to send liquidation instructions to Customs. In this case, as the court has stated, should plaintiffs decide to not request an AR 2, the earliest point at which Customs may liquidate plaintiffs' entries that would be covered by an AR 2 is July 6, 2023 — approximately sixteen months from the date of the publication of this decision.

would be covered by the ensuing POR, a party is entitled to pursue three options, any one of which would protect those entries: (1) file a Form 24 with respect to the entries associated with the ensuing POR; (2) follow “regular motion practice” to secure an injunction on liquidation with respect to the entries associated with the ensuing POR; or (3) request an AR with respect to the ensuing POR. *See Am. Power*, 39 CIT at \_\_, 121 F. Supp. 3d at 1301–02; *YC Rubber*, 43 CIT at \_\_ n.2, 415 F. Supp. 3d at 1243 n.2; USCIT Rules, Appendix of Forms, Specific Instructions - Form 24.

On this basis, plaintiffs’ circumstance does not meet the standard for an immediate threat of liquidation because plaintiffs have ample time — well over one year — before they might suffer the alleged consequences, and irreparable harm, associated with the liquidation of their future entries. *See Fuyao II*, 27 CIT at 1324–25 (declining to grant an injunction of indeterminate scope, reasoning instead that “immediate irreparable harm” existed only with respect to entries made during the then recently concluded POR); *see also Nucor*, 29 CIT at 1453, 1464, 412 F. Supp. 2d at 1343, 1352 (concluding that the alleged harm to the moving parties’ entries made subsequent to the AR whose final results were appealed was not “‘immediate,’ as the law requires to justify the extraordinary relief” sought). These consequences — namely, the loss of plaintiffs’ statutory right to judicial review and economic loss with respect to their future entries — do not “presently” exist so long before an act of liquidation that could trigger the consequences might occur. *See Husteel*, 38 CIT at 1890–91, 1896, 34 F. Supp. 3d at 1359–60, 1364 (determining that the consequences of liquidation were “presently existing” only with respect to entries that were already made or that would be made during the nine remaining months of the POR then-underway (quoting *Zenith*, 710 F.2d at 809)); Pls. Br. at 7. Accordingly, the court concludes that plaintiffs’ reliance in this case on *Mid Continent* is not persuasive.<sup>15</sup>

Last, plaintiffs urge the court to adopt the reasoning and conclusions of the *Mosaic* decision. *See Notice Supp. Authority; Mosaic*, 45 CIT at \_\_, 540 F. Supp. 3d at 1330. The court declines to do so.<sup>16</sup> *Mosaic*, which relied extensively upon “the reasoning of *Mid Continent*, and the principles upon which it is based, as they apply to the issue of irreparable harm,” echoed the conclusion in *Mid Continent* that the threat of liquidation becomes immediate and presently ex-

---

<sup>15</sup> The court notes also that the factual circumstances of *Mid Continent* and this case are strikingly different. In *Mid Continent*, the court issued an injunction of indeterminate scope after the first two ARs were completed and two additional ARs were underway. *See Mid Continent*, 44 CIT at \_\_, 427 F. Supp. 3d at 1378–80.

<sup>16</sup> *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) (explaining that one judge on the USCIT is not bound by the decisions of another judge on the Court).

isting upon “the publication of the [AD or] CVD Order.” *Mosaic*, 45 CIT at \_\_\_, 540 F. Supp. 3d at 1335–36. For the same reasons that plaintiffs’ reliance in this case on *Mid Continent* is not persuasive, the court concludes also that plaintiffs’ reliance on *Mosaic* is not persuasive.

In addition, the *Mosaic* decision states correctly that the Court frequently grants statutory injunctions on liquidation pursuant to 19 U.S.C. § 1516a(c)(2). *See id.* at \_\_\_, 540 F. Supp. 3d at 1334–35. However, the Court grants *infrequently* statutory injunctions of indeterminate scope such as the one that plaintiffs propose.<sup>17</sup> *See Nucor*, 29 CIT at 1463 n.15, 412 F. Supp. 2d at 1351 n.15 (identifying cases “in a wide range of contexts” in which the Court has “denied requests to enjoin the liquidation of future entries”); *see also Husteel*, 38 CIT at 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15; *cf. Mid Continent*, 44 CIT at \_\_\_, 427 F. Supp. 3d at 1386; *Mosaic*, 45 CIT at \_\_\_, 540 F. Supp. 3d at 1337–38. Further, the Federal Circuit has long held that “injunctive relief is to be granted only in extraordinary circumstances” and upon a proper showing that the requested relief is warranted. *Zenith*, 710 F.2d at 809; *see also Sumecht*, 923 F.3d at 1345 (“Although preliminary injunctions against liquidation have become almost automatic in antidumping and countervailing duty cases, they are an extraordinary remedy never awarded as of right.” (internal quotation marks and citation omitted)).

In sum, the court concludes that plaintiffs’ reliance on the foregoing decisions is misplaced, and the liquidation of plaintiffs’ future entries is not a “presently existing” threat.

## 2. Whether threat of liquidation is “actual”

The threat of liquidation of plaintiffs’ future entries is not “actual” because both of plaintiffs’ reasons that the “premature[]” liquidation of their future entries might occur are speculative. Pls. Reply Br. at 5 n.1.

---

<sup>17</sup> In *Husteel*, for instance, the court did not issue injunctions of indeterminate scope, instead concluding that injunctions of limited scope were appropriate to ensure “that movants receive the full benefit of their judicial challenge to the investigation, and possibly to the order itself.” *See Husteel*, 38 CIT at 1891–92, 34 F. Supp. 3d at 136062; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72.

**a. Whether an ongoing *threat* of liquidation that “increases as the litigation carries on” — as described by plaintiffs — is “actual”**

The court considers first plaintiffs’ allegation that the threat of liquidation is ongoing and “increases as the litigation carries on.” *See* Pls. Reply Br. at 4–5, 8. Plaintiffs argue that the threat of liquidation is ongoing because their entries may be liquidated at the 144.92% rate set by Commerce in its Final Determination “until this litigation is ultimately resolved[,] and that threat only increases as the litigation carries on.” *Id.* at 4. According to plaintiffs, “[a]s the years go on” the scenarios under which plaintiffs’ entries face an actual threat of liquidation rate will “multiply.” *Id.* at 5.

The *Fuyao I* and *Fuyao II* decisions demonstrate the reasons that the mere *threat* of liquidation is speculative — even if it is ongoing and “increases as the litigation carries on”. *Id.* at 4; *see Fuyao I*, 27 CIT 1166; *Fuyao II*, 27 CIT 1321. In *Fuyao I*, the court denied the moving party’s first motion for an injunction because the court found that the threat of liquidation posed by the party’s potential withdrawal of its AR request was “wholly within [the party’s] power to prevent” and consequently was “more in the way of a possibility than a present threat.” 27 CIT at 1170. Once the party withdrew its AR request, however, the court concluded that the threat of liquidation was no longer speculative and now posed irreparable harm. *See Fuyao II*, 27 CIT at 1324. According to the court, the “possibility” of liquidation did not present an “actual” threat if the moving party was entitled to pursue recourse to avoid “the eventuality of such harm.” *Fuyao I*, 27 CIT at 1170.

In this case, plaintiffs contend that their future entries face an ongoing threat of liquidation at the 144.92% rate set by Commerce in its Final Determination. *See* Pls. Reply Br. at 4–5. Plaintiffs point to several scenarios that might occur during the course of this litigation, which, according to plaintiffs, could lead to the premature liquidation of their future entries. *See id.* These scenarios include: (1) plaintiffs (and all other interested parties) decide not to request an AR, and one is not initiated; (2) plaintiffs (or any other interested party) request an AR and then withdraw the request within 90 days of initiation, resulting in the termination of the AR; (3) an AR is conducted and is not appealed to this Court; or (4) plaintiffs (or any other interested party) request an AR, the AR is conducted, plaintiffs (or any other interested party) appeal the final results of the AR, but then fail to request an injunction during pendency of the litigation before the Court. *See id.*

As a threshold matter, it is notable that, as in *Fuyao I*, plaintiffs have within their power to decide what to do with respect to each scenario, but have not yet done so — namely, plaintiffs have not decided: (1) whether they will request one or more ARs; (2) should plaintiffs request one or more ARs, whether plaintiffs will subsequently withdraw such a request; (3) should Commerce conduct one or more ARs, whether plaintiffs will appeal to this Court the final results of the respective AR; or (4) should Commerce conduct one or more ARs — and should plaintiffs appeal to this Court the final results of the respective AR — whether plaintiffs will seek a future injunction in conjunction with such an appeal.<sup>18</sup> See *id.*; *Fuyao I*, 27 CIT 1166. The mere possibility that plaintiffs will make certain decisions associated with each scenario does not support plaintiffs’ contention that the liquidation of their future entries that could result from such decisions presents an actual and non-speculative threat, as such liquidation remains wholly within plaintiffs’ “power to prevent.” *Fuyao I*, 27 CIT at 1170.

With regard to plaintiff’s first scenario, the possibility that plaintiffs will decide not to request an AR does not render the threat of liquidation of plaintiffs’ future entries actual and non-speculative. This decision is fully within plaintiffs’ control and, consequently, the threat of liquidation that plaintiffs allege is wholly within their “power to prevent.” *Fuyao I*, 27 CIT at 1170.

Turning to plaintiffs’ second scenario, the potential decision to withdraw a request for an AR is precisely the decision addressed in *Fuyao I* and *Fuyao II*. *Id.* at 1166; *Fuyao II*, 27 CIT 1321. In *Fuyao I*, the court determined that the liquidation of the moving party’s entries did not pose an actual threat prior to the point at which the party withdrew its request for an AR. See *Fuyao I*, 27 CIT at 1170. Once the party withdrew its AR request, however, the court concluded that the threat of liquidation was no longer speculative and now posed irreparable harm. See *Fuyao II*, 27 CIT at 1324. In accordance with the

---

<sup>18</sup> In *Fuyao I*, the court concluded that the harm resulting from the liquidation of the moving party’s entries would arise only if the party acted to withdraw its request for an AR. See *Fuyao I*, 27 CIT at 1170. Of the four scenarios to which plaintiffs point, only one — the second scenario — involves a similar decision to undertake action; the three remaining scenarios might result in irreparable harm only if plaintiffs decide *not* to act. See Pls. Reply Br. at 4–5. However, this distinction is not material to a consideration of whether the premature liquidation that plaintiffs allege might result from the foregoing scenarios presents an “actual” threat. In *Fuyao I*, the court determined that whether an alleged harm is speculative does not depend on whether the party undertakes action to avoid the harm, but on whether the harm is within the party’s “power to prevent.” *Fuyao I*, 27 CIT at 1170. This “power,” the court noted, may result from the party’s “action or inaction.” *Id.* (emphasis supplied).

reasoning set forth in *Fuyao I* and *Fuyao II*, the court concludes that the threat of liquidation associated with plaintiffs' second scenario remains speculative prior to the point at which plaintiffs would decide whether to withdraw their potential request of an AR. *Fuyao I*, 27 CIT 1166; *Fuyao II*, 27 CIT 1321.

With respect to plaintiffs' third scenario, the decision not to appeal to this Court the final results of an AR would indicate plaintiffs' acceptance of those results. In such a circumstance, it is not clear to the court how the liquidation of plaintiffs' entries at the rate determined in final results that plaintiffs do not contest would pose irreparable harm to plaintiffs. See *Zenith*, 710 F.2d at 810 (reasoning that "the consequences of liquidation" pose irreparable harm only with respect to entries for which judicial review is sought). Further, the decision of whether to appeal the final results of an AR is fully within plaintiffs' control and, consequently, the alleged threat of liquidation resulting from plaintiffs' decision not to pursue such an appeal is within plaintiffs' "power to prevent." *Fuyao I*, 27 CIT at 1170. Accordingly, the threat of liquidation associated with this decision is too conjectural to meet the standard of presenting an actual and non-speculative threat.

Last, turning to plaintiffs' fourth scenario, the possibility that plaintiffs will fail to request a future injunction in conjunction with the appeal of the final results of an AR is not a convincing reason for the court to issue the injunction that plaintiffs propose in this action. The Court will not "exercise its injunctive power where [the moving parties] . . . [are] afforded adequate alternatives to safeguard their rights." *NTN Bearing Corp. of Am. v. United States*, 12 CIT 1117, 1120, 701 F. Supp. 226, 228 (1988); see also *Fundicao Tupy S.A. v. United States*, 11 CIT 561, 563, 669 F. Supp. 437, 439 (1987); 42 Am. Jur. 2d, Injunctions § 34 ("The power to grant injunctive relief is not properly exercised to allay a mere fear or apprehension of injury at an indefinite future time."). In this case, the opportunity to request one or more future injunctions presents an "adequate alternative[]" through which plaintiffs are able to "safeguard their rights." *NTN Bearing*, 12 CIT at 1120, 701 F. Supp. at 228.

In sum, the fact that none of the scenarios that plaintiffs postulate indicates an actual, non-speculative threat of irreparable harm, added to the fact that plaintiffs have not even made any of the four stages of decisions as to which, if any, of the scenarios may actually happen, makes clear that the threat of irreparable harm is speculative and not "actual" and, therefore, there is not a basis in law to grant the injunction requested by plaintiffs.



Moreover, and importantly, plaintiffs do not have to request *any* future ARs in connection with the Vietnam Mattresses Order to protect their future entries from the threat of liquidation during the conduct of this litigation. *See, e.g., Fuyao II*, 27 CIT at 1324–25. In fact, in *Fuyao II*, the court granted the moving party’s motion for an injunction upon the party’s decision to *withdraw* its earlier request for an AR. *Id.* Even if plaintiffs do not subsequently request an AR with respect to a future POR, they are entitled to pursue two alternative and additional options with respect to each POR covering their future entries: (1) file a Form 24, should defendant consent to an injunction; or (2) follow “regular motion practice” to secure an injunction covering the entries of the POR, should defendant oppose an injunction.<sup>19</sup> USCIT Rules, Appendix of Forms, Specific Instructions - Form 24; *see also Fuyao II*, 27 CIT at 1321, 1325. Form 24 presents an option of minimal cost and burden that enables plaintiffs to protect adequately their future entries from the threat of liquidation. Accordingly, in view of the Form 24 and “regular motion practice” options, plaintiffs are incorrect to assert that they would be harmed by a decision “not to undergo a lengthy and burdensome administrative review.” Pls. Reply Br. at 5–6; USCIT Rules, Appendix of Forms, Specific Instructions - Form 24; *see also Mid Continent*, 44 CIT at \_\_\_, 427 F. Supp. 3d at 1384.

