U.S. Court of International Trade

Slip Op. 15–72

THE TIMKEN COMPANY, Plaintiff, v. UNITED STATES, Defendant, NSK LTD., NSK CORPORATION, NSK PRECISION AMERICA, INC., NTN BEARING CORP. OF AMERICA, NTN CORPORATION, NTN BOWER, INC., NTN DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., JTEKT CORPORATION, JTEKT NORTH AMERICA, INC., NACHI-FUJIKOSHI CORPORATION, NACHI AMERICA, INC., NACHI TECHNOLOGY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00155

[Plaintiff's motion for judgment on the agency record granted; Commerce's final results in antidumping duty administrative reviews remanded for Commerce to apply differential pricing analysis.]

Dated: July 8, 2015

Geert M. De Prest, Stewart and Stewart, of Washington, DC, argued for plaintiff. With him on the brief was *Terence P. Stewart*.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and Claudia Burke, Assistant Director. Of counsel on the brief was *Shana A. Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alexander H. Schaefer, Crowell & Moring, LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief for NSK Ltd., NSK Corporation, and NSK Precision America, Inc. were *Hea Jin Koh* and *Robert A. Lipstein*.

Kevin M. O'Brien, *Diane A. MacDonald*, *Eunkyung Kim Shin*, Baker & McKenzie, LLP, of Washington, DC, for defendant-intervenors NTN Bearing Corp. of America, NTN Corporation, NTN Bower, Inc., NTN Driveshaft, Inc., and American NTN Bearing Manufacturing Corp.

Neil R. Ellis, *Dave M. Wharwood*, *Rajib Pal*, Sidley Austin, LLP, of Washington, DC, for defendant-intervenors JTEKT Corporation and JTEKT North America, Inc.

Greyson L. Bryan, Jr., *David J. Ribner*, *McAllister M. Jimbo*, O'Melveny & Myers, LLP, of Washington, DC, for defendant-intervenors Nachi-Fujikoshi Corporation, Nachi America, Inc., and Nachi Technology, Inc.

OPINION

OVERVIEW

Restani, Judge:

This matter is before the court on plaintiff The Timken Company's ("Timken") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Timken contests the U.S. Department of Commerce's ("Commerce") final results in the 2009–2010 annual administrative reviews of the antidumping duty orders covering imports of ball bearings and parts thereof from Japan and the United Kingdom. *Ball Bearings and Parts Thereof from Japan and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part; 2009–2010*, 79 Fed. Reg. 35,312 (Dep't Commerce June 20, 2014) ("*Final Results*"). Specifically, Timken challenges Commerce's failure to apply the differential pricing analysis to determine whether the examined foreign exporters engaged in targeted dumping. The court grants the motion and remands the *Final Results* to Commerce.

BACKGROUND

This case concerns Commerce's decision not to apply the differential pricing analysis in the challenged administrative reviews to determine whether the examined foreign exporters engaged in a practice commonly referred to as "targeted dumping." To better understand the dispute, it is necessary to provide some background on the statutory and regulatory framework regarding targeted dumping before addressing Commerce's decision not to apply the differential pricing analysis in the administrative reviews at issue.

Prior to 2012, Commerce's default methodology for comparing home market and export prices in administrative reviews had been the average-to-transaction ("A-T") methodology. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8101 (Dep't Commerce Feb. 14, 2012) ("*Final Modification*"). When applying the A-T methodology, Commerce did not allow transactions with export prices above the home market price to offset transactions with export prices below the home market price, a controversial practice commonly referred to as "zeroing."[1] *Id.*

[1] For a detailed explanation of the zeroing practice and its history, see *Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013).

Commerce's default comparison methodology in investigations in 2012, however, was (and continues to be) the average-to-average ("A-A") methodology, without zeroing. *See* 19 U.S.C. § 1677f-1(d)(1)(A) (2012); *see also Beijing Tianhai Indus. Co. v. United States*, 7 F. Supp. 3d 1318, 1325 (CIT 2014). Commerce is permitted to use the A-T methodology in an investigation if it finds "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time." 19 U.S.C. § 1677f-1(d)(1)(B)(i). This pattern is commonly referred to as "targeted dumping." Additionally, Commerce must explain why the default A-A methodology cannot take account of the pattern before the A-T methodology can be employed. *Id.* § 1677f-1(d)(1)(B)(ii).[2]

Starting in 2008, Commerce began using the "*Nails* test"[3] in investigations to determine whether there was targeted dumping.[4] *See Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1372–73 (CIT 2010). Under the *Nails* test, Commerce required domestic petitioners to make allegations of targeted dumping before Commerce would determine whether targeted dumping was occurring. Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Light-Walled Rectangular Pipe and Tube from Mexico; 2011–2012 at 3–4, A-201–836, (Jan. 22, 2014), *available at* http://enforcement.trade.gov/frn/summary/mexico/2014–02068–1.pdf (last visited June 29, 2015) ("*Mexican Pipe and Tube*"). For several years, the *Nails* test was applicable only to investigations because, as explained, the A-T comparison methodology was used in administrative reviews by default.

On February 14, 2012, Commerce announced that the A-A methodology (without zeroing) would be the new default comparison meth-

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[2] The transaction-to-transaction methodology also is listed as a preferred methodology, but Commerce, for practical reasons, rarely employs this methodology. *See* 19 C.F.R. § 351.414(c)(2) (2014) ("The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.")

[3] The *Nails* test gets its name from the proceedings in which the test was first used. *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008).

[4] The actual details of the *Nails* test are not in question, nor are they relevant to resolution of the issue at hand. For a detailed discussion of the *Nails* test, *see Timken Co. v. United States*, 968 F. Supp. 2d 1279 (CIT 2014), *aff'd without opinion*, 589 F. App'x 995 (Fed. Cir. 2015). Similarly, the actual mechanics of the differential pricing analysis are not relevant to resolution of this case. For a detailed discussion of the differential pricing methodology, *see Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (Dep't Commerce May 9, 2014).

odology for administrative reviews. *Final Modification*, 77 Fed. Reg. at 8101–02. Commerce, however, did not rule out the use of the A-T methodology with zeroing in all circumstances. *See id.* at 8102. Rather, Commerce explained that its practice in reviews would parallel its practice in investigations, under which Commerce used the A-T methodology with zeroing where it found targeted dumping and explained why the A-A methodology could not take account of the pattern of differing prices. *See id.* At the time of the *Final Modification*, Commerce's practice was to use the *Nails* test in order to determine whether there was targeted dumping in deciding if the alternative A-T methodology should apply. Accordingly, no mention was made of a differential pricing analysis. Commerce explained that the *Final Modification* would govern (1) administrative reviews with preliminary results issued after April 16, 2012, and (2) administrative reviews discontinued as of February 14, 2012, and resumed after April 16, 2012. *Id.* at 8113.