To conclude, the liquidation of plaintiffs’ future entries is “more in the way of a possibility than a present threat” and, consequently, is too conjectural to meet the standard of presenting an actual and non-speculative threat. *Fuyao I*, 27 CIT at 1170. The prospect of the premature liquidation of plaintiffs’ future entries depends on pre-summptions about decisions that plaintiffs have not yet made — deci-

---

<sup>19</sup> The court conducted an electronic and public search on CM/ECF of actions before the USCIT, filed between March 10, 2017, and March 10, 2022, that involved appeals of final determinations by Commerce and the Commission in investigations brought pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i)-(ii). Based on this search, parties in 58 cases requested injunctions on liquidation. The parties made these requests through the filing of a Form 24 or through “regular motion practice.” Of the 58 cases, the Court granted the requests for injunctive relief in 52 instances; motions are pending in two cases. Of the four remaining cases, the motion for an injunction was denied in one action due to the moving party’s failure to establish standing, *see Synthos S.A. v. United States*, Consol. Ct. No. 17–00250, Order (Feb. 9, 2018), ECF No. 31, and the motions were denied as moot in the other three actions. *See Am. Cast Iron Pipe Co. v. United States*, Ct. No. 19–00082, Judgment (Dec. 16, 2019), ECF No. 37 (motion mooted following dismissal for lack of subject matter jurisdiction); *Am. Cast Iron Pipe Co. v. United States*, Ct. No. 19–00088, Judgment (Oct. 16, 2019), ECF No. 36 (motion mooted following dismissal for lack of subject matter jurisdiction); *Am. Cast Iron Pipe Co. v. United States*, Ct. No. 19–00084, Mot. for Prelim. Inj. (July 29, 2019), ECF No. 17 (motion mooted following voluntary dismissal of action).

Consequently, the Court has granted injunctions on liquidation in approximately 90% of the cases involving appeals of investigations filed in the past five years in which such relief has been requested.



sions that are completely within their control to make such that premature liquidation is completely within plaintiffs’ “power to prevent.” *Id.*

In determining whether the opportunity for future recourse renders the threat of liquidation speculative, the Court has evaluated the feasibility of such recourse to the moving party. *See Fuyao I*, 27 CIT at 1170 (stating that the option available to the moving party to withdraw its request for an AR would render the threat of liquidation of the party’s entries non-speculative). Further, the Court has stated that for judicial review “to be meaningful, it must be capable of providing a party with effective relief and the ability to enforce its rights” prior to the point at which the party’s entries might be liquidated. *NSK Corp. v. United States*, 31 CIT 1962, 1965 (2007) (quoting *NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1244, 120 F. Supp. 2d 1135, 1140 (2000)).

In the instant case, should the court grant an injunction of limited scope, plaintiffs will not be “left without recourse” to avoid the liquidation of their future entries. *Neo Solar Power Corp. v. United States*, 2016 WL 3247553 at \*2 (CIT 2016). Rather, the foregoing options — Form 24, “regular motion practice” and the request of one or more ARs — are available to plaintiffs and are “capable of providing [plaintiffs] with . . . the ability to enforce [their] rights” with respect to their future entries. *NSK Corp.*, 31 CIT at 1965 (quoting *NMB Singapore*, 24 CIT at 1244, 120 F. Supp. 2d at 1140). Accordingly, the “eventuality” of harm associated with the liquidation of plaintiffs’ future entries remains, at this point, speculative. *Fuyao I*, 27 CIT at 1170.

**b. Whether threat of liquidation resulting from “errors or miscommunication” — as described by plaintiffs — is “actual”**

Plaintiffs allege also that there is an actual threat of premature liquidation that may result from “errors or miscommunications” by the United States. Pls. Reply Br. at 13–14 (citing *Yancheng Baolong Biochemical Prods. Co. v. United States*, 27 CIT 992, 277 F. Supp. 2d 1349 (2003)). The fact that Customs may make errors on occasions does not provide a basis for the court to conclude that this *possibility* presents an *actual and non-speculative* threat of liquidation. *See Sumecht NA, Inc. v. United States*, 42 CIT \_\_, \_\_, 331 F. Supp. 3d 1408, 1412 (2018), *aff’d*, 923 F.3d 1340 (Fed. Cir. 2019) (concluding that plaintiff’s allegations that Customs’ wrongful liquidation of its entries would deprive plaintiff of the opportunity to challenge Commerce’s decisions were “speculative, unsupported . . . [and] not particularized enough to meet the burden of proof required for the issu-

ance of a preliminary injunction”).<sup>20</sup> To the contrary, plaintiffs do not articulate a particularized allegation of mistaken or erroneous liquidation by Customs likely to occur with respect to their future entries. Accordingly, the court concludes that the mere possibility of future errors by Customs does not constitute an actual, non-speculative threat.

Further, plaintiffs’ argument proves too much. Using plaintiffs’ reasoning, the threat of erroneous liquidation by the United States — and, therefore, irreparable harm — would exist necessarily in every investigation or review appealed to this Court, unless the Court were to grant an injunction of indeterminate scope. Such a use of a statutory injunction would be overly broad. *See, e.g., Husteel*, 38 CIT 1890–93, 34 F. Supp. 3d at 1360–62; *Husteel*, Consol. Ct. No. 14–00215, Order (Dec. 18, 2014), ECF No. 72; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1365 n.3, 1369; *Am. Cast Iron Pipe*, Ct. No. 19–00083, Order (Sept. 4, 2019), ECF No. 15; *Fuyao II*, 27 CIT at 1325; *Sumecht*, 42 CIT at \_\_\_, 331 F. Supp. 3d at 1412 (concluding that plaintiff’s allegations that Customs’ erroneous liquidation of its entries would pose irreparable harm were “speculative, unsupported . . . [and] not particularized”).

Accordingly, the threat of liquidation of plaintiffs’ future entries is neither “presently existing” nor “actual,” and plaintiffs do not face irreparable harm without an injunction of indeterminate scope.<sup>21</sup> Following the Supreme Court’s 2008 decision in *Winter*, 555 U.S. 7, the Federal Circuit has not decided whether the USCIT is required to evaluate the likelihood of success on the merits, balance of the equities and public interest factors, should a moving party fail to establish irreparable harm. *See, e.g., Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (declining to decide whether the Federal Circuit’s “sliding-scale jurisprudence remains good law after *Winter*”). Consequently, following *Winter*, the Court has not consistently considered, or declined to consider, the three remaining factors in cases in which the Court concludes that there is no irreparable

---

<sup>20</sup> It is well established that the Court applies the same four-factor test that it uses in the preliminary injunction context to evaluate motions for injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2). *See Zenith*, 710 F.2d at 809; *Qingdao*, 581 F.3d at 1378; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1366; *see also* S. Rep. No. 96–249, at 248–49 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 634.

<sup>21</sup> As already discussed, the court grants the statutory injunction of limited scope that covers plaintiffs’ entries made from November 3, 2020, through April 30, 2022 (excluding any entries made during the gap period from May 2, 2021, through May 13, 2021). The court concludes only that with respect to plaintiffs’ proposed injunction of indeterminate scope, plaintiffs fail to demonstrate that the threat of liquidation of their future entries poses irreparable harm.

harm. *Compare Lumber*, 43 CIT at \_\_\_, 393 F. Supp. 3d 1276–77 (noting that the moving party’s failure to demonstrate that irreparable harm existed was “grounds for denying injunctive relief”); *Sumecht*, 42 CIT at \_\_\_, 331 F. Supp. 3d at 1412 (“Because Sumech [sic] has not demonstrated that it will suffer irreparable harm absent a preliminary injunction, the court need not address the remaining three factors.”); *with Celik Halat v. Tel Sanayi A.S.*, 44 CIT \_\_\_, \_\_\_, 483 F. Supp. 3d 1370, 1377–81 (2020) (evaluating the three remaining factors despite concluding that the moving party failed to establish irreparable harm). Accordingly, without direction from the Federal Circuit following *Winter*, the court evaluates the parties’ arguments with respect to the three remaining factors.

## II. Likelihood of success on the merits

### A. Positions of the parties

Plaintiffs contend that they have established a likelihood of success on the merits. Plaintiffs argue that they have raised several substantial questions challenging Commerce’s Final Determination, and that, if they are successful in their challenges, their overall AD margin will drop to zero or to a *de minimis* rate. *See* Pls. Br. at 8–9. Plaintiffs argue also that they have a lower burden to establish a likelihood of success on the merits, since “the more the balance of irreparable harm inclines in the [moving party’s] favor, the smaller [is] the likelihood of prevailing on the merits [needed] in order to get the injunction.” *Id.* at 8 (quoting *Qingdao*, 581 F.3d at 1378–79).

In response to plaintiffs’ claims, defendant contends that “Commerce explained its evaluation of the evidence on the record and the reasons for its final determination.” *See* Def. Resp. Br. at 16. Defendant argues also that even if plaintiffs show that they are likely to succeed on the merits (which, defendant maintains, plaintiffs do not), this factor is not dispositive. *See id.* (citing *Fuyao I*, 27 CIT at 1171).

### B. Analysis

A moving party that fails to establish irreparable harm faces a “significant[] . . . burden . . . to prove a likelihood of success on the merits.” *Elkem*, 25 CIT at 196, 135 F. Supp. 2d at 1334–35 (citing *Shandong Huarong Gen. Grp. v. United States*, 24 CIT 1286, 1292, 122 F. Supp. 2d 143, 148 (2000)); *see also Fuyao I*, 27 CIT at 1171. Even if the moving party raises “questions which are serious, substantial, difficult, and doubtful,” *PPG Indus., Inc. v. United States*, 11 CIT 5, 8 (1987) (internal quotation marks omitted), this showing will not satisfy the party’s burden to prove a likelihood of success on the

merits. *See Elkem*, 25 CIT at 196, 135 F. Supp. 2d at 1335 (citing *Am. Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981)). Further, in cases in which the party fails to establish irreparable harm, a showing of likely success on the merits is not dispositive of the motion. *See id.*; *Fuyao I*, 27 CIT at 1171.

In their complaint, plaintiffs raise a number of issues related to Commerce's Final Determination. *See* Second Am. Compl. For example, in counts I and II of the complaint, plaintiffs challenge on the basis of alleged legal and factual errors the weighted-average dumping margin that Commerce assigned to Wanek, Millennium and Comfort Bedding. *See id.* at 9. Plaintiffs contend also that Commerce's decision to not list AFI and AFTC as eligible for the rates assigned to the subject merchandise exported by Wanek, Millennium and Comfort Bedding is unsupported by substantial evidence and otherwise not in accordance with law. *See id.* at 9–10.

Plaintiffs, however, have not established irreparable harm with respect to the liquidation of their future entries, which means that they face a heightened burden to establish a likelihood of success on the merits. *See Elkem*, 25 CIT at 196, 135 F. Supp. 2d at 1334–35. The claims that plaintiffs raise — including those noted above, *see* Second Am. Compl. at 9–10 — are insufficient to conclude that this case is one in which “a decision in [plaintiffs'] favor on the merits can be predicted.” *Chilean Nitrate Corp. v. United States*, 11 CIT 538, 540 (1987). Consequently, plaintiffs do not meet their heightened burden and this factor does not support the issuance of plaintiffs' proposed injunction of indeterminate scope.

### **III. Balance of the equities**

#### **A. Positions of the parties**

On the balance of the equities, plaintiffs present two basic points. First, they argue that they “have established that a limited period injunction creates a foreseeable harm to their interests in the form of erroneous liquidation of their entries prior to the conclusion of this litigation.” Pls. Reply Br. at 15. Second, plaintiffs argue that “[c]ontinuing to suspend liquidation of [their] entries identified in the proposed order during the pendency of litigation, including all appeals, will not impose a significant hardship on any other party to this proceeding.” Pls. Br. at 10.

Defendant argues that plaintiffs' “request for an [open-ended] injunction . . . is not necessary to maintain the status quo, because the [future] entries . . . are not in any danger of being liquidated.” Def. Resp. Br. at 16–17. In addition, defendant contends that an injunction

of indeterminate scope could “hamper Commerce’s ability to perform its statutory mandate and unnecessarily interfere with matters that are within the province of the Executive Branch.” *Id.* at 17 (citing *U.S. Steel Corp. v. United States*, 33 CIT 984, 637 F. Supp. 2d 1199 (2009), *aff’d*, 621 F.3d 1351 (Fed. Cir. 2010)).

## B. Analysis

In the instant appeal, the balance of the equities tips in plaintiffs’ favor. As discussed, there are three options available to plaintiffs to protect their future entries: (1) file a Form 24; (2) follow “regular motion practice” to secure an injunction on liquidation; or (3) request an AR. *See supra* Section I.C.2.a. Plaintiffs do not describe with precision or quantify the cost associated with pursuing any one of these options. Nonetheless, each option involves a certain expense: (1) with respect to Form 24, the cost associated with preparing and filing one or more such Forms; (2) with respect to “regular motion practice,” the cost associated with engaging in litigation before this Court concerning one or more future motions for an injunction; and (3) with respect to ARs, the cost associated with requesting and participating in one or more ARs.

By contrast, an injunction on the liquidation of all of plaintiffs’ entries through the conclusion of this litigation would not impose upon defendant or defendant-intervenors a substantial hardship. *See SKF*, 28 CIT at 175, 316 F. Supp. 2d at 1328. An injunction on liquidation “at most inconveniences” the United States, as such an injunction only delays the United States in collecting or refunding, with interest, “any amounts owed from or due to” the moving party. *Id.* Should the court decide in defendant’s favor with respect to the substantive merits of plaintiffs’ action, there is virtually no risk that the United States will not receive from plaintiffs all of the amounts due and owing. *See id.*

Further, defendant’s argument that an injunction of indeterminate scope could “hamper Commerce’s ability to perform its statutory mandate” is not persuasive. Def. Resp. Br. at 17. Defendant cites to the *U.S. Steel* decision in support of this argument. *Id.* (citing *U.S. Steel*, 33 CIT 984, 637 F. Supp. 2d 1199). That decision, which sustained an administrative decision by Commerce to apply a particular methodology to calculate weighted-average dumping margins, did not involve a motion for injunctive relief. *U.S. Steel*, 33 CIT at 984–85, 637 F. Supp. 2d at 1203–04. Rather, defendant references *U.S. Steel* based on the statement in the decision that “[t]he deference accorded to Commerce’s interpretation is at its highest when that agency acts

. . . to harmonize U.S. practices with international obligations” and “allows the Executive Branch to speak on behalf of the U.S. to the international community on matters of trade and commerce.” *Id.* at 995, 637 F. Supp. 2d at 1212. Neither this statement, nor the *U.S. Steel* decision in its entirety, is relevant to a consideration of how the motion for a statutory injunction before the court “could hamper Commerce’s ability to perform its statutory mandate and unnecessarily interfere with matters that are within the province of the Executive Branch.” Def. Resp. Br. at 17. Accordingly, this argument does not present a consideration that weighs in defendant’s favor.

In addition, should the court issue an injunction of indeterminate scope, defendant would be able to move subsequently to modify or dissolve such an injunction. In seeking to modify or dissolve an injunction, a party must establish that changed circumstances make the modification or dissolution necessary and the continuation of the original injunction inequitable. *See SolarWorld Americas, Inc. v. United States*, 41 CIT \_\_, \_\_, 279 F. Supp. 3d 1343, 1347 (2017); *see also AIMCOR Alabama Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999). It is true that dissolution requires a “very compelling demonstration,” and the standard for modification also imposes upon the moving party a high burden. *See AIMCOR*, 23 CIT at 939, 83 F. Supp. 2d at 1299; *SNR Roulements v. United States*, 31 CIT 1762, 1764–65, 521 F. Supp. 2d 1395, 1397–98 (2007). Nonetheless, in this case, the court concludes that this potential burden to defendant is outweighed by a greater burden to plaintiffs.

On the basis of the foregoing considerations, the court concludes that the balance of the equities tips in plaintiffs’ favor. Nonetheless, the court’s conclusion in this regard does not alter its decision that plaintiffs’ requested injunction of indeterminate scope is not warranted based on the language and legislative history of 19 U.S.C. § 1516a(c)(2). *See also NTN Corp. v. United States*, 34 CIT 1532, 1538–39, 744 F. Supp. 2d 1370, 1377 (2010) (denying the moving parties’ motion for an injunction despite concluding that the balance of the hardships tipped in the parties’ favor); *FMC Corp.*, 3 F.3d at 427 (“If the injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial.”).

#### **IV. Public interest**

##### **A. Positions of the parties**

Plaintiffs articulate several arguments to buttress their view that an injunction of indeterminate scope — rather than an injunction of



limited scope — would better serve the public interest. In particular, plaintiffs argue that the injunction they favor would better preserve the statutory right to meaningful judicial review, ensure the effective enforcement of trade laws, promote the accurate collection of anti-dumping duties and foster judicial economy. *See* Pls. Br. at 10–12; Pls. Reply Br. at 16–17.

Defendant contends that “no valid public interest is served by enjoining the liquidation of future entries that are not subject to liquidation in the first place.” Def. Resp. Br. at 17–18. In addition, defendant argues that plaintiffs are not deprived of meaningful judicial review because they are required only to “exercise basic due diligence [and] coordinate with Commerce to update the Form 24 to add new dates” to protect their future entries as the case progresses. *Id.* at 17.

## B. Analysis

Plaintiffs do not meet their burden of establishing that their proposed injunction better serves the public interest. *See Zenith*, 710 F.2d at 809; *Ugine*, 452 F.3d at 1292; *Am. Cast Iron Pipe*, 43 CIT at \_\_\_, 399 F. Supp. 3d at 1366. Plaintiffs fail to establish that an injunction of limited scope restricts their access to judicial review, as such an injunction allows plaintiffs — through Form 24, “regular motion practice” and the request for one or more ARs — to maintain access to “meaningful” judicial review and “enforce [their] rights” with respect to their future entries. *NSK Corp.*, 31 CIT at 1965 (quoting *NMB Singapore*, 24 CIT at 1244, 120 F. Supp. 2d at 1140).

In addition, plaintiffs do not demonstrate that an injunction of indeterminate scope would ensure the effective enforcement of trade laws any more than would an injunction of limited scope. Likewise, plaintiffs fail to make such a showing with respect to the accurate collection of antidumping duties.

Last, plaintiffs point to the benefits in terms of the judicial economy of their proposed injunction of indeterminate scope. *See* Pls. Br. at 10–11; Pls. Reply Br. at 17. Defendant does not contest this argument. The court concludes that plaintiffs’ argument on this point is persuasive.<sup>22</sup> However, the court notes also that the purpose of an injunction

---

<sup>22</sup> It is possible that Congress, when it enacted the provisions of law discussed *supra* pertaining to statutory injunctions on liquidation, did not contemplate the nature or complexities of current Commerce, Commission and Customs practice under title VII of the Tariff Act of 1930. In 1980, Congress revised 19 U.S.C. § 1516a(c)(2) to remove the second sentence of the provision, which stated:

(2) INJUNCTIVE RELIEF. — . . . In ruling on a request for . . . injunctive relief, the court shall consider, among other factors, whether —

(A) the party filing the action is likely to prevail on the merits,



on liquidation is to “preserve the status quo during judicial proceedings so that relief may be provided in accordance with the final litigation results.” *Am. Cast Iron Pipe*, 43 CIT at \_\_, 399 F. Supp. 3d at 1366; see *SKF*, 28 CIT at 172, 316 F. Supp. 2d at 1326 (“The purpose of a preliminary injunction is to preserve the relative positions of the parties pending adjudication by the court.”). In the instant case, plaintiffs do not establish that their proposed injunction is *required* to preserve the status quo during the judicial proceedings, as an injunction of limited scope would accomplish the same objective. See *Am. Cast Iron Pipe*, 43 CIT at \_\_, 399 F. Supp. 3d at 1366. Accordingly, the judicial economy that an injunction of indeterminate scope would foster does not outweigh that such an injunction would exceed its purpose to preserve the parties’ relative positions pending adjudication. *SKF*, 28 CIT at 172, 316 F. Supp. 2d at 1326.

In addition, any benefits of plaintiffs’ proposed injunction in terms of judicial economy are not “sufficient to outweigh the serious deficienc[ies]” with respect to plaintiffs’ positions on irreparable harm and likelihood of success on the merits. *NSK Ltd. v. United States*, 34 CIT 1344, 1350 (2010). Based on plaintiffs’ inability to demonstrate irreparable harm or likelihood of success on the merits, the court concludes that the public interest in this case is better served by the decision not to grant plaintiffs’ proposed injunction of indeterminate scope.

- 
- (B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,
  - (C) the public interest would best be served if liquidation is enjoined, and
  - (D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

1979 Act § 1001(a).

In revising this provision, Congress directed the Court to “apply the same standards as those employed by the district courts” in deciding on motions for statutory injunctions brought pursuant to 19 U.S.C. § 1516a(c)(2). H.R. Rep. No. 96–1235, at 41, 69.

In 1984, Congress revised 19 U.S.C. § 1675, the statute regulating the AR process, to require an AR “only when an interested party requests one.” *Husteel*, 38 CIT at 1891, 34 F. Supp. 3d at 1360. Subsequent to the 1984 revision of the AR process, Congress has not amended 19 U.S.C. § 1516a(c)(2), nor has Congress provided the Court with any further direction as to the Court’s evaluation of motions for injunctions in view of the revised AR process. See *Antidumping and Countervailing Duties; Administrative Reviews on Request; Transition Provisions*, 50 Fed. Reg. 32,556, 32,556 (Dep’t of Commerce Aug. 13, 1985). In particular, Congress has not provided the Court with further direction as to the Court’s application of the “standards . . . employed by the district courts.” H.R. Rep. No. 96–1235, at 41, 69. Without such direction, the Court evaluates plaintiffs’ motion using the direction that Congress provided in 1980. See *id.* To the extent that Congress did not contemplate in 1980 the nature of current practice under title VII of the Tariff Act of 1930, it is the prerogative of Congress to consider modifications to the foregoing provisions related to statutory injunctive relief.

## CONCLUSION

The musical *Once Upon a Mattress*,<sup>23</sup> which premiered in May 1959, was an adaptation of Hans Christian Andersen's fairy tale, *The Princess and the Pea*.<sup>24</sup> Set in a fictional 15<sup>th</sup> century medieval kingdom in Europe, one element of the story has Prince Dauntless the Drab meeting Winnifred, the 13<sup>th</sup> princess who seeks to marry him (the first 12 declined his invitation after meeting him).

Minstrel: "And the princess only *looked* as though she'd come in from a storm."

Winnifred: "Actually, I swam the moat. But never mind. If I just stand right here, there's a nice draft. I'll be dry in no time."

Queen: "You swam the moat?"

Winnifred: "All right, I was a little anxious. My friend, Sir Harry uh — he's still out there — he told me you had an opening for a princess. *Any* princess. I figured: the Early Bird . . . Anyway, here I am. Who's the lucky man?"

Queen: (After a song) "You swam the moat?"

Winnifred: "Does she ever say anything else except 'You swam the moat?'"

1<sup>st</sup> knight: "Why don't you ask her yourself?"

Winnifred: "Do you ever say anything except 'You swam the . . .'"

Dauntless: "No, wait!"

Winnifred: "You're the one, I guess."

Dauntless: "Sure, I'm Prince Dauntless the Drab."

Winnifred: "Well, glad to have met you."

Dauntless: "No, please don't go. I like you. Everybody does. Well, almost everyone."

Winnifred: "Dauntless, I'd like to stay here, but I wouldn't want to come between you and your mother. So, I guess I'll just face the facts, cut my losses, and just head back to the swamps."

Dauntless: "But I really like you."

Winnifred: "You do? Why?"

Dauntless: "You swam the moat!"

Following this exchange, the Queen hatches a scheme, indicating that she will permit Dauntless to marry Winnifred if Winnifred is unable to sleep one night due to a pea being placed beneath 20 thick, downy mattresses. She passes the test, but it is revealed that the King, who favored the marriage, had actually placed jousting equipment and various other sharp items in the mattresses.

<sup>23</sup> Mary Rodgers, *Once Upon a Mattress* (1959).

<sup>24</sup> Hans Christian Andersen, "The Princess and the Pea," in *Fairy Tales Told for Children. First Collection* (1835).

\* \* \*

The court notes that there is no indication in the record that the mattresses that are the subject of Commerce’s investigation in this action contained jousting equipment, other sharp objects or a pea.

For the reasons stated above, the court concludes that: (1) the threat of liquidation of plaintiffs’ future entries does not pose irreparable harm; (2) plaintiffs do not demonstrate a likelihood of success on the merits; (3) the balance of the equities tips in plaintiffs’ favor; and (4) an injunction of indeterminate scope as proposed by plaintiffs does not better serve the public interest. On this basis, plaintiffs do not establish entitlement to an injunction of indeterminate scope. Consequently, the court grants a statutory injunction covering entries imported by AFI or AFTC, and produced and/or exported by Wanek, Millennium or Comfort Bedding,<sup>25</sup> from November 3, 2020, through April 30, 2022, excluding any entries made from May 2, 2021, through May 13, 2021.

Dated: March 28, 2022

New York, New York

*/s/ Timothy M. Reif*

TIMOTHY M. REIF, JUDGE

---

<sup>25</sup> Defendant notes that because Vietnam is a non-market economy (“NME”) country and “Commerce’s non-market economy practice uses a chain rate, the Government consents to enjoin entries produced *and* exported by” Wanek, Millennium or Comfort Bedding. Def. Resp. Br. at 18 n.2 (emphasis supplied). Plaintiffs’ proposed injunction, however, would enjoin the liquidation of entries “produced *and/or* exported by” Wanek, Millennium or Comfort Bedding. Pls. Br. at 2 (emphasis supplied).

Pursuant to 19 C.F.R. § 351.107(b)(1)(i), Commerce “may establish a ‘combination’ cash deposit rate,” also known as a “chain” rate, in AD proceedings involving an NME country. However, Commerce’s discretion to use a chain rate in AD proceedings involving an NME country does not *require* that the Court issue an injunction using the specific terms that defendant proposes. Further, the Court previously has issued injunctions covering entries “produced and/or exported” by parties that have appealed AD proceedings involving NME countries. *See, e.g., Dalian, Ct. No. 20–00110, Order (Oct. 18, 2021), ECF No. 75; Trans Texas Tire, LLC v. United States, Consol. Ct. No. 19–00189, Order for Stat. Inj. upon Consent (Sept. 4, 2020), ECF No. 43.* Accordingly, the court grants an injunction covering entries imported by AFI or AFTC, and produced and/or exported by Wanek, Millennium or Comfort Bedding.

## Slip Op. 22–30

UNITED STATES, Plaintiff, v. KATANA RACING, INC., d/b/a WHEEL & TIRE DISTRIBUTORS, Defendant.

Court No. 19–00125

[Defendant's motion to dismiss granted.]

Dated: March 28, 2022

*Ashley Akers*, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director, for the plaintiff. Of Counsel *Karen Hiyama*, Senior Attorney, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, Detroit, MI.

*John M. Peterson*, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson LLP, New York, NY, for the defendant.

### *Opinion & Order*

#### **AQUILINO, Senior Judge:**

This matter concerns a complaint for unpaid customs duties and fees owing to the United States Treasury allegedly “stem[ming] from violations of subsection 592(a) of the Tariff Act of 1930, 19 U.S.C. §1592(a), with respect to 386 entries of certain passenger vehicle and light truck tires (‘PVLТ’) from [the People’s Republic of] China into the United States from November 24, 2009 through August 7, 2012” via untrue declarations on entry forms filed with plaintiff’s U.S. Customs and Border Protection (‘CBP’). *See* Complaint ¶1.

Oddly, the complaint does not seek penalties *per se*, only recovery of \$5,742,483.80 plus interest and costs, purportedly the responsibility of the nominal importer-of-record (‘IOR’) on the entry documents, a certain California-based reseller of PVLТ and other motor vehicle wares. *See id.* ¶3.

Summoned herein, the defendant has interposed, prior to filing an answer, a motion to dismiss for lack of jurisdiction pursuant to USCIT Rule 12(b)(1) and 12(b)(6), explaining that it was the victim of a scheme of identity theft of its company name and denying it violated §1592(a). The complaint predicates timeliness<sup>1</sup> on its July 15, 2019

<sup>1</sup> *See* 19 U.S.C. §1621:

No suit or action to recover any duty under section 1592(d), 1593a(d) of this title, or any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later; except that—

filing, the basis thereof being the latest of three consecutive waivers by the defendant of the statute of limitations (“SoL”) up to and including July 19, 2019. *See id.* ¶ 4. The defendant, however, revoked its last SoL waiver on June 26, 2019, and it contends that jurisdiction here is lacking, being time-barred either by 19 U.S.C. §1621 or by laches. *See* Def’s Memorandum of Points and Authorities in Support of Motion to Dismiss (“Def’s Br.”) at 33 & Ex. P.

## I

To defendant’s knowledge,

this case represents the first instance in the history of the current Section 592 law — *i.e.*, since the [Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, 92 Stat. 893] — where the Government has brought suit to collect withheld duties under Section 592(d) *without even attempting* to undertake the administrative proceedings necessary to establish that a predicate violation of Section 592(a) occurred. Accordingly, this action must be dismissed as time-barred, for failure to exhaust administrative remedies, and for failure to state a claim upon which relief can be granted.

Def’s Br. at 20–21 (emphasis in original).

Defendant’s counsel contend that dismissal is compelled because the plaintiff never found or articulated that their client violated §1592(a). A finding of such a violation is an obvious and necessary predicate to assessing responsibility, let alone penalties for withheld duties under that statute, they argue. Section 1592(b)(1) specifies the administrative process pursuant to which CBP is authorized to determine the existence of a §1592(a) violation. Counsel contend that CBP never followed or “exhausted” such procedure to determine any violation by the defendant, much less others actually responsible. Hence, when it became “clear” that no such administrative procedures were forthcoming, despite previous administrative promise(s) to the contrary, the defendant revoked its last SoL waiver.

On that basis, defendant’s counsel argue for equitable tolling against CBP’s arguments *vis-à-vis* defendant’s revocation of its latest

---

(1) in the case of an alleged violation of section 1592 or 1593a of this title, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud, and

(2) the time of the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation.

SoL, which would result in time-barring of this action and dismissal pursuant to Rule 12(b)(1) and/or 12(b)(6).

The issues of moment defendant's counsel distill to these:

1. Whether CBP is required to conduct administrative procedures to "assert and determine" the existence of a 19 U.S.C. §1592(a) violation for which the defendant bears responsibility before commencing suit to recover "withheld duties" under 19 U.S.C. §1592(d);
  2. Whether the defendant could properly revoke its last SoL, prior to the commencement of this case, because that act implicates whether this action is timely commenced within the five-year SoL set out in §1621, eight to ten years having elapsed since the transactions at issue; and
- (3) Whether laches applies in the alternative.

See Def's Reply. Its initial brief also noted the following:

To the extent the parties rely on materials outside the pleadings, USCIT Rule 12(d) permits the Court, upon notice to the parties, to treat the motion as one for summary judgment. See [,] *e.g.*, *Easter v. United States*, 575 F.3d 1332, 1335–36 (Fed.Cir. 2009); *Cisco Sys. v. United States*, 804 F.Supp.2d 1326, 1336–1337 (Ct. Intl. Tr. 2011); *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 366 F.Supp.2d 1280, at 1285–1286 (Ct. Intl. Tr. 2005).

Def's Br. at 4 n.4.