On March 4, 2013, Commerce first used the differential pricing analysis instead of the *Nails* test in a targeted dumping analysis in the investigation of xanthan gum from the People's Republic of China. *See Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 33,351, 33,351–52 (Dep't Commerce June 4, 2013). Since that date, Commerce generally has applied the differential pricing analysis in all investigations and reviews when the preliminary results have issued after March 4, 2013.[5] *See* Issues and Decisions Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand at 22, A-549–822, (July 10, 2013), *available at* http://enforcement.trade.gov/frn/summary/thailand/2013–17042–1.pdf (last visited June 29, 2015) ("*Thai Frozen Warmwater Shrimp*"). Importantly, Commerce performs the differential pricing analysis sua sponte, using sales data submitted by the parties, in order to determine whether there is targeted dumping; no allegation of targeted dumping is needed. *Mexican Pipe and Tube* at 4–5. As explained above, Commerce previously had required petitioners to file allegations of targeted dumping before Commerce would employ the *Nails* test.

Turning to the facts of this case, Commerce issued the preliminary results for these administrative reviews on April 21, 2011. Issues and

[5] Commerce explained in its request for comment on the differential pricing analysis that it was switching from the *Nails* test to this analysis "based on the Department's further research, analysis and consideration of the numerous comments and suggestions on what guidelines, thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the average-to-transaction method." *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. at 26,722.

Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from Japan and the United Kingdom; 2009–2010 at 1, A-588–804, A-421–801, (June 13, 2014), *available at* http://enforcement.trade.gov/frn/summary/multiple/2014–14493–1.pdf (last visited June 29, 2015) ("*I&D Memo*"). At that time, the default comparison methodology in reviews remained the A-T methodology with zeroing, so no allegations regarding targeted dumping would have been relevant. On July 15, 2011, Commerce discontinued the reviews because of related litigation in the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit. *See id.* Then, over two years later, Commerce resumed the instant reviews, effective November 29, 2013. *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resumption of Administrative Reviews, and Advance Notification of Sunset Reviews*, 78 Fed. Reg. 76,104 (Dep't Commerce, Dec. 16, 2013). Because the reviews were discontinued as of February 14, 2012, and resumed after April 16, 2012, all parties agree that the instant reviews became subject to the *Final Modification*, that is, the A-A methodology would be the default comparison methodology. 77 Fed. Reg. at 8113; Pl.'s Reply Br. in Supp. of Its Mot. for J. on the Agency R. 2–3, ECF No. 66 ("Timken Reply Br."); Def.'s Resp. to Pl.'s Rule 56.2 Mot. 8, ECF No. 64 ("Gov. Br."); Def.-Intvnrs' Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 9, ECF No. 65 ("Def.-Intvnrs' Br.").

Commerce issued "post-preliminary"[6] results on March 25, 2014. Post-Preliminary Analysis Memorandum and Intent to Rescind a Review in Part, bar code 3190716–01 (Mar. 25, 2014). Commerce did not make any changes from the preliminary results except to apply the change in default methodology announced in the *Final Modification*. *See id.* at 5–6. Even though these "post-preliminary" results were issued over a year after the differential pricing analysis was first applied in *Xanthan Gum*, Commerce applied the A-A methodology here without performing any targeted dumping analysis. *See* Gov. Br. at 8.

Timken subsequently met with Commerce officials and submitted comments questioning Commerce's failure to use the differential pricing analysis to determine whether there was targeted dumping. Pl.'s Mem. of P. & A. in Supp. of Its Mot. for J. on the Agency R. 15, ECF No. 55 ("Timken Br."). On June 13, 2014, Commerce issued the *Final Results*, and, again, did not apply the differential pricing analysis. *See*

[6] This is a term not found in the statute or regulations.

I&D Memo at 6–7. Addressing Timken's comments in the *I&D Memo*, Commerce explained that it had "expressly limited the application of our [differential pricing] analysis to those reviews for which preliminary results were signed and issued after March 4, 2013." *Id.* at 7. For this proposition, Commerce cited the issues and decision memorandum accompanying an unrelated administrative proceeding. *See id.* at 7 & n.14. Commerce also asserted that the statute's use of the word "may" gives Commerce discretion in determining whether or not to use the A-T comparison methodology, and that "[g]iven the timing of the *Preliminary Results* in this review, we exercised our discretion and determined not to consider using the A-T method in these reviews." *Id.* The margins for each of the foreign respondents using the A-A comparison methodology without zeroing was calculated at zero. *Final Results*, 79 Fed. Reg. at 35,313–14.[7]

Timken now challenges Commerce's failure to employ the differential pricing analysis.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). "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). "This standard requires that Commerce . . . 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1328 (CIT 2010) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

DISCUSSION

Timken argues that Commerce failed to adequately explain its departure from what Timken alleges is a consistent practice of applying the differential pricing analysis in proceedings after March 4, 2013. Timken Br. at 18–29. Timken also argues that it would be an abuse of discretion for Commerce to completely close off a targeted dumping inquiry in this case without any explanation besides the statute's directive that Commerce "may" employ the alternative A-T methodology. Timken Br. at 30–36.

Defendant the United States ("the government") argues that Commerce's determination was consistent with its stated policies, in that

[7] According to Timken, had Commerce employed the differential pricing analysis, the resulting weighted-average dumping margins for the individually examined respondents would have been more than de minimis. Pl.'s Mem. of P. & A. in Supp. of Its Mot. for J. on the Agency R. 16–17 & n.43, ECF No. 54 (confidential version).

the reviews were subject to the *Final Modification*, but the differential pricing analysis applies only to cases in which the original preliminary results issued after March 4, 2013. Gov. Br. at 10–12. According to the government, because the differential pricing analysis was inapplicable, Timken was required to rely on the *Nails* test to show that targeted dumping had occurred. *Id.* at 12–14. Because Timken never submitted the necessary targeted dumping allegations in order to perform the *Nails* test, Commerce appropriately employed the default A-A comparison methodology. *Id.* Defendant-intervenors similarly contend that Timken should have submitted *Nails* test allegations and Timken's failure to do so is fatal to its case. *See* Def.-Intvnrs' Br. at 10–16. The government additionally contends that Commerce's use of the A-A methodology in this case was a reasonable exercise of its discretion. Gov. Br. at 14–17.

In rebuttal to the various arguments raised by the government and defendant-intervenors, Timken argues that there is no established practice of limiting the application of the differential pricing analysis solely to cases wherein the preliminary results issued before March 4, 2013. Timken Reply Br. at 6–11. Timken notes that the cases cited for this proposition declined to apply the differential pricing analysis for practical and policy reasons that were independent of the date of the preliminary results. *Id.* According to Timken, the reasons given in those cases for declining to apply the differential pricing analysis support applying it in this case. *Id.* at 12–13. Timken also notes that Commerce never relied on the absence of *Nails* test allegations in explaining its decision to apply the A-A comparison. *Id.* at 5; Timken Br. at 5, 27.[8]

The court will first address the government's and defendant-intervenors' justifications based on the date of the preliminary results. The court then will address the arguments based on the statute's use of the word "may." Based on the facts of this case, the court determines that Commerce's failure to employ the differential pricing analysis was unreasonable and an abuse of its discretion.