Plaintiff's general disagreement with the foregoing, and the court's consideration thereof, resulted in a cross-motion for summary judgment. See ECF No. 24 ("Pl's X-Mot"). In response, the defendant urges a decision on its motion to dismiss first, before turning to any decision on the merits. *E.g.*, ECF No. 37.

Consideration of the parties' positions persuades the court that it lacks jurisdiction over this matter.

## II

Judicial consideration often involves interpretation of governing legal authorities, such as statutes and other questions of law. *E.g.* *Kent v. Principi*, 389 F.3d 1380, 1384 (Fed.Cir. 2004) (interpretation of a statute or regulation is a question of law) (citation omitted); *Yanko v. United States*, 869 F.3d 1328, 1331 (Fed.Cir. 2017) (treating as a "pure legal issue of statutory interpretation" claim based on interpretation of statutory provision and related executive order). Such legal interpretations are appropriately resolved under a Rule 12(b)(6) motion to dismiss. See *Yanko* at 1331 (citation omitted).

Rule 12(b)(6) dismissal is appropriate when a complaint's allegations do not entitle a remedy. See *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed.Cir. 2006) (citation omitted). A motion thereunder "tests the legal sufficiency of a complaint," *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), to determine if it presents a legally cognizable right of action, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted), or fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The court accepts well-pleaded factual allegations as true and draws all reasonable inferences in favor of the claimant, *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed.Cir. 2013), with the exception of legal conclusions among the allegations, *Twombly*, 550 U.S. at 555, nor need a court "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit". *Secured Mail Sols., LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed.Cir. 2017) (citation omitted).

A Rule 12(b)(6) motion is thus considered under the same standard as a motion for judgment on the pleadings. See *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1166 (Fed.Cir. 2018). It presents either a "facial" challenge to a pleading or to the factual basis of the jurisdiction invoked. See, e.g., *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed.Cir. 1993). Facial challenges are based on the "sufficiency" of a pleading's allegation(s), which are to be evaluated presuming the allegations as true and as construed in their best light. See *id.*, citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). If a challenge denies or controverts material aspects of the complaint as pled, then the movant is deemed to be challenging the factual basis for subject matter jurisdiction, in which case only the uncontroverted factual allegations of the complaint are accepted as true for purposes of the motion. See *id.*, citing, *inter alia*, *Gibbs v. Buck*, 307 U.S. 66, 72 (1939); *Kellogg Brown*, 728 F.3d at 1365.

If jurisdiction is contested, consideration of extrinsic evidence outside the pleadings may be necessary to resolving that issue. See *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed.Cir. 1996) ("[a] party may challenge the court's jurisdictional authority by denying or controverting necessary jurisdictional allegations"), citing, *inter alia*, *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). When "close calls" are present, the foregoing may appear to obfuscate judgment on the pleadings and summary judgment, but if subject matter jurisdiction is lacking, then there can be no adjudication on



the merits, *see id.*; consideration of matters outside the pleadings in deciding a 12(b)(6) motion brings the matter into the realm of summary judgment, and it is therefore appropriate to treat the motion as such. *See* USCIT Rule 12(d); *see, e.g., Forest Lab'ys, Inc. v. United States*, 29 CIT 1401, 1402 (2005), *aff'd*, 476 F.3d 877 (Fed.Cir. 2007).

### III

According to defendant's papers, the United States imposed "safeguard" import duties on PVLТ from the People's Republic of China ("PRC") pursuant to 19 U.S.C. §2451(f) (omitted since Dec. 11, 2013). Proclamation No. 8414, 3 C.F.R. §8414 (2009). They were imposed in addition to the 3.4% or 4% *ad valorem* tariffs on PVLТ<sup>2</sup> and were in effect for three years, at declining rates of 35%, 30%, and 25%, *ad valorem*, respectively. The safeguard duties were set to expire in September 2012. *See id.*

The announcement of those duties prompted the defendant to curtail supply from the PRC. PRC producers responded by persuading the defendant to purchase tires at "Delivered Duty Paid" ("DDP") prices. *See, e.g., International Chamber of Commerce, Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Items* (2010) ("Incoterms") ("[t]he Incoterms rules explain a set of three-letter trade terms reflecting business-to-business practice in contracts for the sale of goods").

A DDP agreement obligates *sellers* with the responsibility for all necessary legal compliance relevant to importing the goods, for example payment of import duties and merchandise processing fees. *See* note 4, *infra*. After "satisfactory" negotiations along those lines, the defendant agreed to continue to purchase PVLТ from the PRC companies involved on a DDP basis.

This, apparently, is where trouble began. The defendant was at that time also induced to agree to a power of attorney ("POA")<sup>3</sup> that its suppliers, as it later turned out, had falsely represented was necessary to allow them to move the imported tires from the Customs area at the Port of Long Beach to defendant's facility in Southern California, as more wholly described below. *See* Def's Br., Ex. B (CBP Audit Report dated March 22, 2013). Instead, the sellers, or certain unknown and unscrupulous individuals taking advantage of them, used

<sup>2</sup> *I.e.*, subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the Harmonized Tariff Schedule of the United States ("HTSUS").

<sup>3</sup> *See* 19 C.F.R. §141.32 (2009): "Customs Form 5291 may be used for giving power of attorney to transact Customs business. If a Customs power of attorney is not on a Customs Form 5291, it shall be either a general power of attorney with unlimited authority or a limited power of attorney as explicit in its terms and executed in the same manner as a Customs Form 5291."

defendant's identifying information from the POA, including its importer number, to falsely declare the defendant as the importer of record on the entry documents concerned.

## A

The defendant claims it had no knowledge of such falsified entries, averring that for the next three years it received PVLТ at its California facility on a DDP basis and tendered payment to its vendors at the negotiated prices.<sup>4</sup> In mid-2012, CBP's Regulatory Audit Division at the Port of Seattle, Washington, contacted the defendant in order to conduct a "Quick Response Audit"<sup>5</sup> of some 61 customs entries of PVLТ on which the defendant had been listed as the IOR.

The defendant claims it found none of the alleged entries among its records. Its records, audited by CBP, reflect that it was billed on a DDP basis by vendors *with whom it actually did business* and made payments to those vendors on that basis. The records also showed that the defendant never advanced or paid any separate or segregated monies for duties in respect of the imported PVLТ, never corresponded with any customs brokers regarding those tires, and never received bills for customs duties or bills for freight forwarding or customs brokerage services.

The defendant therefore deduced the theory that its identity must have been "misappropriated", so on July 23, 2012 it "protectively" filed such theory in writing to CBP via a voluntary prior disclosure at the Port of Los Angeles/Long Beach pursuant to 19 U.S.C. §1592(c)(4). The filing stated that erroneous entries had been made in its name and without its knowledge, authorization, or consent. *See* Def's Br., Ex. A (Prior Disclosure of July 23, 2012<sup>6</sup>).

The Quick Response Audit concerned certain selected entries in 2012 and 2013. The defendant claims it gave its full cooperation

---

<sup>4</sup> As the buyer in a DDP transaction, the defendant here disclaims responsibility for customs obligations such as clearance or payment of duty to CBP. According to Incoterms, "Delivered Duty Paid" means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. *The seller* bears all the costs and risks involved in bringing the goods to the place of destination and has an *obligation* to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." *See* <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010> (emphasis added) (last accessed this date).

<sup>5</sup> The defendant describes Quick Response Audits as single-issue audits with a narrow focus and designed to address a particular limited objective within a reasonably short period of time. The authority for auditors to examine records and conduct audits is contained in 19 U.S.C. §§ 1508 and 1509.

<sup>6</sup> The filing stated at the outset: "Katana Racing has knowingly acted as the importer of record of tires subject to the Safeguard duties. To Katana Racing's knowledge, it has deposited the appropriate Safeguard duties for all entries where it was aware that it acted as the importer of record."

during the audit, and it also obtained other Importer Trade Activity (“ITRAC”<sup>7</sup>) data from CBP that confirmed that its identity had been “misappropriated” for the purpose of making not only the 61 selected entries with which the Quick Response Audit had been concerned but also hundreds of other entries of PVLТ from the PRC as well. According to the defendant, they were filed by dozens of separate customs brokers, all of whom it claims were and are complete strangers to it.

Beginning February 3, 2013, defendant’s counsel contacted the dozens of brokers identified in the ITRAC report who had filed entries in its name and began collecting copies of the entry summaries improperly filed. This information confirmed to the defendant that it had been the victim of a pervasive scheme of what it styles as “identity theft”, as PRC vendors had engaged U.S. customs brokers to file entries in its name, without its knowledge or permission. It claims that it also cooperated fully with the CBP audit, providing agency auditors with copies of all commercial invoices and proofs of payment for all DDP entries in question.

On April 5, 2013, CBP issued a report finding that duties, taxes and fees had been underpaid on the 61 entries in the aggregate amount of \$792,053.69. *See id.*, Ex. B (CBP Audit Report of April 5, 2013). The report included notes on the cooperation of Katana and its General Manager, Mr. Joe Garcia, thanking for that cooperation and recognizing that the defendant “stated that it did not direct the importation of these goods.” *Id.*, Ex. B, at 4; *see also id.* (“[u]nbeknownst to [defendant], it appears that the [PRC] suppliers, working with Customs brokers in Los Angeles, made Katana the importer of record . . .” *et cetera*).

CBP’s auditors noted that these facts, combined with defendant’s genuine lack of access to relevant bills of lading or shipping contracts, had frustrated agency effort to make an adjustment to its calculation of revenue loss such that it could reflect non-dutiable international transportation expenses that were included in the DDP prices stated in the operable invoices. According to the defendant, the auditors had based their calculation of dutiable values on the DDP prices paid by it.

On August 31 and September 1, 2013, the defendant provided additional information to CBP in an effort to assist its prior disclosure. *See id.*, Ex. C (Def’s Letter of August 31, 2013), Ex. D (Def’s Letter of September 1, 2013). In addition, on May 16, 2014, the defendant executed a two-year waiver of the SoL period in response to

---

<sup>7</sup> “ITRAC” refers to company-specific import data placed in a database and provided on CD-Rom to the requestor for a processing fee. *See* <https://www.cbp.gov/trade/itrac-requests> (last accessed this date).

CBP's request therefor. *See id.*, Ex. E (Def's First SoL Waiver of May 16, 2014); *see also* 19 U.S.C. §1621.

## B

After conducting the foregoing, and with the ITRAC information provided to it by the defendant, CBP expanded the audit to encompass a total of 386 entries made while the safeguard duties were in place (*i.e.*, September 26, 2009 through September 25, 2012, including the 61 previously described). The defendant claims that it continued to fully cooperate in this effort, retrieving entries from the various customs brokers that had unlawfully filed entries in its name, and comparing the information contained therein to the DDP invoices which the defendant had received from its vendors.

On June 22, 2015, CBP's Fines, Penalties and Forfeitures Office in Long Beach, CA, issued a letter to the defendant, indicating that CBP had calculated a loss of revenue totaling \$10,451,452.75, and requesting payment of that amount to "perfect" the 2012 voluntary prior disclosure. *See* Def's Br., Ex. F.<sup>8</sup>

The defendant underscores that CBP's letter does not constitute a pre-penalty or penalty notice under 19 U.S.C. §1592. It responded to

<sup>8</sup> CBP's lengthy regulation on voluntary disclosure, 19 C.F.R. §162.74(c), provides as follows (emphasis added):

(c) Tender of actual loss of duties, taxes and fees or actual loss of revenue. *A person who discloses the circumstances of the violation shall tender any actual loss of duties, taxes and fees or actual loss of revenue.* The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after CBP notifies the person in writing of CBP calculation of the actual loss of duties, taxes and fees or actual loss of revenue. The Fines, Penalties, and Forfeitures Officer may extend the 30-day period if there is good cause to do so. The disclosing party may request that the basis for determining CBP asserted actual loss of duties, taxes or fees be reviewed by Headquarters, provided that the actual loss of duties, taxes or fees determined by CBP exceeds \$100,000 and is deposited with CBP, more than 1 year remains under the statute of limitations involving the shipments covered by the claimed disclosure, and the disclosing party has complied with all other prior disclosure regulatory provisions. A grant of review is within the discretion of CBP Headquarters in consultation with the appropriate field office, and such Headquarters review shall be limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (GSP, CBI, HTS 9802, etc.). The concerned Fines, Penalties, and Forfeitures Officer shall forward appropriate review requests to the Chief, Penalties Branch, Office of International Trade. After Headquarters renders its decision, the concerned Fines, Penalties, and Forfeitures Officer will be notified and the concerned Center director will recalculate the loss, if necessary, and notify the disclosing party of any actual loss of duties, taxes or fees increases. Any increases must be deposited within 30 days, unless the local CBP office authorizes a longer period. Any reductions of the CBP calculated actual loss of duties, or and fees shall be refunded to the disclosing party. Such Headquarters review decisions are *final*. *Further, disclosing parties requesting and obtaining such a review waive their right to contest either administratively or judicially the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP under this procedure. Failure to tender the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP shall result in denial of the prior disclosure.*

the letter by noting its inability to pay the amount demanded and questioning the amount stated in the letter on the basis that CBP's calculations had not adjusted the DDP prices to reflect non-dutiable elements such as customs duties or international freight. *See id.*, Ex. G (Def's Letter of July 23, 2015). It also provided CBP with a second SoL waiver to allow additional time to "rectify" the problem through an orderly administrative process. *See id.*, Ex. H.

On February 12, 2016, CBP issued a revised duty demand to the defendant, requesting payment of a revenue loss of \$5,742,483.80. *See id.*, Ex. I.

### C

On February 24, 2016, the defendant wrote to CBP requesting a meeting. *See* Def's Br., Ex. J. On March 21, 2016, defendant's counsel, and the President, General Manager and Controller of the defendant in Long Beach, California, met with the Assistant CBP Port Director Jorgé Garcia.

At the meeting, the defendant made a brief presentation, during which it reiterated its inability to pay the amounts demanded, stated it did not believe it was liable for same, asked CBP to allow it to retain its "prior disclosure" status, requested issuance of a "formal" pre-penalty notice, and claimed that the latter was "required" by 19 U.S.C. §1592(b) so that the administrative process could commence and the company could provide a thorough narrative of events to demonstrate why it had not acted in any manner that violated the proscriptions of §1592(a).

Mr. Garcia indicated apparent agreement as to defendant's view of the overall process, which the defendant documented and left the meeting anticipating receipt of a notice of the specifics of the alleged §1592(a) violation so that the company could make its case. *See id.*, Ex. K.

On October 25, 2016, upon request, the defendant furnished CBP with its third waiver of the SoL, through July 15, 2019. *See id.*, Ex. L. The waiver specifically states that the defendant agreed to the extended limitations period

in order that Katana might obtain the benefits of the orderly continuation and conclusion of any administrative proceedings *currently being conducted or contemplated by CBP, so that Katana could enjoy the benefit of orderly administrative proceedings* in which CBP is reviewing entries of tires by Katana which might be subject to safeguard duties formerly imposed on entries of certain passenger car and light truck tires from China.

*Id.* (emphasis added).

**D**

Nothing of note occurred thereafter until May 2018, nearly a year and a half later, when CBP attorney Karen Hiyama indicated by *e-mail* that she had “inherited” defendant’s case file that had been transferred from the Port of Long Beach to her office at CBP’s Center of Excellence and Expertise (“CEE”) for Automotive and Aviation products, in Detroit, MI. *See* Def’s Br., Ex. M (*e-mail* correspondence with Ms. Hiyama on May 24, 2018, June 14, 2018, August 22, 2018, March 28, 2019). The defendant believes that Ms. Hiyama had not received the entire case file and was not aware of all that had transpired between it and CBP before. Defendant’s counsel therefore, in response to Ms. Hiyama’s inquiry, provided her with information regarding defendant’s meeting with Assistant Port Director Garcia. *Cf. id.*

Defendant’s counsel also aver that, on or about March 28, 2019 (nine months later), Ms. Hiyama stated to them that this matter had come to the “top of my docket after quite a long hiatus.” *Id.* She noted Katana’s statement of inability to pay the \$5.7 million, indicated that substantiating information concerning the company’s inability to pay should be submitted, and “advised” that “there is a pathway to settlement by treating any offer by [the defendant] as an offer in compromise without the issuance of a duty demand.” *Id.*

The defendant emphasizes that at that point it was still awaiting the initiation of administrative procedures “required under Section 592(b), which had been promised long before by Assistant Port Director Garcia.” Def’s Br. at 7; *see also id.*, Ex. L (Def’s Third SoL Waiver of October 25, 2016) (“This waiver is made knowingly and voluntarily by Katana Racing, Inc., in order that Katana might obtain the benefits of the orderly continuation and conclusion of any administrative proceeding currently being conducted or contemplated by CBP, in which CBP is reviewing entries of tires by Katana which might be subject to safeguard duties formerly imposed on entries of certain passenger car and light truck tires from China”); Def’s Reply at Appx. V (*e-mail* exchange between the parties dated May 3–6, 2019 with attachment of the third SoL waiver). Further, “Ms. Hiyama had previously been fully apprised of Mr. Garcia’s awareness and representations in this regard.” Def’s Br. at 8.

Subsequently, on May 31, 2019, Ms. Hiyama e-mailed defendant’s counsel that her office would be preparing a §1592(d) duty demand. *See id.*, Ex. N. In it, she stated “I’m unfamiliar with the reason or reasons why the government would not also seek a penalty *given the*

1592(a) violation that underlies the duty demand.” *Id.* (emphasis added).<sup>9</sup> Several weeks later, on June 20, 2019 — with just 25 days remaining in the waived limitations period for events which began years before — CBP finally issued a summary demand for payment of duties pursuant to 19 U.S.C. §1592(d).<sup>10</sup> The notice, as defendant’s counsel emphasize, contained none of the information normally specified in a “Section 592(b) notice and completely omitted any allegations of any violation of Section 592(a)” attributable to the *defendant*. *Id.*, referencing Ex. O (CBP Section 592(d) Demand of June 20, 2019). Specifically, the notice stated in pertinent part:

Demand is hereby made of your client, Katana Racing, Inc., pursuant to Title 19, United States Code, Section 1592(d) for payment of \$5,742,483.80, representing duties deprived the United States due to violation of Title 19, United States Code, Section 1592(a). The actions, which constitute the violation, are specified in Exhibit A, enclosed.

\* \* \*

#### Exhibit A

\* \* \*

#### 4. FACTS ESTABLISHING THE VIOLATION:

On July 9, 2009, the U.S. International Trade Commission (USITC) issued a report stating that certain passenger vehicle and light truck (PVLТ) tires from China were being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers. To provide import relief with respect to the tires, the President issued Proclamation 8414, which imposed additional duties on imports of PVLТ tires from China for three years, effective September 26, 2009 to September 26, 2012.

---

<sup>9</sup> Ms. Hiyama’s revelation speaks volumes regarding the government’s motivation for this action. The Constitution *protects* citizens from a government that would keep them in limbo for years, attempting as-yet-to-be-determined reasons for keeping them in such limbo, for as-yet-to-be-determined “offenses,” before reaching for that lowest hanging statutory fruit of “unpaid duties”.

<sup>10</sup> That subsection provides as follows:

Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a), the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.



The subject 386 entries were submitted misclassified and undervalued, and also omitted safeguard duties on PVLTs from China as required by Presidential Proclamation 8414.

On July 23, 2012, Katana submitted a Prior Disclosure, (PD), to the Port of Los Angeles/Long Beach related to potential value and classification errors for Chinese tire imports subject to safeguard duties pursuant to Presidential Proclamation 8414. *Katana admitted to \$5,393,570.88 in duties and fees owed to CBP*; however, Katana did not tender payment, claiming an inability to pay. An audit was conducted by CBP to determine whether the loss of revenue, (LOR), identified by Katana related to the PD was accurate and complete, and to determine any additional LOR that may be due to CBP. Based on the review by CBP, the LOR identified by Katana was inaccurate; *the actual LOR was determined to be \$5,742,483.80*. A request was issued for the actual LOR of \$5,742,483.80 but the payment was not tendered.

Def's Br., Ex. O (emphasis added).

Responding, the defendant filed a detailed submission and requested an in-person conference. *See* Def's Br., Ex. P (Def's Letter of June 26, 2019) ("Under the Customs Regulations, Katana is permitted the right to make an oral presentation, as well as a written presentation, in response to this demand. We hereby request an oral conference. ..."<sup>11</sup>). It also revoked its most recent waiver of the SoL, since at that point it now seemed "clear" to the defendant that the waiver had been procured by "false pretenses." Def's Br. at 8 (citing Ex. L, Def's Third SoL Waiver of October 25, 2016). Elaborating here, the defendant explains that despite having taken more than three years to act since its conference with CBP's Assistant Port Director, CBP by that point had completely failed to initiate the "promised" administrative process. *See id.* at 7 ("CBP never initiated the proceedings required under Section 592(b)").

Ms. Hiyama responded to defendant's counsel by *e-mail* on July 1, 2019. The defendant avers that her message "falsely" claimed that "you have been representing since 2016 that your client would work toward a payment plan to pay the loss of revenue." *Cf. id.*, Ex. P (Def's Letter of June 26, 2019). In fact, the defendant argues, in its last

---

<sup>11</sup> "Moreover, Katana did not benefit from the falsehoods contained in the entries. The company had agreed to pay DDP prices for Chinese tires, and paid such prices. By doing so, Katana believed its sellers had elected to bear the burden of the safeguard duties, possibly trimming their profit margins in order to continue making sales — a common business practice. It appears the Chinese sellers elected to enhance their profits by short-paying Customs." Def's Br., Ex. P (Def's Letter of June 26, 2019), ECF No. 12-3 at page 211 of 426.

substantive communication with CBP the company *disclaimed* liability and requested that it

be given an opportunity to present defenses grounded in (1) identity theft and misappropriation by various Customs brokers and (2) whether any conduct by Katana constituted a violation of 19 U.S.C. §1592(a), to wit, entry or attempted entry or introduction of goods into the United States by means of false and material statements or practices, or by means of material omissions. As we discussed, findings by two teams of Customs auditors have supported Katana's claims that its identity was stolen or misappropriated, and that the subject entries were made without Katana's knowledge or authorization.

*See id.*, Ex. K (Letter of March 22, 2016), Ex. Q (*e-mail* of Ms. Hiyama, July 1, 2019).

The defendant highlights Ms. Hiyama's indication that it had been her "goal" to "settle this matter without issuance of a formal duty demand" (and without providing the notice and procedure "required" by Section 592(b), according to the defendant), and it further points out that she overemphasized the evidence of defendant's financial condition, provided at *her* request<sup>12</sup>, upon her assertion that counsel had "made it appear as though you and your client were negotiating in good faith." *See id.*

The defendant avers that no such negotiation was ever initiated, nor were any offers ever made, and it notes Ms. Hiyama also made the "remarkable" assertion that "[t]he recipient of a duty demand, in contrast to a prepenalty notice, has no right to an administrative process."<sup>13</sup> *See id.* The defendant responded on July 2, 2019, reiterating its claim of innocence and noting its "statutory entitlement to the Section 592(b) procedures which CBP was refusing to give." *See id.*, Ex. R.

CBP then e-mailed counsel on July 8, 2019, attaching a response to that letter. *See* Def's Br., Ex. S (*E-mail* of CBP Paralegal), Ex. T (CBP Letter of July 8, 2019). CBP summarily denied defendant's request for a conference and reiterated the agency's demand for payment of

---

<sup>12</sup> Defendant's counsel explain that the financial information was provided in order to corroborate its March 22, 2016 representation to Mr. Garcia in anticipation of the "promised" administrative proceedings under Section 592. *See* Def's Br., Ex. K (Def's Letter of March 22, 2016).

<sup>13</sup> The defendant contends this assertion calls into question why CBP had thrice requested from Katana waivers of the statute of limitations, each time predicated on the notion that it would allow for an orderly administrative process. *See* Def's Br., Exs. E, H, L.

“withheld duties” on entries long ago liquidated and final.<sup>14</sup> *See id.* CBP thereafter filed its Summons and Complaint in this action seeking to collect “withheld” duties under §1592(d).

Regarding the complaint, the defendant notes that CBP again failed to include any allegation of an underlying violation of §1592(a) *by it* or any CBP finding of such a violation. In particular, the complaint alleges, for example, as follows:

11. The 386 entries were submitted to CBP with invoices that listed prices lower than what Katana actually paid its Chinese vendors for the PVL T tires.

12. For example, one commercial invoice supplied by a customs broker to CBP during the entry process valued the covered merchandise at \$21,220.00. *The Chinese tire vendor paid duties of \$6,253.84 assessed against the value of the merchandise stated in the invoice supplied at entry, including \$5,305.00 assessed as safeguard duties. Another commercial invoice, supplied by Katana to CBP during a regulatory audit, valued the same merchandise at \$136,350.00. Using the information reflected in the latter invoice, which is the amount actually paid by Katana to the Chinese tire vendor, the safeguard duties alone should have amounted to \$34,087.50.*

Emphasis added.

#### IV

As framed by defendant’s instant motion, the question here is whether plaintiff’s complaint fails to state a claim for which relief can be granted, which implicates the circumstances that would permit a company to revoke its waiver of the relevant statute of limitations (“SoL”) pertaining to a customs duty matter. Plaintiff’s unpaid duty complaint is not inconsistent with defendant’s “identity theft” averment and its disclaimed responsibility for such duties, but the papers and extrinsic evidence persuade that the defendant was at least defalcated with respect to the imported tires it actually received through the misuse of its good name<sup>15</sup>. There is insufficient evidence to deduce whether the defendant actually received all the imports

<sup>14</sup> The defendant also contends this correspondence obliterates the assertion in paragraph 24 of plaintiff’s complaint that “after it submitted its tax returns on May 21, 2019, [it] stopped communicating with CBP.”

<sup>15</sup> Defalcation is “financial wrongdoing involving a breach of trust[.]” *Black’s Law Dictionary* (11th ed. 2019). Arguably, in the context of an importer DDP transaction, the risk of defalcation or embezzlement would seem to be obvious. *Cf.* 19 U.S.C. §1484 (“importer” is subject to reasonable care standard when making entries, *etc.*). However, the mechanism by which “identity theft” of the defendant’s good name could actually occur for import transactions it did *not* receive, if any, is unclear, given the steps that must be undertaken

covered by the 386 entries, but after considering its efforts in attempting to work with CBP to resolve matters, it may at least be concluded that defendant's revocation of its last SoL was not unreasonable, and not mere "litigation strategy."

The general proscription against inaccuracies in customs duty declarations is found in 19 U.S.C. §1592(a):

(a) Prohibition

(1) General rule. Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception. Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

This general rule is followed by 19 U.S.C. §1592(b), which provides that, "[i]f the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) *and determines that further proceedings are warranted*, it shall issue *to the person concerned* a written notice<sup>16</sup>] of its intention to issue a claim for a monetary penalty." 19 U.S.C. §1592(b)(1)(A) (emphasis added).

to release imported goods to the importer. *See, e.g., id.*; 19 U.S.C. §1499 (required examination of certain imports). Be that as it may, it is also notable that after the events in question, in late 2019 CBP proposed via Federal Register notice to amend its regulations in order "to require customs brokers to collect certain information from importers to enable the customs brokers to verify the identity of importers, including nonresident importers." *Customs Broker Verification of an Importer's Identity*, 84 Fed.Reg. 40302 (CBP Aug. 14, 2019).

<sup>16</sup> A "violation of subsection (a)" notice "*shall*": (i) describe the merchandise; (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction; (iii) *specify all laws and regulations allegedly violated*; (iv) *disclose all the material facts which establish the alleged violation*; (v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;

Such person is not defined, but it is plain that in an administrative decision to pursue “the person concerned” for a violation of subsection (a) — whether the decision involves proceedings before the agency or involves it pursuing that person directly in court — the question is, in either event, a decision on a “further proceeding” by the agency that comes within the ambit of subsection (b)’s requirement of proper written notice, regardless of whether it decides to pursue a monetary penalty or not.

The statute’s subsection (c) then describes, *inter alia*, the “maximum penalties” for fraud, gross negligence, and negligence, and thereafter subsection (d) provides as follows:

Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a), the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.<sup>17</sup>

An aspect of the overall problem here is the extent to which “administrative procedures” by CBP were “required” to “get to the bottom” of the defendant’s “identity theft” issue as a precondition of any duty demand — and, arguably, as promised. The “faith” (good or otherwise) of CBP’s dealings with the defendant has not been established as a matter of fact at this point in this action, but the starting point for any such inquiry must be the presumption of administrative regularity, the burden being on the defendant to prove otherwise. But again, whatever the merits of plaintiff’s position herein<sup>18</sup>, as a matter of procedural posture the paper trail makes plain that the plaintiff did not properly exhaust the administrative procedures that it had obliged itself to undertake. *See infra*.

---

(vi) state the estimated loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated. 19 U.S.C. §1592(b)(1)(A) (emphasis added).

<sup>17</sup> The cross-reference to section 1514 in this subsection (d) of 19 U.S.C. §1592 concerns the finality of administrative protests of decisions of CBP as to appraisal, classification, duty drawback, *et cetera*, which, generally speaking, are “final” unless challenged in this Court of International Trade within 180 days. *See* 19 U.S.C. §1514(a); 28 U.S.C. §2636(a).

<sup>18</sup> CBP’s best practices compliance measures involve taking all reasonable steps to safeguard the legitimate use of one’s business name in commerce, a safeguard that should be obvious even outside the realm of customs law. *See, e.g.*, “Protecting Personal Information, A Guide for Business” at [https://www.ftc.gov/system/files/documents/plain-language/pdf-0136\\_proteting-personal-information.pdf](https://www.ftc.gov/system/files/documents/plain-language/pdf-0136_proteting-personal-information.pdf) (*sic*) (last examined this date). Thus, on the one hand, defendant’s position might appear to depend upon the parameters of the power of attorney it intended to convey, *see supra*, note 3, which is not evident among the papers presented, but, on the other hand, the plaintiff may well have sued the wrong party here.

Early in this unpaid-duties matter, both CBP and the defendant invoked the maxim that administrative requirements may be relaxed when circumstances warrant<sup>19</sup>, as evident among the documents indicating the Assistant Port Director's intonations to the defendant at their meetings, which are not controverted herein, during which was expressed some form of assent or agreement as to defendant's predicament and a desire between both sides to continue defendant's "voluntary disclosure" status and pursue further administrative process in furtherance of the record. Such indications are part of this action, all of which plaintiff's "inheriting" caseworker seems to have ignored or downplayed.