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[8] Counsel for Timken at oral argument asserted for the first time before the court that Timken did in fact submit the necessary allegations for Commerce to perform the *Nails* test. Were it relevant, the most appropriate time to raise this contention would have been in Timken's reply brief (accompanied by the relevant portions of the administrative record), when Timken was responding to the arguments made the by the government and defendant-intervenors in their respective briefs.

I. The Date of the Preliminary Results Is Not a Sufficient Justification in this Case

Commerce explained in the *I&D Memo* that it had "expressly limited the application of [the differential pricing] analysis to those reviews for which preliminary results were signed and issued after March 4, 2013." *I&D Memo* at 7. The government and defendant-intervenors reiterate this point. They further assert that the *Nails* test was the appropriate test and that the A-A methodology was applied because Timken never made the proper *Nails* test allegations. The court rejects these arguments based on the facts of record.

As Timken points out, Commerce never justified the use of the A-A comparison methodology based on the lack of *Nails* test allegations. As a general matter, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. Read literally, the *I&D Memo* suggests that because of the date of the preliminary results and when the reviews were resumed, the reviews are subject to the *Final Modification*'s change of the default methodology to the A-A comparison methodology, but not to Commerce's exception in the *Final Modification* that allows application of the A-T methodology. *See I&D Memo* at 7; 77 Fed. Reg. at 8102. It also singles out these reviews for disparate treatment without any explanation other than the dates of the preliminary results and the reinstatement order. An agency is free to change or deviate from its settled practice, but it must provide a reasoned explanation for doing so. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004). Even assuming that Commerce implicitly determined that, in this case, any targeted dumping inquiry would be governed by the *Nails* test instead of the differential pricing analysis, *see State Farm*, 463 U.S. at 43 (agency determinations may be upheld if agency's path is reasonably discernable), its determination does not withstand scrutiny.

Commerce stated that it had "expressly limited" application of the differential pricing analysis to reviews in which preliminary results were issued after March 4, 2013. *I&D Memo* at 7. For this proposition, Commerce cited *Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Partial Recision of Review, and Revocation of Order (in Part); 2011–2012*, 78 Fed. Reg. 42,497 (Dep't Commerce July 16, 2013). *I&D Memo* at 7 & n.14. In the issues and decision memorandum in that case, Commerce noted: "The Department has recently implemented its differential pricing analysis on a case-by case basis such that it has been applied in investigation preliminary determinations and review preliminary

results signed and issued after March 4, 2013." *Thai Frozen Warmwater Shrimp* at 22. Commerce further explained that "[w]hile we have switched to a differential pricing analysis for administrative reviews with preliminary results following the *Xanthan Gum Investigation* post-preliminary analysis, the *Nails* test is still a statutorily-consistent and valid method for determining whether to apply an A-to-T comparison method as an alternative to an A-to-A comparison method." *Id.* at 23. Commerce then explained that it was declining to depart from the *Nails* test, which it had used in the preliminary results. *Id.*

Defendant-intervenors cite several other cases supposedly supporting this proposition, but in only one of these cases did Commerce discuss whether the *Nails* test or the differential pricing analysis should apply. In *Fresh Garlic from China*, Commerce stated: "The Department has implemented its differential pricing analysis on a case-by-case basis such that it has been applied in review and investigation preliminary results issued after March 4, 2013." Issues and Decision Memorandum for the Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China 10, A-570–831, (June 10, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–14329–1.pdf (last visited June 29, 2015) ("*Fresh Garlic from China*"). Commerce added: "We also note that while we have switched to a differential pricing analysis for preliminary results issued after March 4, the *Nails* test is still a statutorily-consistent and valid method for determining whether to apply an average to transaction comparison... ." *Id.* Commerce noted that the *Nails* test applied at the time the preliminary results were issued in December 2012 and that "[i]n order to apply differential pricing in this proceeding, the Department would have had to issue amended calculations (applying the differential pricing methodology) and allowed parties to submit comments on these results." *Id.* at 9–10. Commerce determined that it did not have enough time within the statutory deadlines for completion of the review to do so. *Id.* at 10.

The reviews cited are clearly distinguishable from the administrative reviews currently before the court and do not provide a reasonable basis for Commerce's failure to apply the differential pricing analysis in this case. In the cases discussed above and cited by defendant-intervenors, the *Nails* test clearly governed the preliminary results, and the parties to those proceedings presumably were aware of that fact. Petitioners in those cases thus had either submitted *Nails* test allegations and Commerce had performed a targeted dumping inquiry, or petitioners failed to submit the allegations, but

were on clear notice that they should have done so. Changing the targeted dumping methodology late in the proceedings would have created administrative problems such as those identified in *Fresh Garlic from China*. In those cases, maintaining consistency in the applicable targeted dumping analysis between the preliminary and final results was fair to the parties and avoided administrative difficulties.

Here, however, the original preliminary results issued before the *Final Modification*. During that time, *no targeted dumping analysis applied*, because the default comparison methodology in reviews was the A-T methodology. For purposes of applying the A-A methodology as the default or conducting any targeted dumping analysis, only after resumption of the reviews was any targeted dumping methodology pertinent. As explained above, the reviews were resumed nine months after Commerce had introduced the differential pricing analysis as the new targeted dumping methodology, and the "post-preliminary" results issued a full year after Commerce had transitioned to the new test. There were no equitable or administrative reliance interests in employing the *Nails* test based on the original preliminary results, because there was no prior practice of relying on the *Nails* test applicable to this case. The government at oral argument specifically conceded that applying the differential pricing analysis would not have created any administrative burden. In this regard, the "post-preliminary" results issued following the resumption of the reviews were the functional equivalent of the preliminary results in the cases cited by Commerce and the defendant-intervenors, as this was the first opportunity for Commerce to apply a targeted dumping analysis.