The giving of proper monetary demand notice, and the reasons therefor, is a necessary predicate to pursuing any claim under 28 U.S.C. §1582. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").<sup>20</sup> At a minimum, any such notice must explain not only what the violation of subsection (a) actually *is* but also the accused's *relationship to it*. See *Philipp Bros. Chemicals v. United States*, 222 F.Supp. 489, 491 (Cust. Ct. 1963) (collector's notice of appraisalment to importer on form reciting that it was being "given for the reason checked below" without any "checked" reason to inform noticee which reason was applicable to his importation did not give legal notice but only a blanket notice, and any liquidation based upon such notice was invalid).

In this matter, the "Exhibit A" attached to the monetary demand notice sent to the defendant does identify that a violation did occur, couched in the form of the second paragraph ("The subject 386 entries were submitted misclassified and undervalued, and also omitted safeguard duties on PVLTS from China as required by Presidential Proclamation 8414.").

What is missing from the written demand, however, is a clear statement of how that subsection (a) violation is attributable *to the*

---

<sup>19</sup> "[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (citation omitted). For example: foregoing the deposit of sums that CBP would otherwise demand as a condition of even considering an administrative appeal.

<sup>20</sup> *But see Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (18 How. 272) (1856) (the distress collection of debts due the crown, established by common law, had been the exception to the rule in England of notice, was at the time of adoption of the U.S. Constitution long usage in the United States, and was thus sustainable).

*defendant*. The demand letter refers to defendant’s “admi[ssion] to \$5,393,570.88 in duties and fees owed to CBP”, but whether the defendant had the capacity to “admit” that CBP was owed that amount in duties and fees, the statement gives no indication of what defendant’s *actual* (alleged) responsibility for those duties and fees *is*, given CBP’s awareness that those duties should have been paid by the Chinese sellers of the PVLIT via their freight forwarders or brokers due to defendant’s DPP agreement with them, and that the defendant had apparently been defalcated.

The Federal Circuit has held that the finding of §1592 culpability must originate with CBP in administrative proceedings, and may not be posited by the Department of Justice in litigation. *United States v. Nitek Electronics, Inc.*, 806 F.3d 1376, 1380–81 (Fed.Cir. 2015) (“[T]he legislative history nowhere suggests that the Department of Justice should determine the level of culpability. It leaves this determination in the hands of Customs”). Further, whether to waive exhaustion of administrative proceedings lies in the sound discretion of the court. *Id.* at 1381–82, citing *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed.Cir. 1986). Here, merely stating that the defendant is named on the entry papers as the “importer of record” is insufficient. Waiver of the requirement of exhaustion is not merited here.

The motion at bar satisfies this court that defendant’s interpretation of its DDP offer from its Chinese counterparts was sincere.<sup>21</sup> The defendant responded accordingly, and that consideration leads to the present. Jurisdiction, or lack thereof, emanates from such facts. Here, those include defendant’s attempt at voluntary disclosure, its evolving defense vis-à-vis “responsibility” for the unpaid safeguard duties, and, finally, its steadfast request to CBP that the latter provide, in writing, an explanation of what it, the defendant, is being accused —*i.e.*, the specific §1592(a) violation.

### **A. Attempted “Voluntary Disclosure”**

Defendant’s counsel initially and apparently assumed that their client might bear responsibility for some (but not all) of the erroneous entry declarations that had been perpetrated by others, and solidified the conundrum by filing with CBP a voluntary disclosure pursuant to 19 U.S.C. §1592(c)(4) and 19 C.F.R. §162.74. As far as responsibility for the unreported safeguard duties, the assumption that voluntary disclosure was the right vehicle for addressing that problem was incorrect, as it is not a suitable mechanism to report “identity theft” on entry. The regulation is framed in such a way that the person who makes a voluntary disclosure is to be inferred responsible (*i.e.*, “the

<sup>21</sup> Trust requires a leap of faith. *See, e.g.*, Jack Schaefer, *Shane* (Houghton Mifflin, 1949).



person concerned”) for “the circumstances of a violation” as defined in §162.74(b)<sup>22</sup>. The defendant’s initial action thus defies logic, at least with hindsight here, most likely because the ramifications of its conundrum went unappreciated by it at the time. Among other conditions, the voluntary disclosure regulation requires payment of the sums CBP demands before it will even consider the circumstances of the voluntary disclosure — an onerous requirement of one ostensibly innocent of such wrongdoing. Rather, fraudulent entry (via, *e.g.*, “identity theft”) is properly reported under such statutes as 19 U.S.C. §1619 (award of compensation to informers) or pursuant to the False Claims Act, 31 U.S.C. §3729 *et seq.*, for example.

For its part, in filing this action, it also becomes plain that the government is relying entirely on defendant’s attempt at voluntary disclosure as an admission against interest and as the only basis upon which to hold the defendant responsible for making the United States Treasury whole for unpaid duties. *See, e.g.*, Plaintiff’s Cross Motion for Summary Judgment at 3 (“Katana admitted irregularities” *etc.*). That is, plaintiff’s complaint attempts to hold the defendant “responsible” based entirely on Katana’s attempted prior disclosure and its seemingly-acquiescent statements during the informal Quick Response audit(s).

Obviously, counsel of record on both sides “inherited” this matter. Both might also be considered to have been blind-sided by the novelty of the scam to which the defendant was subjected. But this court interprets defendant’s initial voluntary disclosure response (upon discovery of its “stolen” identity) in the light that it deserves and notes that the plaintiff did not. The court fully understands plaintiff’s position, if not its motivation, and it is bound by the allegations of its complaint. All things considered, the plaintiff does not deserve judgment on this complaint. The papers and extrinsic evidence indicate that the plaintiff chose to exert the entirety of its federal power to “go after” the named defendant — not only as to certain “admitted” (and for purposes of this motion irrelevant) “irregularities” but to demand as well all the “unpaid duties” from the defendant alone, rather than exert *any* effort (none is apparent among the papers) to detect and pursue the person(s) *actually responsible* for those unpaid duties.

---

<sup>22</sup> 19 C.F.R. §162.74(b) provides, *inter alia*, that the term “discloses the circumstances of a violation” means the act of providing to Customs a statement, orally or in writing, that: (1) identifies the class or kind of merchandise involved in the violation; (2) identifies the disclosed importation or drawback claim by some means (*e.g.* entry number); (3) specifies the material false statements, omissions or acts, including an explanation as to how and when they occurred; and (4) sets forth, to the best of the disclosing party’s knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents, and states that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date.

Defendant's counsel elaborate that the purpose of the voluntary disclosure filing was to make CBP at least "aware of the alleged violations by means of a 19 U.S.C. §1592(c)(4) prior disclosure filed in 2012." Def's Mot. for a Status Conference at 2, ECF 27 (March 16, 2020) (emphasis added). And, once again, the papers do make clear that CBP expressed awareness that the defendant had been defalcated. *See, e.g., id.* at 6, quoting Def's App. at 212 ("... despite the fact that [Katana] was improperly named as importer of record") and at 230 (the "386 entries involved in the instant demand [that] had been made in the company's name"). The defendant's filing of a 19 U.S.C. §1592(c)(4) "prior disclosure" with CBP does not constitute an "admission" or a finding of a §1592(a) violation by the defendant; by law, a prior disclosure only discloses "the circumstances of a violation of [§1592] subsection (a)." Indeed, it is remarkable that no party here has asserted that this prior disclosure was ever referred for investigation, or that CBP ever attempted to determine the identities of the parties who had created and provided the apparently false invoices, in contravention of its "formal" duty of investigating based on "the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed", 19 C.F.R. §162.74(g), once the defendant had alerted CBP to its problem of defalcation.

### ***B. Revocation of SoL Waiver***

Statute of limitation waivers in proceedings with the government are voluntary, unilateral, and non-contractual. *Stange v. United States*, 282 U.S. 270, 276 (1931). The Federal Circuit adopted this standard in *United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (2007) (quoting the Supreme Court's standard with specific respect to the 19 U.S.C. §1621 SoL for §1592 violations).

With regard to the effect of defendant's last SoL waiver, CBP asserts that the presence of the word "might" in it deprives Katana of any reliance interest. *See supra*. But, the defendant explains that its execution of the waiver was prompted by more than the language of the waiver form itself: at an in-person meeting between Katana's counsel and officers and the Assistant Port Director of Customs at Long Beach, California, held on March 21, 2016, Assistant Port Director Garcia expressly represented to Katana that it would be provided an administrative notice claiming and explaining Katana's "violation" of withheld duties and granting the company an opportunity to respond. Katana's counsel confirmed this representation in

writing. *See* Def’s Br., Ex. H. This representation was operative and uncontradicted when, seven months later, CBP requested a third SoL waiver, to allow for the orderly conclusion of administrative proceedings. *See id.*, Ex. L.

The central question of whether the complaint was timely filed obviously involves resolving the propriety of defendant’s revocation of its last SoL, when it became clear that the further administrative procedures it had been “promised” would not be forthcoming. Defendant’s position that it was entitled to further “administrative procedure” is somewhat at odds with generalized decisions on what administrative procedure is “required” when only unpaid duties are claimed. *See, e.g., United States v. Aegis Security Insurance Co.*, 43 CIT \_\_\_, 422 F.Supp.3d 1328 (2019). Unpaid duties would seem to be an obvious violation of subsection (a), and “the United States may also seek the unpaid duties “from those parties traditionally liable for such duties, *e.g.*, the importer of record and its surety” in addition to the person who actually violated subsection (a). *United States v. Blum*, 858 F.2d 1566, 1570 (Fed.Cir. 1988).

From a purely technical perspective, plaintiff’s filing of this action, after affording the defendant “notice” of its duty demand, is not inconsistent with generalized case law on notice and opportunity to be heard (*i.e.*, here). Any action to recover unpaid duties, whether administratively or judicially, is, of course, a “further proceeding” within the meaning of section §1592(b)(1). And as a least fundamental matter of due process, the defendant was entitled to, and did, receive<sup>23</sup> in the monetary demand from CBP a “specific” explanation that duties had been underpaid on entries of PVLTL, which, obviously, constituted a “violation” of subsection (a), apart from the fact that the defendant was named as the “importer of record” on the entries and the fact that it had “admitted” to about \$5.3 million as being “owed to” the Treasury.

However, the plaintiff filed this action without undertaking the type of administrative procedure it had “promised” the defendant. And its note does *not* state that the defendant “admitted” that *it* owed that amount to CBP. Given all that is now before the court, the monetary demand was short on such facts. The defendant has steadfastly and repeatedly informed CBP that it did not authorize the use of its name as the IOR on the entry forms. Furthermore, it undertook its own investigation to *aid* CBP to discover the truth of the matter. Absent a

---

<sup>23</sup> *Cf.* 19 U.S.C. §1592(b)(1) (“[i]f the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) and determines that further proceedings are warranted, it shall issue to the person concerned a written notice” *et cetera*).

specific accusation in the notice to the defendant that explains *exactly how*, under such circumstances, CBP believed the defendant to be “responsible” for the unpaid duties, the duty demand notice to the defendant can hardly be said to fulfill the requirements of §1592(b)(1).

Plaintiff’s complaint suffers a similar shortcoming. It barely mentions that the defendant, “as the importer of record, caused” the under-calculated duties and fees. Compl. ¶13. But again, the plaintiff knew, and apparently agreed beforehand, that the defendant had been defalcated. *See supra*. The complaint’s reliance on that duty demand thus fails to “state[] a claim to relief that is plausible on its face” (*Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 570), given the facts as presented now herein.

The record herein supports the conclusion that the defendant does not bear responsibility for the unpaid duties that the plaintiff seeks. The defendant was certainly aware of the breadth of the problem in which it was enmeshed. And generalized case law indicates that collection of unpaid duties does not “require” the “elaborate” administrative procedures of §1592(b)(1), once CBP reasonably concludes that a defendant bears responsibility for making the Treasury whole for unpaid duties as a result of a subsection (a) violation. Nonetheless, the law does not excuse CBP from failing to provide the precise reasons for holding a defendant “responsible” for paying its §1592(d) duty demand in its complaint, which has not been articulated in the one at bar beyond alleging that the defendant was the “importer of record,” and omitting any indication of the fact that defendant was defalcated. *See supra*. Merely stating that the defendant was the “importer of record” does not suffice in the circumstances of this action.

Therefore, given all that had transpired since the initiation of the audit(s) and beyond, the court cannot conclude that defendant’s prior revocation of its last SoL was without legal effect, once it became apparent that CBP was simply going to bring it to court on an inarticulate charge. CBP’s first audit report acknowledges defendant’s position that “[u]nbeknownst to Katana, it appears that the Chinese suppliers, working with Customs brokers in Los Angeles, made Katana the importer of record.” Letter of June 26, 2019, at Exhibit D, page 4. The audit nonetheless continued to assume Katana “knew” that it was the importer of record. *See id.* at 5 (“Katana, as the IOR, is responsible for the correctness of the entry documentation presented to CBP and all applicable duties, taxes, and fees”). But prior to Ms. Hiyama’s receipt of the Katana file, CBP’s Assistant Port

Director had already, and therefore apparently, acknowledged Kataka's DDP agreement with its sellers. Correctly construed, that agreement absolved it of the problems caused by those who *actually* inflicted injury on the Treasury through misuse of defendant's name.

## V

This being the case, and considering CBP's apparent recalcitrance in specifying to the defendant the actual §1592(a) violation it committed, the defendant has provided reasonable justification for its revocation of its last SoL, with the result that this action is now barred by the passage of time.

Plaintiff's cross-motion for summary judgment must therefore be denied, with judgment of dismissal entered on behalf of the defendant.

So ordered.

Dated: March 28, 2022  
New York, New York

*/s/ Thomas J. Aquilino, Jr.*  
SENIOR JUDGE



## Slip Op. 22–31

JELD-WEN, INC., Plaintiff, v. UNITED STATES, Defendant, and COALITION OF AMERICAN MILLWORK PRODUCERS, Defendant-Intervenor.

Before: Leo M. Gordon, Judge  
Court No. 21–00114

[Sustaining the U.S. International Trade Commission's *Final Determination*.]

Dated: March 28, 2022

*James L. Rogers Jr.*, Nelson, Mullins, Riley & Scarborough LLP, of Greenville, S.C., for Plaintiff Jeld-Wen, Inc.

*Brian R. Soiset*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

*Timothy C. Brightbill* and *Laura El-Sabaawi*, Wiley Rein, LLP of Washington, D.C., for Defendant-Intervenor Coalition of American Millwork Producers.

## OPINION

### Gordon, Judge:

This action involves the final affirmative material injury determinations by the U.S. International Trade Commission (“ITC” or “Commission”) in the countervailing duty and antidumping duty investigations into imported Wood Mouldings and Millwork Products (“WMMP”) from China. *See Wood Mouldings and Millwork Products from China*, 86 Fed. Reg. 9,951 (Int’l Trade Comm’n Feb. 17, 2021) (“*Final Determination*”); *see also Wood Mouldings and Millwork Products from China*, Inv. Nos. 701-TA-636 and 731-TA-1470, USITC Pub. 5157 (Feb. 2021), ECF No. 20–1 (“*Views*”).

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiff Jeld-Wen, Inc. (“Jeld-Wen”). *See* Pl.’s Mot. for J. on the Agency R., ECF No. 32 (“Pl.’s Br.”); *see also* Def.’s Resp. to Pl.’s Mot. for J. on the Agency R., ECF No. 35; Def.-Intervenor Coalition of American Millwork Producers’ Resp. to Pl.’s Mot. for J. on the Agency R., ECF No. 37; Pl.’s Reply in Supp. of Mot. for J. on the Agency R., ECF No. 40. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i),<sup>1</sup> and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the ITC’s final affirmative injury determinations are sustained.

### I. Background

The statutory framework governing unfair trade investigations requires a determination by the Commission on whether imported articles within the scope of a particular investigation (the “subject merchandise”) have injured a domestic industry. *See* 19 U.S.C. §§ 1671, 1673. Domestic “industry” is defined as “the producers as a whole of the domestic like product....” 19 U.S.C. § 1677(4)(A).

In the underlying investigation, the U.S. Department of Commerce (“Commerce”) defined the subject merchandise in relevant part as:

[WMMP] that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn).

---

<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

See *Views* at 6–7. WMMP are “lengths of wood molded into various shapes, or profiles, for use in a wide variety of functional and decorative applications in residential and non-residential construction.” *Id.* at 8. WMMP can be manufactured from “solid or, more commonly, finger-jointed softwood or hardwood lumber; [LVL]; or some combination of wood and composite materials” and are “sold to distributors, construction companies and contractors, lumber wholesalers, and home improvement retailers.” *Id.* at 8–9.

The statute provides for three types of injury to the domestic industry: material injury, threat of material injury, or material retardation of the establishment of an industry. See 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). The statute also requires that a causal nexus exist between a type of injury and imports of the subject merchandise, *i.e.*, the injury must be “by reason of” imports of the subject merchandise. *Id.*

In making its injury determination, the Commission compares subject merchandise to its U.S. domestic counterpart, which by statute must be a product “which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.” 19 U.S.C. § 1677(10). The Commission relies on the scope of the subject merchandise provided by Commerce to serve as the outside parameter for defining the domestic like product. See *Views* at 5–8; see also *NEC Corp. v. Dep’t of Commerce*, 22 CIT 1108, 1110, 36 F. Supp. 2d 380, 383 (1998) (“[a]lthough the Commission must accept the determination of Commerce as to the scope of the imported merchandise sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified”).

Where the subject merchandise involves a range of products, as here, the Commission disregards minor variations among them absent a “clear dividing line” between particular products in the range. See *Nippon Steel Corp. v. United States*, 19 CIT 450, 455, 1995 WL 170410 (1995) (ITC “disregards minor differences, and looks for clear dividing lines between like products”). The Commission generally considers the following six factors in its like-product analysis: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer perceptions; (5) common manufacturing facilities and production employees; and where appropriate, (6) price. See *NEC Corp.*, 22 CIT at 1110, 36 F. Supp. 2d at 383.<sup>2</sup>

<sup>2</sup> These factors are not exhaustive, as an investigation may give rise to other considerations relevant to the factual determination on the domestic like product, and the Commission’s practice in defining domestic like product is on a case-by-case basis with no single factor considered dispositive. See, *e.g.*, *Views* at 6.



In reaching its *Final Determination*, the Commission defined “a single domestic like product consisting of all WMMP, coextensive with the scope of the investigations.” *Views* at 14. Before the Commission, Jeld-Wen and other respondents objected to the definition of a single domestic like product, arguing that “the Commission should define two domestic like products: (1) LVL WMMP; and (2) all other WMMP described in the scope of the investigations.” *Id.* at 12. One of the respondents, other than Jeld-Wen, argued that the proposed second domestic like product, all other WMMP, should also include medium density fiberboard mouldings and millwork products (“MDF MMP”), even though MDF MMP was not included within Commerce’s scope of the investigations. *Id.* Another respondent argued in favor of a single domestic like product that included all in scope WMMP and out-of-scope MDF MMP. *Id.* The Commission considered the various arguments, first by comparing LVL WMMP to other in-scope WMMP under the Commission’s six-factor domestic like product analysis, and then by comparing MDF MMP to all in-scope WMMP using the same test. *See id.* at 14–32.

In analyzing whether to define LVL WMMP and other in-scope WMMP as a single like product, the Commission determined that “[t]here [were] similarities in terms of physical characteristics and uses, interchangeability, channels of distribution, customer and producer perceptions, production processes, and price.” *Id.* at 21. Specifically, the Commission found that LVL WMMP and other WMMP are both “made of wood molded into the same shapes for use in many of the same applications, can be used interchangeably in these applications, are sold through similar channels of distribution, are produced using similar back-end equipment and production processes, and are comparable in terms of price.” *Id.* The Commission noted that “many customers and producers ... perceive LVL WMMP and other WMMP as comparable and suitable for the same end uses.” *Id.* While acknowledging that there are some differences between the two types of WMMP—such as the engineered nature of LVL WMMP—the Commission ultimately determined that “on balance, ... there are more similarities than differences between LVL WMMP and other in-scope WMMP in terms of the Commission’s domestic like product factors.” *Id.* at 22. The Commission therefore defined a single domestic like product encompassing LVL WMMP and other in-scope WMMP. *Id.*

Next, the Commission considered whether to include MDF MMP in its like product definition. The Commission acknowledged that both products are “made of or derived from wood that, when molded into the same shapes, may be used interchangeably in decorative interior applications, are sold through similar channels of distribution, ... are

produced using similar back end processes, with some exceptions,” and that “[c]ustomers view the products as interchangeable in many decorative interior applications.” *Id.* at 29. However, the Commission noted that “MDF MMP are made of a different constituent material, medium density fiberboard, that renders MDF MMP more fragile and susceptible to moisture than WMMP.” *Id.* at 30. Consequently, the Commission found that MDF MMP is “unsuitable for exterior applications and applications subjected to high moisture, and generally unsuitable for structural applications and applications requiring small profiles—applications that account for a substantial portion of the WMMP market.” *Id.* at 30. This unsuitability limits the interchangeability of MDF MMP and WMMP largely to “a subset of interior decorative applications.” *Id.* Additionally, the Commission found that “many customers perceive MDF MMP to be an inferior substitute for WMMP in such applications” and “[m]any producers also perceive MDF MMP to be separate and distinct from WMMP.” *Id.* at 27. Finally, the Commission found the prices of MDF MMP to be “significantly lower” than WMMP. *Id.* at 31. The Commission determined that the record demonstrated “sufficient differences between MDF MMP and WMMP to draw a dividing line at the scope of the investigations, notwithstanding some similarities between MDF MMP and WMMP.” *Id.* at 32. As a result, the Commission declined to include MDF MMP in the domestic like product. *Id.*

Consistent with its definition of the single domestic like product, the Commission identified the domestic industry and conducted a material injury analysis. The Commission found that the domestic industry was materially injured through loss of market share in a growing market and declining performance. *Id.* at 61–62. The Commission further determined that the record demonstrated that there was a “causal nexus” between subject imports and the injury to the domestic industry. *Id.* Specifically, the Commission found that the increase in subject imports prevented the domestic industry from capitalizing on the increase in U.S. consumption and that “[t]he domestic industry’s financial performance correlated with trends in subject import market share.” *Id.* Accordingly, the Commission determined that an industry in the United States was “materially injured by reason of subject imports of WMMP from China that are sold in the United States at [less than fair value] and subsidized by the government of China.” *Id.* at 70. Plaintiff then commenced this action challenging the ITC’s *Final Determination*.

## II. Standard of Review

The court sustains the Commission’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A West’s Fed. Forms, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of the Commission’s interpretation of the Tariff Act. See *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

## III. Discussion

Jeld-Wen challenges four of the Commission’s determinations: (1) that LVL and other in-scope WMMP constitute a single domestic like product, Pl.’s Br. at 5–21; (2) that there is a single domestic industry that encompasses producers of both LVL and other in-scope WMMP, *id.* at 21–23; (3) that conducting a material injury/threat of material injury analysis of LVL, and not a material retardation analysis of it, was reasonable, *see id.* at 23–25; and (4) that the alleged material injury to the domestic WMMP industry was “by reason of” the subject imports, *id.* at 26–29.

### A. Single Domestic Like Product

As explained above, the Commission must identify a “domestic like product” that is defined as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.” 19 U.S.C. § 1677(10). Jeld-Wen maintains that “[i]n considering the proper interpretation of ‘domestic like product’ under 19 U.S.C. § 1677(10), the court applies the two-step framework of *Chevron*.” Pl.’s Br. at 20. Plaintiff, however, makes no argument challenging the Commission’s interpretation of “domestic like product.” *See id.* at 20–21. Rather, Jeld-Wen appears to present arguments challenging the reasonableness of ITC’s application of the statutory term “separate like product,” a factual issue reviewable under the substantial evidence standard. *See id.* at 21 (contending that ITC’s *application* of statute in defining domestic like product “as one which included LVL and [other in-scope WMMP] but excluded MDF was rife with inconsistencies and offered insufficient reasons for treating similar situations differently.”).

Accordingly, the court will turn to Jeld-Wen’s arguments that the Commission’s like product determination was unsupported by substantial evidence. *See id.* at 10–20. Specifically, Jeld-Wen maintains that, in applying the six-factor like product analysis, the Commission unreasonably “found that [MDF MMP] was different from WMMP for many of the same reasons that it chose to ignore or find negligible when comparing LVL to [other in-scope WMMP].” *Id.* at 10–11.

Regarding the first factor—physical characteristics and uses—Jeld-Wen argues that “[other in-scope WMMP] is typically made from solid or finger-jointed lumber, while LVL and [MDF MMP] are both made from wood derived raw materials that are engineered with glue or resin under heat and pressure to form a finished product.” *Id.* at 11. Jeld-Wen highlights the Commission’s findings that LVL WMMP’s engineered nature generally gives it an advantage over other in-scope WMMP regarding strength, stability, and resistance to damage. *Id.* at 12. Jeld-Wen maintains that if “the Commission determined that [MDF MMP] was not included in the Commission’s definition of like product despite its general flimsiness (as compared to [other in-scope WMMP]), then it should have found that LVL was a separate like product, given its many enhanced performance characteristics.” *Id.* Jeld-Wen further contends that MDF MMP and other in-scope WMMP have more in common under this factor than LVL WMMP, as “both are weaker than LVL, both have issues being used in areas exposed to high moisture, and both fare poorly in certain structural applications, such as door frames.” *Id.*

Jeld-Wen's arguments above fail to demonstrate that the Commission acted unreasonably in reaching its determination to define the domestic like product as including LVL with "traditional" WMMP but excluding MDF MMP. The Commission found that LVL, though an engineered product, is "made from thin veneers of wood," while MDF MMP is "made from sawdust and shavings mixed with resin and formed into MDF panels." *Views* at 15, 23. Furthermore, although LVL WMMP may be preferable in some applications, it is typically used in "structural applications such as interior and exterior window and door frames, which are also leading applications for other WMMP." *Id.* at 14. MDF MMP, on the other hand, is "unsuitable for external applications and wet environments such as in bathrooms, and generally unsuitable for small profiles and structural applications." *Id.* at 24. Given these findings, the court concludes that the ITC's analysis of the physical characteristics-and-uses factor reasonably supports its domestic like product determination.

Turning to the factor of manufacturing facilities, production processes, and production employees, Jeld-Wen underscores the Commission's finding that LVL WMMP and MDF MMP are "made in separate manufacturing facilities using different employees than [other in-scope WMMP]," and that the front-end processes for LVL WMMP and MDF MMP "both differ from [other in-scope WMMP]," while the back-end process for all three are similar. *Id.* at 13. Jeld-Wen argues that "the Commission attempted to draw a distinction between [MDF MMP] and [other in-scope WMMP] by asserting that [MDF MMP] production requires different, complex, and capital-intensive facilities while ignoring the fact that *the same is true as to LVL.*" Pl.'s Br. at 13. This argument is unpersuasive. While the Commission did find that the back-end production processes are similar for LVL WMMP, other in-scope WMMP, and MDF MMP, it also noted some exceptions for MDF MMP: "[t]he process of molding MDF into MMP requires carbide blades that yield softer profiles than the steel blades used to mold WMMP, and can also require different molds and tooling than WMMP." *Views* at 17, 25. Furthermore, Plaintiff's argument that the Commission ignored the differences between LVL and other WMMP production processes is unsupported by the record. The Commission "recognize[d] that there are also some differences between the two LVL WMMP and other WMMP in terms of physical characteristics and uses; manufacturing facilities, processes, and employees; and customer and producer perceptions." *Id.* at 21–22. Accordingly, this factor likewise reasonably supports the Commission's domestic like product determination.

Regarding interchangeability, the Commission found that “LVL WMMP and other WMMP may be used interchangeably in most applications, although some customers prefer LVL WMMP in certain applications such as fiberglass doors and external doors subject to high winds and moisture.” *Id.* at 17. As to the interchangeability of MDF MMP, the Commission found that “[a]lthough MDF MMP and WMMP are interchangeable in many decorative interior applications, the physical limitations of MDF MMP preclude its substitution for WMMP in exterior applications and applications subject to moisture, and generally in structural applications and applications requiring small profiles.” *Id.* at 26. Jeld-Wen contends that where “[t]he Commission found that MDF was not sufficiently interchangeable with [other WMMP] because MDF isn’t suitable for use in certain applications[,] ... the same is true when comparing [other WMMP] to LVL—the qualitative superiority of LVL limits its interchangeability with WMMP.” Pl.’s Br. at 15. However, the ITC noted that while LVL may be a superior choice in some applications, “[t]he three most common applications for LVL WMMP, external door frames, door stiles, and quarter rounds, are also served by other WMMP.” *Views* at 18. The ITC thus found that MDF MMP is not nearly as interchangeable with WMMP. *See id.* at 26. Given this, the Commission’s finding that “[t]here are similarities in terms of ... interchangeability” between LVL WMMP and other WMMP was reasonable. *Id.* at 21. Similarly, it was reasonable for the Commission to find that “the differences between WMMP and out-of-scope MDF MMP in terms of ... interchangeability ... outweigh any similarities. *Id.* at 29–30.

Regarding the fourth and sixth factors of customer perceptions and price in the like-product analysis, Jeld-Wen argues that the Commission failed to reconcile inconsistent responses of the domestic industry regarding whether price, not quality, was a “key concern” of the industry’s customer base. *See* Pl.’s Br. at 17 (“The Respondents asserted that none of their customers *ever* mentioned quality issues, and instead repeatedly asserted that customers told them that price was their key concern.” (Jeld-Wen’s emphasis) (citing Transcript, Commission Hearing (Dec. 23, 2020), PR<sup>3</sup> 203 at 58–59). Jeld-Wen points to anecdotal record evidence relating the importance of quality versus price as a purchasing factor for customers of traditional WMMP and LVL. *Id.* at 17–19.

For the most part, the Commission simply ignored price as a factor. It found “that customers perceived [WMMP] as having superior per-

---

<sup>3</sup> “PR” refers to a document in the public administrative record, which is found in ECF No. 21, unless otherwise noted. “CR” refers to a document in the confidential administrative record, which is found in ECF No. 20, unless otherwise noted.



formance characteristics compared to MDF” but at the same time found that “customers perceived LVL as having superior performance characteristics compared to [other in-scope WMMP].” *See, e.g.*, Pl.’s Br. at 17 (quoting *Views* at 18–19, 14–15). Based on the record, with respect to LVL WMMP the Commission found that “domestically produced WMMP is generally comparable to subject imports in terms of quality, and that differences between domestically produced WMMP and subject imports in terms of ... the availability of LVL WMMP did not serve to limit their substitutability to an appreciable degree” despite some minor quality differences. *See Views* at 68–69; *see also id.* at 69 n.304 (“Most responding purchasers rated domestically produced WMMP as comparable or superior to subject imports with respect to quality meets industry standards (21 of 29) and quality exceeds industry standards (16 of 28). Most responding purchasers, 27 of 40, also reported that domestically produced WMMP always or usually meets minimum quality specifications.” (internal citations omitted)).