Commerce presumably believes that the differential pricing analysis is preferable to the *Nails* test in conducting the targeted dumping inquiry, otherwise Commerce would not have abandoned the *Nails* test in its favor. *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720, 26,722 (Dep't Commerce May 9, 2014) ("Given the Department's experience over the last several years, and based on the Department's further research, analysis and consideration of the numerous comments and suggestions on what guidelines, thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the average-to-transaction method, the Department is developing a new approach for determining whether application of such a comparison method is appropriate in a particular segment of a proceeding pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The new approach is referred to as the 'differential pricing'

analysis, as a more precise characterization of the purpose and application of section 777A(d)(1)(B) of the Act."). At the time the relevant reviews were reinstated, the differential pricing test already had been broadly adopted. Commerce provided no reason for its refusal to apply its current methodology and its supposed reversion back to the test it had abandoned nine months before these reviews were reinstated other than the arbitrary cut-off date discussed in the cases cited above. But the cut-off date made some sense in those cases. The practical difficulties of switching from the *Nails* test to the differential pricing test late in the administrative proceedings weighed against employing the new test. In this case, Commerce was not sticking with the test that it had already applied or could have applied—the "post-preliminary" results were the first opportunity for a targeted dumping analysis of any type to be applied. As explained above, there was no raising of administrative burden or equitable interest in applying the *Nails* test, and Commerce's arbitrary cut-off date makes no sense in this case. Commerce has not provided a reasonable justification for refusing to apply its most current methodology to these reviews, and the court holds that the failure to apply the differential pricing analysis was an abuse of discretion.

The arbitrariness of Commerce's determination is evidenced further by the lack of notice given to Timken that the *Nails* test, which places the burden on petitioners to initiate the targeted dumping inquiry, would be applied instead of the differential pricing analysis that Commerce was applying in the other administrative proceedings at the time. Commerce ultimately seeks to use the default comparison methodology applicable on November 29, 2013 (the date the reviews were reinstated), but for determining whether any exception to that default methodology should apply, Commerce seeks to use the test that was applicable on April 21, 2011 (the date the preliminary results were issued). The cases cited by the government and defendant-intervenors failed to provide adequate notice that Commerce might take such a strange position.

Commerce never clearly stated that the differential pricing analysis would apply only in reviews with preliminary results following March 4, 2013. The statements quoted and discussed above reasonably could be read as providing context for the parties' arguments in those cases (i.e., to establish that Commerce had put forward a new methodology while the proceedings were ongoing) and/or to describe Commerce's practice until that point. Notably, Commerce did not reject application of the differential pricing analysis in those cases simply because of the date of the preliminary results. In *Thai Frozen Warmwater*

Shrimp, Commerce already had applied the *Nails* test in the preliminary results, and the respondent seeking the differential pricing analysis would not have received any benefit from the change in methodology because it had received a de minimis margin even though the *Nails* test was used. *Thai Frozen Warmwater Shrimp* at 23. The date of the preliminary results, by itself, was not a key factor in the analysis. Similarly, in *Fresh Garlic from China*, Commerce explained that it was too late in the proceedings to switch from one targeted dumping methodology to another and complete the review within the statutory deadline. *Fresh Garlic from China* at 10. Again, the date of the preliminary results, by itself, was not the dispositive factor.

The language Commerce used in the cited cases was equivocal, Commerce did not base its decisions solely on the date of the preliminary results, and the reasons given for not applying the differential pricing analysis in those cases do not apply in this case. The passages supposedly giving "notice" from these other administrative cases stand in stark contrast to the straightforward and unequivocal statement in the *Final Modification* that clearly explained which proceedings were subject to the change in the default comparison methodology. *See* 77 Fed. Reg. at 8113. One might further argue that parties do not receive notice from statements buried in issues and decision memoranda in other cases, even when clearer than the ones at issue here. Issues and decision memoranda are not published in the Federal Register. Rather, they must be accessed through Commerce's website or legal research databases such as Lexis or Westlaw. One could also assume that had Commerce chosen a more public form of notice to announce its asserted policy, it might have used clearer language, as it did in the *Final Modification*.

Under the facts of this case, Timken was entitled to assume that Commerce would apply the same analysis it was applying in other proceedings at the time (i.e., differential pricing), and Commerce's failure to do so was unreasonable.[9] Again, it was only at this time that the new default A-A methodology was applied to these reviews, and

[9] An opinion of this Court recently held that a party in that case could "not rely on the *Xanthan Gum* [post-preliminary analysis] memorandum for its claim that the memorandum established a change in the controlling law obligating Commerce to take action" regarding the differential pricing analysis. *See Husteel Co. v. United States*, Slip Op. 15–66, 2015 WL 3853709, at *14 (CIT June 23, 2015). In that case, at the time the party submitted its arguments regarding the differential pricing analysis to Commerce, Commerce had yet to apply the analysis in a final determination. *See id.* at *13–14. Thus, the party could not show that there had been an actual change in law or policy. This is clearly distinguishable from the case here, where the differential pricing analysis had been applied in numerous cases before the reviews at issue were resumed and targeted dumping became relevant.

thus it was the first time that *any* targeted dumping analysis became relevant. Timken did not have sufficient reason to know that Commerce, despite applying the differential pricing analysis in investigations and reviews for a year before the "post-preliminary" results, would revert back to a test that it had abandoned a year prior and had never applied in any segment of these reviews.[10] This failure to give Timken sufficient notice as to the applicable inquiry bolsters the court's conclusion that Commerce abused its discretion. *See Borden, Inc. v. United States*, 22 CIT 233, 240–42, 4 F. Supp. 2d 1221, 1228–30 (1998) (remanding for Commerce to articulate standards by which it would evaluate targeted dumping allegations after Commerce repeatedly rejected allegations without explaining what was required to initiated targeted dumping inquiry), *overruled in part on other grounds by Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1316 (Fed. Cir. 2001).

II. Commerce Abused the Discretion Given to It by the Statute

Commerce additionally relied on the language in 19 U.S.C. § 1677f-1(d) that provides that Commerce "may" use the A-T comparison methodology if the statutory criteria are met. The court has recognized that the statute gives Commerce discretion in determining, based on standards it chooses, to apply the A-T comparison methodology or not, even in the face of some evidence of targeted dumping. *See Timken Co. v. United States*, 968 F. Supp. 2d 1279, 1289–91 (CIT 2014), *aff'd without opinion*, 589 F. App'x 995 (Fed. Cir. 2015). The use of the word "may," however, does not give Commerce the freedom to act arbitrarily.

Even when operating under a statute that explicitly gives Commerce discretion, "if Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." *Save Domestic Oil*, 357 F.3d at 1283–84. As explained above, Commerce appears to have singled out these reviews by applying the new default A-A comparison methodology without even considering whether the alternative A-T methodology might be appropriate. Commerce has failed to explain this departure. Even assuming that Commerce's implicit reasoning was that any targeted dumping analysis was subject to

[10] The court emphasizes that Commerce did not simply change the statistical standards by which it would determine whether there was targeted dumping, but rather Commerce changed its practice as to who must initiate a targeted dumping inquiry in the first place. Assuming that Commerce's assertion that Timken's failure to submit *Nails* test allegations formed part of its reasoning and was supported by the record, Timken was not simply faced with a new methodology on which to comment, but rather was given the burden of making allegations Timken had no clear understanding that it had to make.

procedures surrounding the *Nails* test, and thus these reviews were treated similarly to other reviews subject to the *Nails* test, the court holds that this would be an abuse of discretion under the facts of this case. As indicated above, at the time the reviews were reinstated and the "post-preliminary results" were issued, the differential pricing test had long been in place, and Timken lacked sufficient notice that it would be required to make allegations relevant to a test that Commerce had abandoned many months prior. Although the statute gives Commerce discretion in determining whether to apply the A-T methodology, parties generally are entitled to notice as to how Commerce plans to conduct its targeted dumping inquiry. *See Borden*, 22 CIT at 240–42, 4 F. Supp. 2d at 1228–30. Timken lacked that notice, and the statute's use of the word "may" does not deprive them of that right.