The Commission also found that “[c]ustomers view LVL WMMP and other WMMP as similar insofar as both come in the same shapes and can be used in many of the same applications, including in door frames.” *Id.* at 19.

With respect to MDF MMP, the Commission noted that “[n]umerous responding producers, importers, and purchasers commented that customers perceive MDF MMP as a less expensive and generally inferior substitute for WMMP in interior applications, and not as a substitute for WMMP in structural or exterior applications or applications subjected to moisture.” *Id.* at 27.

When it focused on price at all, the Commission found that some LVL WMMP was priced higher, and some was priced lower than other in-scope WMMP. *Id.* at 20. MDF MMP prices, on the other hand, were “significantly lower than WMMP prices.” *Id.* at 28. The Commission’s findings regarding the consumer perception and pricing factors for both LVL WMMP and MDF MMP are distinct, and Jeld-Wen’s attempt to conflate them here does not persuade the court that the Commission’s reasoning is inconsistent or unreasonable.

Finally, Jeld-Wen argues that “[t]he Commission’s determination that the same factor—similar channels of distribution—supported a finding that LVL and [other in-scope WMMP] are a single like product but was not pertinent to its analysis of [MDF MMP] makes no sense.” Pl.’s Br. at 19. Jeld-Wen’s characterization of the ITC’s finding on this factor is not supported by the record. The Commission explicitly found that “[m]ost responding domestic producers, importers, and purchasers reported that WMMP is fully or mostly comparable to



MDF MMP in terms of channels of distribution,” and further acknowledged that “there are some similarities [between MDF MMP and WMMP] in terms of ... channels of distribution.” *Views* at 26, 29. Nevertheless, the Commission determined that “the differences between WMMP and out-of-scope MDF MMP in terms of physical characteristics and uses; manufacturing facilities, production processes, and production employees; interchangeability; producer and customer perceptions; and price outweigh any similarities” relative to the factor of channels of distribution. *Id.* at 29–30.

Despite recognizing the Commission’s “broad discretion in determining whether a particular difference or similarity is minor,” Jeld-Wen argues that such deference “does not extend to the point where the Commission can permissibly determine that the same difference is minor for one product but major for another.” Pl.’s Reply at 4. While the similarities and differences between MDF MMP and WMMP and those between LVL WMMP and other in-scope WMMP might be similar, they are not identical. For example, unlike LVL WMMP, which can be used in “many of the same applications” as other WMMP, MDF MMP is “more fragile and susceptible to moisture than WMMP,” making it unsuitable for many of the applications of WMMP. *Views* at 21, 30. Furthermore, while many customers perceive LVL WMMP and other WMMP as “comparable and suitable” for the same end uses, many customers perceive MDF MMP to be an “inferior substitute” to WMMP in interior decorative applications. *Id.* Therefore, given the totality of the record, the court cannot agree with Plaintiff that “the reasons that the Commission relied upon to determine that MDF was not included within the Commission’s definition of the domestic like product were equally applicable to LVL.” *See* Pl.’s Br. at 10.

Overall, the Commission explained that the demonstrated similarities outweighed the differences between LVL WMMP and other in-scope WMMP, and that the demonstrated differences outweighed the similarities between MDF MMP and WMMP. *See Views* at 22, 32. Accordingly, the Commission’s determination that LVL WMMP and other in-scope WMMP constitute a single domestic like product, while MDF MMP is excluded, is sustained as reasonable.

### **B. Single Domestic Industry**

Jeld-Wen next argues that “[t]he Commission’s decision to define the domestic ‘industry’ as one which includes producers of both LVL and [other in-scope WMMP]” was unreasonable. Pl.’s Br. at 22. As discussed above, in order to determine whether an industry is materially injured, threatened with material injury, or materially retarded

by reason of imports of the subject merchandise, the Commission must identify the relevant domestic “industry.” 19 U.S.C. §§ 1671, 1673. As Jeld-Wen points out, the statute defines “industry” in relevant part as “the producers as a whole of a domestic like product....” *see* Pl.’s Br. at 22 (quoting 19 U.S.C. § 1677(4)(A)). Jeld-Wen maintains that, because “LVL is at most a *separate* like product with respect to [other in-scope WMMP],” the Commission was required to identify an LVL industry separate from an industry encompassing other in-scope WMMP. Pl.’s Br. at 22.

Ultimately, to prevail on this argument, Plaintiff must demonstrate that it was unreasonable for the ITC to include LVL in the domestic like product. Because the court sustains the Commission’s determination that LVL WMMP and other in-scope WMMP constitute a *single* domestic like product, it will likewise sustain the Commission’s determination that there is a single domestic industry that includes producers of all in-scope WMMP.

### C. Material Retardation

Plaintiff argues that “the Commission’s failure to conduct a material retardation analysis as it pertains to LVL, rather than a material injury/threat of injury analysis, was not supported by substantial evidence and was not in accordance with the law.” Pl.’s Br. at 23. Plaintiff maintains that “[i]n considering whether the Commission properly interpreted the statute at issue, the court applies the two-step framework of *Chevron*.” *Id.* (citing *NMB Singapore Ltd. v. United States*, 27 CIT 1325, 1331, 288 F. Supp. 2d 1306, 1312 (2003)). Although Plaintiff accurately explains the two-step framework of *Chevron*, nowhere in its litigation brief does Plaintiff challenge the ITC’s *interpretation* of any statutory provision. Pl.’s Br. at 23–25. Instead, the crux of Plaintiff’s challenge appears to be focused on whether the ITC reasonably applied the statutory provisions at issue. *See id.* at 25. Plaintiff maintains that in circumstances where there is only limited domestic production of merchandise identical or similar to certain subject imports, the Commission conducts a two-step analysis to determine whether subject imports were materially retarding the establishment of a domestic industry. *See id.* at 24–25. Plaintiff further contends that in determining whether an industry has been established, the ITC examines: “(1) the length of domestic production; (2) the characteristics of domestic production; (3) the size of domestic operations; (4) whether the proposed domestic industry has reached a reasonable financial “break-even” point; and (5) whether the startup is more in the nature of the introduction of a new product line by an

already established business.” *See id.* at 25. Plaintiff also maintains that the characteristics and size of domestic production were unable to meet the current LVL demand and LVL is not in the nature of a new product line. *Id.* These arguments require the court to consider factual information on the record and evaluate the agency’s decision against the substantial evidence standard (reasonableness review). However, Jeld-Wen made no argument whatsoever regarding material retardation before the Commission, nor did Jeld-Wen even mention the term “material retardation” in its administrative case briefs before the ITC. *See* Prehearing Brief of Jeld-Wen, Inc. (Dec. 15, 2020), CR 521; Posthearing Brief of Jeld-Wen, Inc. (Dec. 31, 2020), CR 547.

In challenging final agency action, such as the underlying material injury determination by the ITC at issue here, litigants must generally exhaust administrative remedies. *See* 28 U.S.C. § 2637(d). Having failed to raise this argument before the Commission, Plaintiff may not raise it now. *See Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). This is precisely the sort of argument for which exhaustion of administrative remedies is appropriate. Had Jeld-Wen presented the material retardation argument directly to the Commission at the agency level, the twin purposes of the doctrine of exhaustion of administrative remedies—protecting administrative agency authority and promoting judicial efficiency—would have been served. *Id.* By failing to raise its argument about the material retardation at the administrative level, Jeld-Wen deprived the ITC of the opportunity to address that issue and “apply its expertise,” potentially “rectify administrative mistakes,” or “compile a record adequate for judicial review.” *Id.* Therefore, the court deems Plaintiff’s material retardation argument waived, and will sustain the ITC’s determination as to this issue.

#### **D. Causation**

The Commission will make an affirmative material injury determination when it finds (1) material injury that is (2) by reason of the subject imports. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015). To determine whether a domestic industry is materially injured, the ITC considers:

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and

(III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

19 U.S.C. § 1677(7)(B)(i). The ITC may also “consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.” *See id.* § 1677(7)(B)(ii). No single factor is dispositive, and the ITC evaluates “all relevant economic factors ... within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” 19 U.S.C. § 1677(7)(C)(iii). Here, the ITC’s material injury analysis resulted in affirmative findings as to the volume, pricing, and impact factors. 19 U.S.C. § 1677(7)(B)(i)(I)–(III).

Plaintiff maintains that any material injury to the domestic industry was by reason of “other economic factors,” but does not challenge the reasonableness of the ITC’s determinations regarding volume and pricing of subject imports. *See* Pl.’s Br. at 26–29 (contending that any alleged injury resulted not from LVL imports but from “changes in technology, demand and customer tastes, as well as management decisions by domestic producers not to get into LVL production”).

In evaluating the impact of subject imports on the domestic industry, the ITC evaluates “all relevant economic factors which have a bearing on the state of the industry,” including, but not limited to:

(I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). The statute further provides that ITC “shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.*

The Commission observed an increase in apparent U.S. consumption between 2017 and 2019, while “the domestic industry’s operating and financial performance declined by nearly all measures.” *Views* at 56. Specifically, the Commission also perceived that (1) “[t]he domestic industry’s capacity, production, and rate of capacity utilization declined between 2017 and 2019;” (2) “the industry’s employment indicators declined between 2017 and 2019;” (3) “the domestic industry also experienced a decline in its U.S. shipments and market share;” (4) “the domestic industry’s end-of-period inventories increased irregularly between 2017 and 2019;” (5) “[t]he domestic industry’s net sales revenues declined each year and its profitability declined between 2017 and 2018 before improving in 2019 to a level below that in 2017;” and (6) “[t]he domestic industry’s declining performance resulted in plant closures, production curtailments, and layoffs.” *Views* at 57–61. The Commission found “a causal nexus between subject imports and the domestic industry’s declining performance between 2017 and 2019, noting that [s]ubject import volume and market share increased significantly between 2017 and 2018 and remained elevated in 2019 at the direct expense of the domestic industry.” *See id.* at 61. The ITC also found that “[d]ue to subject imports, the domestic industry was unable to capitalize on the 4.0 percent increase in apparent U.S. consumption between 2017 and 2019, and instead suffered declining performance according to most measures during the period.” *See id.* at 61–62.

Jeld-Wen argues that “any alleged injury to the domestic WMMP industry was not by reason of LVL imports, but rather by reason of other economic factors, including changes in technology, demand and customer tastes, as well as management decisions by domestic producers not to get into LVL production.” Pl.’s Br. at 27. However, the Commission considered whether such other factors had an adverse impact on the domestic industry to ensure that “it had not misattributed injury from these factors to subject imports.” *Views* at 62–69. The ITC found that “differences between subject imports and the domestic like product in terms of quality, gesso coatings, and the availability of LVL WMMP did not significantly attenuate subject import competition,” because “domestically produced WMMP is generally comparable to subject imports in terms of quality, and that differences between domestically produced WMMP and subject imports in terms of gesso coatings and the availability of LVL WMMP did not serve to limit their substitutability to an appreciable degree.” *Views* at 68–69 (citing Table II-10a, II-12). Specifically, the Commission noted that:

Most responding purchasers rated domestically produced WMMP as comparable or superior to subject imports with respect to quality meets industry standards (21 of 29) and quality exceeds industry standards (16 of 28). Most responding purchasers, 27 of 40, also reported that domestically produced WMMP always or usually meets minimum quality specifications.

*See Views* at 69 n.304 (internal citations omitted).

The Commission also observed that “LVL WMMP accounted for a small share of apparent U.S. consumption of WMMP during the 2017–19 period” and “[t]he domestic industry also produced substantial volumes of WMMP with an extruded gesso coating ... and most responding purchasers reported that such coatings were only somewhat or not important to their purchasing decisions.” *See id.* at 69. Plaintiff’s conclusory contention that any injury resulted from “changes in technology, demand and customer tastes, as well as management decisions by domestic producers not to get into LVL production,” fails to address the ITC’s findings in support of its determination. *See Pl.’s Br.* at 27–29. For the court to remand and direct the ITC to reach Plaintiff’s preferred conclusion that any injury was not due to subject imports, Plaintiff needed to establish that its preferred conclusion is the one and only determination on this administrative record, not simply that its preferred outcome may have constituted another possible reasonable choice. *See Tianjin Wanhua Co. v. United States*, 40 CIT \_\_\_, \_\_\_, 179 F. Supp. 3d 1062, 1071 (2016) (citing *Globe Metallurgical Inc. v. United States*, 36 CIT 1222, 1230, 865 F. Supp. 2d 1269, 1276 (2012)). Plaintiff has failed to make such a showing, and accordingly, the court concludes that the ITC reasonably found that the volume, price effect, and impact of subject imports on the domestic producers of domestic like products were significant. Accordingly, the court will sustain the *Final Determination*.

#### IV. Conclusion

For the foregoing reasons, the court denies Jeld-Wen’s motion for judgment on the agency record and sustains the Commission’s *Final Determination*. Judgment will enter accordingly.

Dated: March 28, 2022

New York, New York

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





# Index

*Customs Bulletin and Decisions*  
*Vol. 56, No. 14, April 13, 2022*

## *U.S. Customs and Border Protection*

### *General Notices*

	<i>Page</i>
Grant of “Lever-Rule” Protection . . . . .	1
Modification of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification and Eligibility of Certain Bed Linen Products for Preferential Tariff Treatment Under the United States-Israel Free Trade Agreement . . . . .	2
Proposed Modification of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Men’s Full Zip Hoodie (Jacket) . . . . .	14
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Unframed Automotive Side Mirrors . . . . .	25
Transfer of Cargo to a Container Station . . . . .	31
Proposed Modification of a Ruling Letter Relating to the Origin of Polyetheretherketone Powder . . . . .	33
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Plastic Urine Drainage Bags . . . . .	41
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Babies’ Swimwear . . . . .	45
Proposed Revocation of One Ruling Letter, Proposed Modification of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Men’s Vest/Sleeveless Jacket . . . . .	54

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

	<i>Appeal No.</i>	<i>Page</i>
StarKist Co., Plaintiff-Appellant v. United States, Defendant-Appellee . . . . .	2021–1548	68

# *U.S. Court of International Trade*

## Slip Opinions

	Slip Op. No.	Page
Building Systems de Mexico, S.A. de C.V., Plaintiff, v. United States, Defendant, and Full Member Subgroup of the American Institute of Steel Construction, LLC and Corey S.A. de C.V., Defendant-Intervenors. . . . .	22–25	79
Magid Glove & Safety Manufacturing Co. LLC, Plaintiff, v. United States, Defendant. . . . .	22–28	95
Ashley Furniture Industries, LLC; Ashley Furniture Trading Company; Wanek Furniture Co., Ltd.; Millennium Furniture Co., Ltd.; and Comfort Bedding Company Limited, Plaintiffs, v. United States, Defendant, and Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocer, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; The International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, Defendant-Intervenors. . . . .	22–29	106
United States, Plaintiff, v. Katana Racing, Inc., d/b/a Wheel & Tire Distributors, Defendant. . . . .	22–30	144
Jeld-Wen, Inc., Plaintiff, v. United States, Defendant, and Coalition of American Millwork Producers, Defendant-Intervenor. . . . .	22–31	166