CONCLUSION

For the reasons stated above, Commerce's refusal to perform the differential pricing analysis was unreasonable and an abuse of discretion. The case therefore is remanded to Commerce for it to apply the differential pricing analysis. The court notes that Commerce declined to address certain issues in the *I&D Memo* on the grounds that the use of the A-A comparison methodology without a targeted dumping inquiry mooted those issues. The court also recognizes that the respondents' had no need to challenge in court any determinations made by Commerce in the *Final Results* because they received zero margins; respondents, however, may wish to raise these issues either before the agency or before the court if application of the differential pricing analysis results in non-de minimis margins. To facilitate the efficient resolution of this case, Commerce shall identify as early as possible the issues that it will consider on remand and those issues for which it will adopt the analysis contained in the *I&D Memo*. Commerce shall make clear in the remand results which issues were considered anew and which issues are governed by the analysis in the *I&D Memo*.

Remand results shall be filed by September 10, 2015. Because the court cannot anticipate the scope of the arguments following remand, which may include issues that are not presently before the court, the parties shall confer and file a joint status report or proposed briefing schedule within fourteen days of the filing of the remand results.

Dated: July 8, 2015
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Slip Op. 15–74

TYCO FIRE PRODUCTS L.P., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 08–00190

[Plaintiff's motion for summary judgment is denied in Customs classification matter; Defendant's cross-motion for summary judgment is granted.]

Dated: July 10, 2015

Michael E. Roll, Pisani & Roll, of Los Angeles, CA, argued for plaintiff.

Amy M. Rubin, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Restani, Judge:

In its second motion for summary judgment, Tyco Fire Products L.P. ("Tyco") once again contends that its products, filled glass bulbs, should be classified under Chapter 84 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as parts of either fire sprinklers or water heaters. U.S. Customs and Border Protection ("Customs") originally determined, and Defendant the United States ("the government") continues to argue in its second cross-motion for summary judgment, that the products are properly classified under Chapter 70, as articles of glass. After denying the parties' original cross-motions for summary judgment due to insufficient evidence as to material facts, the court now denies Tyco's motion, grants the government's cross-motion, and holds that the filled bulbs are properly classified under subheading 7020.00.60, as other articles of glass.[1]

BACKGROUND

The court assumes familiarity with the facts of the case as set out in the previous opinion, *Tyco Fire Products L.P. v. United States*, 918 F. Supp. 2d 1334, 1337–39 (CIT 2013) ("*Tyco I*"), but they are summarized below for ease of reference. From July 2004 to July 2006, Tyco imported forty-two models of filled glass bulbs from two German

[1] Tyco challenges Customs' classification decisions in two separate cases that have not been consolidated, Ct. Nos. 08–00190 and 08–00194. The cases generally cover the same products, and therefore this opinion addresses the claims in both cases for which the parties filed identical briefs. An order is issued simultaneously in Ct. No. 08–00194 adopting this decision.

producers, Geissler Glasinstrumente GmbH ("Geissler") and Job GmbH ("Job") through the port of Dallas-Fort Worth, Texas, for use in fire sprinklers and water heaters. *Id.* at 1337–38.

Each of these filled bulbs is made of glass and has an inner tube which contains an air bubble and colored liquid. *Id.* at 1337. According to the Customs' Laboratory Report, the colored liquid is triethylene glycol.[2] Laboratory Report No. NY20131574, DE 75–6 ("Customs' Lab Report"). The filled bulbs function as thermal activation devices because when the bulbs are exposed to heat, the glass exterior transfers the heat to the liquid contained in the inner tube of the bulb, causing the liquid to expand. *Tyco I*, 918 F. Supp. 2d at 1337. As the liquid expands, the pressure in the bulb builds. *Id.* Once the bulb reaches its activation temperature, which is determined partially by the size of its air bubble, the pressure inside the bulb becomes too strong and the bulb shatters. *Id.* at 1337–38 & n.5. For bulbs used in water-based fire sprinklers, when the bulb shatters, the valve which previously had been held closed by the bulb is released and water is dispersed. *Id.* at 1337–38. For the filled bulbs used in water-heaters, when the bulb shatters, a door that was previously held open by the bulb closes, cutting off the air supply to the combustion chamber, thereby preventing an explosion. *Id.* at 1338.

Customs classified the filled bulbs under subheading 7020.00.60 of the HTSUS as "other articles of glass," and Tyco protested. *Id.* at 1338–39. The protest was denied. Tyco filed suit and eventually moved for summary judgment. *Id.* at 1337, 1338 n.6. Tyco argued that either all forty-two models of filled bulbs should be classified under HTSUS 8424.90.90 as "other parts" of goods covered by Heading 8424 or three of Tyco's forty-two bulb models should be classified under HTSUS 8419.90.10 as parts of water-heaters, with the remainder being classified under HTSUS 8424.90.90, as parts of fire-sprinklers. *See id.* at 1338 n.6. Tyco argued that thirty-nine models of its filled bulbs derive their essential character from the liquid that they contain and that the sole or principal use of the bulbs was as parts of fire sprinkler systems. *Id.* at 1337, 1344. As to the remaining three models, Tyco argued that the sole or principal use of the bulbs was as parts of water-heaters. *Id.* at 1344. The government filed a cross-motion for summary judgment, claiming that the bulbs could be

[2] Customs' Lab Report indicates that nine of the twenty-three samples analyzed contain triethylene glycol, and the parties agree that Geissler bulbs contain triethylene glycol. Customs' Lab Report at 1–2; Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. 5, ECF No. 84 ("Def.'s Reply"). The parties disagree as to whether the Job bulbs contain other unidentified chemicals that are essential to the proper functioning of the bulbs. Def.'s Reply at 5. Because the filled bulbs have the essential character of glass and are thus properly classified in Heading 7020, the exact chemical composition of the liquid would not alter the classification decision.

classified only under HTSUS 7020.00.60 and rejecting plaintiff's classification, because statutory Note 1(c) of Chapter 84 excludes parts made of glass. *Id.* at 1339, 1341. The government argued that the bulbs derive their essential character from their glass component and alternatively that Tyco had not established the sole or principal use of the bulbs. *Id.* at 1342–43.

Though the court found that three models of the filled bulbs were principally used in water heaters, the court denied both parties' motions for summary judgment. *Id.* at 1344–45. Neither Tyco nor the government presented evidence on the relative weight or value of the glass and liquid components used in the filled bulbs. *Id.* at 1343. In the absence of this information, the court denied both parties' motions for summary judgment, concluding that it had insufficient evidence to determine the essential character of the filled bulbs. *Id.* Additionally, because of the conflicting evidence that Tyco and the government presented on the uses of thirty-nine models of filled bulbs that Tyco argued were used in fire sprinklers, the court could not determine the principal use of those bulbs as a matter of law. *Id.* at 1344. The principal use determination for the water-heater bulbs also did not resolve the inquiry in Tyco's favor because principal use is relevant only upon a finding that the bulbs are not excluded from Chapter 84.

In response to the court's opinion, Tyco submitted twenty-three samples to the Customs Laboratory for testing. Pl.'s Mem. of Law in Opp'n to Def.'s Second Cross-Mot. for Summ. J. and in Reply to Def.'s Opp'n to Pl.'s Second Mot. for Summ. J. 5 n.1, ECF No. 79 ("Pl.'s Reply"). The results indicate that by weight the glass is the predominant component of the filled bulbs. Customs' Lab Report at 1. The average percent by weight of glass in the bulbs ranges from a low of 68.85% to a high of 83.54%. *Id.* Inversely, the average percent by weight of liquid in the bulbs ranges from a low of 16.46% to a high of 31.15%. *Id.* The parties also calculated the relative importance of the glass and liquid by value. The glass is predominantly the more expensive component. In the Geissler bulbs, the glass accounts for the majority of the material cost. Pl.'s Mem. of Law in Supp. of Pl.'s Second Mot. for Summ. J. 13, ECF No. 68–5 ("Pl.'s Mot."); Def.'s Reply at 21; Decl. of Peter Rahm 2, ECF No. 68–2 ("Rahm Decl."). For the Job bulbs, the glass is predominantly more expensive, but the relation of glass value to liquid value varies based the size of the bulb. For the 5mm diameter bulbs, the glass accounts for 80% of the material cost. Decl. of Bodo Muller 4, ECF No. 68–1 ("Muller Decl."). For the 3mm bulbs, the glass accounts for 64% of the material cost. *Id.* For the 2.5mm bulbs and water-heater bulbs, however, the glass accounts for 30% of the material cost. *Id.*

Tyco has filed another motion for summary judgment, arguing once again that the filled bulbs are properly classified in Chapter 84. Pl.'s Mot. at 2. Tyco provides two reasons as to why Note 1(c) does not exclude the bulbs from classification under Chapter 84. *Id.* at 11–12. First, Tyco argues that the proportion of liquid in the bulbs is too high for the bulbs to be considered articles of glass. *Id.* Second, Tyco argues that the glass in the bulbs is static because "it [the glass] just sits there" and the liquid is dynamic such that its function means that the bulbs have lost their character as glass. *Id.* at 12–13. Tyco also argues that the court should hold that the bulbs do not have the essential character of glass because the liquid, if not more important, is at least as important to the function of the bulbs as the glass is. *Id.* at 17. Tyco finally argues that the court already determined that the three bulb models used in water-heaters are solely and principally used in water-heaters and that the court should now determine that the remaining thirty-nine models are solely and principally used in fire sprinkler systems. *Id.* at 4–9.

In response to Tyco's motion, the government argues that Customs' classification of Tyco's bulbs under Heading 7020 was correct and that Note 1(c) prevents the bulbs from being classified under Chapter 84. Def.'s Mem. in Supp. of Its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. 11, 13, ECF No. 75 ("Def.'s Mot."). Specifically, the government argues that the presence of liquid in the bulb does not stop the bulb from being "of glass" and that the bulbs derive their essential character from their glass component. Def.'s Mot. at 14–15, 18; Def.'s Reply at 13–22. Alternatively, and despite the law of the case which has decided the principal use of the water-heater bulbs, the government argues that Tyco has not adequately established the principal use of the bulbs as parts of either water-heaters or fire sprinkler systems. Def.'s Mot. at 26–30; Def.'s Reply at 26–27.

Because the filled bulbs are excluded from Chapter 84 by Note 1(c), have the essential character of glass, and are not more specifically described elsewhere in the HTSUS, the court will grant the government's cross-motion for summary judgment, deny Tyco's motion, and holds that the bulbs are properly classified in Heading 7020.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). Summary judgment is appropriate when the parties' submissions "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Where tariff classification is at issue, "summary judgment is appropriate when there is no genuine dispute as to the underlying

factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The court makes findings of fact and conclusions of law de novo. *See* 28 U.S.C. § 2640(a).

Plaintiff has the burden of establishing that the government's classification of the product was incorrect, but does not bear the burden of establishing the correct tariff classification; instead, the correct tariff classification will be determined by the court. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). In determining the correct tariff classification, the court first must "ascertain[] the proper meaning of specific terms in the tariff provision." *David W. Shenk & Co. v. United States*, 21 CIT 284, 286, 960 F. Supp. 363, 365 (1997). That meaning is a question of law. *See Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). Second, the court must determine the tariff provision under which the subject merchandise is properly classified based upon the factual description of the goods. *See Bausch & Lomb*, 148 F.3d at 1365. This ultimate determination is also a question of law. *Id.* at 1365–66. The statutory presumption of correctness given Customs' classification decisions by § 2639(a)(1) does not apply if the court is presented solely with a question of law by a proper motion for summary judgment. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

DISCUSSION

The General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs") of the HTSUS provide the analytical framework for the court's classification of goods. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). GRI 1 instructs that tariff classification "shall be determined according to the terms of the headings and any relative section or chapter notes." The section and chapter notes of the HTSUS are not interpretive rules; rather, they are statutory law, and therefore, they must be considered in resolving classification disputes. *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (recognizing the controlling authority of chapter notes).

I. Exclusion From Chapter 84

As required by GRI 1, the court begins its inquiry with the relative section and chapter notes to headings 8424 and 8419. Chapter Note 1(c) excludes from Chapter 84 parts that are for technical use and are of glass. Specifically, Note 1(c) states "This chapter does not cover: [l]aboratory glassware (heading 7017); machinery, appliances or other articles for technical uses or parts thereof, of glass (heading

7019 or 7020)." Chapter Note 84, 1(c). Accordingly, if the bulbs are "of glass," they cannot be classified in Chapter 84 as parts of other goods.

For additional guidance on the scope and meaning of tariff headings, the court may also consider the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992). Although the ENs are not part of U.S. law and therefore are not binding on the court, they are "indicative of proper interpretation" of the tariff schedule. *Id.*, (quoting H.R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582) (internal quotation marks omitted).

The ENs to Chapter 84 indicate that an item ceases to be "of glass" when it is combined with a "high proportion" of other materials or when static components of glass are combined with "mechanical components" of other materials, such as a motor or pump. EN Ch. 84 at 1393 (2002).[3] Tyco argues that because the bulbs combine glass with 16–31% liquid and alternatively because the glass acts as a static component and the liquid operates as a dynamic component, the bulbs are not of glass and are not excluded from Chapter 84 by Note 1(c). Pl.'s Mot. at 10–13. Thus, according to Tyco, because the filled bulbs are not excluded from Chapter 84, they are more specifically described outside Chapter 70 and therefore cannot be properly classified in Heading 7020. *See* EN Ch. 70 at 1155.[4] The government responds that the liquid does not represent a "high proportion" of other materials and that the liquid is not a mechanical component such that the filled bulbs would be excluded from Chapter 84 by Note 1(c) and the bulbs are classified in Heading 7020. Def.'s Reply at 13–17.

The court holds that Note 1(c) excludes the filled bulbs from Chapter 84 because the filled bulbs are "of glass." First, the filled bulbs do not combine the glass component with a high proportion of another material, namely the liquid. In context, the 16–31% liquid that is combined with the glass is not a "high proportion" of non-glass material. Second, the filled bulbs do not combine a static glass component with a mechanical non-glass component.

The filled bulbs are of glass because the 16–31% of liquid combined with the glass in the filled bulbs is not a sufficiently high proportion of another material to cause the filled bulbs to lose their character of glass. *See* EN Ch. 84 at 1393. "[H]igh proportion" is not defined elsewhere in the HTSUS or ENs, however, the arguments presented

[3] All citations to the ENs are to the 2002 version, the most recently promulgated edition at the time of importation.

[4] Tyco does not dispute that the filled bulbs are for technical uses. Def.'s Reply at 9.

to the court indicate that 16–31% is insufficient. Although Tyco argues that nothing in the ENs suggest that high proportion must mean predominant or majority, and instead merely means significant, the history behind the EN indicates otherwise. Pl.'s Mot. at 11 n.6.

The relevant EN containing the "high proportion" language was adopted after a challenge was brought before the Nomenclature Committee of the Customs Co-Operation Council ("the Council") by the German Administration.[5] Supplemental Authority Filed with Letter to Ct. dated June 10, 2015, ECF No. 91 ("Gov. Supp. Authority"). In evaluating whether a rotary vacuum evaporator should be classified in Heading 8417 as an "apparatus for heat treatment of materials" or in Heading 7021 as "machinery and appliances of glass," the Council was called upon to examine Note (1)(c) to Chapter 84. *Id.* at 13. The Council looked to the ENs for Heading 9025 as the only source of guidance available, which explained the dividing line between instruments of Heading 9025 and laboratory glassware of Heading 7017. *Id.* at 17. The ENs to Heading 9025 read "instruments normally cease to have the essential character of glassware when they consist partly of glass but are *mainly* of other materials." Explanatory Notes to the Brussels Tariff Nomenclature 7, ECF No. 92 (emphasis added). The challenge also proposed the adoption of an EN that stated articles of glass would not be excluded from Chapter 84 when the glass components "are combined with an equal or greater proportion of components of materials not excluded from [Chapter 84]." Gov. Supp. Authority at 15. In 1970, at its 24th Session, the Nomenclature Committee adopted a new EN to Chapter 84 which included the "high proportion" language. *Id.* at 38.

When the ENs to Chapter 84 at issue were adopted, the drafters intended to apply a criterion for excluding glassware from Chapter 84 similar to that contained in the then existing ENs to Chapter 90. *Id.* at 33. Therefore, because the EN to Chapter 84 was based in part on the EN to Heading 9025, the EN to Chapter 84 should be interpreted similarly to that of Heading 9025. Accordingly, because the presence of 16–31% liquid does not make the filled bulbs mainly of liquid rather than of glass, the filled bulbs are of glass and are excluded from Chapter 84 by operation of Note 1(c).

Further, the filled bulbs also remain of glass because the liquid contained in the bulbs is not a mechanical non-glass component combined with a static glass component, which would cause the bulbs to lose their character of glass. EN Ch. 84 at 1393 ("Combinations of static components of . . . glass with mechanical components such as

[5] The Customs Co-Operation Council is the precursor to the World Customs Organization, the body which promulgates the ENs.

motors, pumps, etc., of other materials (e.g., of metal)" as a general rule lose the character of glass). Tyco argues that the filled bulbs operate dynamically when heated, as the liquid expands and eventually the filled bulbs shatter. Although this description is correct, dynamic is not the same as mechanical, the term used in the EN. "Mechanical" means "of, relating to, or concerned with machinery." *Webster's Third New International Dictionary (Unabridged)* 1400 (Phillip B. Gove, 1981).[6]

Plaintiff argues that "mechanical" is also defined as "relating to physical forces or motion." Pl.'s Surreply to Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. 12, ECF No. 87. *Webster's* seventh definition of mechanical is "caused by, resulting from, or relating to a process that involves a purely physical as opposed to a chemical change." *Webster's* at 1401. The parties agreed at oral argument that when the liquid heats and expands there is no chemical reaction that alters the chemical composition of the liquid. The parties disagree, however, whether the expansion of the liquid and resulting shattering of the bulb is a purely physical, and thus, mechanical process. Although the functioning of the bulb likely meets the purely physical process definition of mechanical, that is not the proper definition of mechanical for purposes of the EN at issue. The EN indicates that mechanical components, which when combined with static components of glass cause the item to lose the character of glass, include motors and pumps and suggests that the mechanical components be of metal, plastic, or similar solid materials. EN Chapter 84 at 1393. The inclusion of motors and pumps in the EN as examples of mechanical components colors the proper interpretation of the term "mechanical." Although mechanical components are not limited to motors and pumps, those examples indicate that the drafters were not intending to refer to the physical movement of atoms when they used the term "mechanical." There is nothing mechanical in the bulb that would render it similar to a motor or pump and nothing in the bulb similar to machinery.

Finally, as discussed below, the filled bulbs have the essential character of glass. Accordingly, even if the analysis under Note 1(c) to determine whether the filled bulbs are "of glass" is not as stringent as the essential character analysis, because the filled bulbs are essen-

[6] A similar definition of "mechanical" was recently utilized by the court in *Rubbermaid Commercial Products, LLC v. United States*, 32 F. Supp. 3d 1331, 1343 (CIT 2014) (defining "mechanical" as "of or relating to machines or tools" based on the American Heritage® Dictionary of the English Language (2014)).

tially of glass, they are in fact of glass for purposes of Note 1(c). Thus, the filled bulbs cannot be classified in Chapter 84.[7]

II. Essential Character

As the bulbs are not classifiable in Chapter 84, the court must determine whether they are properly classified under Heading 7020 (as articles of glass). The ENs to Chapter 70 explain that articles containing glass are to be classified in Chapter 70 provided they are not more specifically covered by other headings of the HTSUS and are to be classified in Heading 7020 when the articles are not otherwise classified in Chapter 70. EN Ch. 70 at 1155; EN Heading 7020 at 1178. The ENs further explain that articles remain in Heading 7020 "even if combined with materials other than glass, **provided** they retain the essential character of glass articles." EN Heading 7020 at 1178 (emphasis in original). The government thus argues that because the filled bulbs retain the essential character of glass and are not more specifically described elsewhere in Chapter 70 or the HTSUS, the bulbs are classified in Heading 7020. Even though the bulbs contain a liquid,[8] because they "retain the essential character of glass" they are properly classified under Heading 7020. EN Heading 7020 at 1178.

In evaluating goods' essential character under analogous GRI 3(b),[9] courts consider "the nature of the material or component, its bulk, quantity, weight or value, or . . . the role of a constituent material in relation to the use of the goods." EN GRI 3(b), (VIII) at 4. Courts can also consider the article's name, other recognized names, invoice and catalogue descriptions, size, primary function, uses, and ordinary common sense. *Home Depot, U.S.A., Inc. v. United States*, 427 F.

[7] Under ARI 1(c) "a provision for parts of an article covers products solely or principally used as a part of such articles." Accordingly, were the goods not excluded from Chapter 84, the court would need to determine the sole or principal use of the filled bulbs to determine whether they could be classified as parts of fire sprinklers or water-heaters. As the goods are excluded from Chapter 84, however, there is no need to address the parties' sole or principal use arguments, because under Heading 7020 the goods are not classified as parts.

[8] The court notes that nothing in the Section or Chapter notes for Heading 2909 appears to exclude the filled bulbs. *See* Section VI Notes at 257–58; Chapter 29 notes at 369–70. Heading 2909 covers "Ethers, ether-alcohols, ether-phenols, ether-alcohol-phenols, alcohol peroxides, ether peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives." Subheading 2909.19.30 specifically covers "Triethylene glycol dichloride." Because the essential character of the bulbs is of glass, however, the bulbs are not properly classified in Heading 2909 and must be classified in Heading 7020.

[9] Although the outcome is the same under a GRI 1 or GRI 3(b) analysis, here the essential character analysis is properly under GRI 1 because articles of glass combined with other elements are still articles of glass if that is their essential character. EN Heading 7020 at 1178.

Supp. 2d 1278, 1293, 30 CIT 445, 459–60 (2006), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007).

Both Tyco and the government believe that the function should determine the essential character of the filled bulbs, and each argues that either the glass or the liquid performs the essential function. The primary considerations when selecting a particular filled bulb include 1) the response time required, 2) the load the filled bulb will have to bear, 3) the environmental conditions the bulb will be placed into, and 4) the temperature rating. Relative to the characteristics that impact the decision of which bulbs to use, the glass is an important structural element of the bulb that impacts the load factor. Silva Dep. 59, 71, ECF No. 75–1–75–3. The glass also impacts the response time, permits the bulb to be used in certain environments where there could be risk of corrosion, and maintains the integrity of the bulb. *See id.* at 75–76, 87–89, 149, 166–67. The glass also keeps the filled bulb in place and prevents it from activating until the proper time. *See id.* at 71, 79, 87–89. The liquid heats up, expands, and is eventually what causes the bulb to shatter. The liquid also impacts the temperature rating and the response time. *See id.* at 74–75, 92–93, 132. It is clear that both the glass and the liquid play critical roles in the proper functioning of the filled bulb. Because both elements are indispensable to the proper functioning of the bulb and are of essentially equal importance to the proper functioning, function cannot determine the essential character of the bulbs.[10]

Relying on the other essential character factors, the court holds that the essential character of the filled bulbs is that of an article of glass. First, in each of the filled bulb models, the glass component weighs more than the liquid component. The percentage weight of glass for each model ranges from 69–84%. Pl.'s Mot. at 11; Def.'s Reply at 5–6. Additionally, for almost all of the product models, the glass is the more expensive component. For the Geissler bulbs, the glass is always more expensive than the liquid. Def.'s Reply at 21; Rahm Decl. at 2. For only the smallest of the Job bulbs and the water-heater bulbs is the glass less expensive. Muller Decl. at 4. Second, the filled bulbs

[10] Tyco argues that because both the glass and liquid are indispensable, the essential character of the bulb cannot be the glass. Pl.'s Mot. at 14, 17 ("[I]f Material A is **at least** as important as Material B, one can say that the item no longer has the essential characteristic of Material B."); thus, according to Tyco, because of the importance of the liquid, the filled bulbs cannot have the essential character of glass. Pl.'s Reply 4. The court has determined, however, that even where two component materials are indispensable to the functioning of a good, it is possible for the good's essential character to come from one of those component materials. *See Alcan Food Packaging (Shelbyville) v. United States*, 929 F. Supp. 2d 1338, 1350 (CIT 2013) (holding that although both the plastic and aluminum foil that made up the product at issue were indispensable to its functioning, the plastic imparted its essential character because it imparted the qualities that made the product what it was).

are known as and referred to, even by Tyco, as "glass bulbs." Def.'s Mot. at 21; Gov. Exs. B, D, F, G, K, L, and M. Finally, when duty was suspended for this class of filled bulbs, and they were given a specific tariff subheading, 9902.24.26, they were described as "liquid-filled *glass* bulbs, designed for sprinkler systems and other release devices." Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, § 1331, 120 Stat. 2922, 3124 (emphasis added).[11] Thus, considering all of the factors relevant to the essential character analysis, the filled bulbs have the essential character of glass. Customs properly classified the filled bulbs in Heading 7020 of the HTSUS consistently with congressional intent.

CONCLUSION

For the foregoing reasons, the court denies Tyco's motion for summary judgment, grants the government's cross-motion for summary judgment, and holds that the filled bulbs at issue are properly classified under subheading 7020.00.60.

Dated: July 10, 2015
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Slip Op. 15–75

TYCO FIRE PRODUCTS L.P., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 08–00194

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now therefore, in conformity with the decision issued in Court No. 08–00190, Slip Op. 15–74, it is hereby

ORDERED, ADJUDGED, and DECREED that Defendant United States' Cross-Motion for Summary Judgment is GRANTED and Plaintiff Tyco Fire Products L.P.'s Motion for Summary Judgment is DENIED. Customs' classification of the subject merchandise under subheading 7020.00.60, HTSUS, is sustained.

[11] If there was any doubt as to what duty provision was being suspended, the drafters of the relevant United States Chapter of the HTSUS indicated the bulbs were otherwise classified under Heading 7020. HTSUS subheading 9902.24.26 (2011) ("Liquid-filled glass bulbs designed for sprinkler systems and other release devices (provided for in subheading 7020.00.60)").

Dated: July 10, 2015
New York, New York

/s/ *Jane A. Restani*
JANE A. RESTANI
Judge